DISCUSSION DOCUMENT

CHILDREN, MEDIA, AND THE LAW

STRIKING AN APPROPRIATE BALANCE BETWEEN THE RIGHTS AND INTERESTS OF CHILDREN: UNDERSTANDING THE LEGAL POSITIONS WHEN IDENTIFYING CHILDREN IN THE MEDIA

MEDIA MONITORING AFRICA

Published by the Media Monitoring Africa
https://mma.org.za

South Africa, September 2020

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This report was prepared with the assistance of ALT Advisory
https://altadvisory.africa/

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INTRODUCTION

A balance of power

Children make up 34% of our population, which translates to around 19.7 million people under the age of 18.[1] Children are afforded a special place in our homes, communities, and laws. Their evolving capacities, their potential, their resilience, their ability to learn, develop, change, and play make them special members of society, and in the eyes of our law. These same qualities also imbue them with huge power in the news wherein many instances they are portrayed at their most vulnerable and most marginalised precisely to highlight the extreme nature of the story in which they feature. Kevin Carter's haunting image of an emaciated child with a vulture in the background was used to highlight the food crisis in Sudan in 1993.[2] The power of similar images stems from the talent of the photographers, but there is a significant element of power that derives from the fact that it is a child being depicted. Despite their special protection under our Constitution and the law, and the power they sometimes acquire in the news, children are often underrepresented or marginalised in news, when in fact they are deserving of protection, and reportage that is empowering and encouraging of their development.

Ethical dilemmas aside, the importance of children to our society and the violation of their rights and when they are on the wrong side of the law are critical news stories that need to be told. The challenge arises when the best interest of the child together with the special protections afforded in law requires not only high levels of skill and knowledge to be exercised by the media, but also for careful balancing acts to take place to ensure that critical news stories can be told but also to ensure that children's rights are respected. In this guide, we look at the latest developments and unpack key issues relating to children, the media, and the law.

Striking a balance

At the end of 2019, the Constitutional Court grappled with finding the appropriate "balance between protecting children, promoting agency and ensuring freedom of expression and open justice are not unduly curbed".[3] Striking the appropriate balance between the rights and interests of children and those of the media has and continues to present challenges and tensions. However, it is possible and ultimately imperative, for the media to fulfil its role in advancing freedom of expression whilst simultaneously ensuring the rights of children are promoted and respected.

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[1] Children's Institute. 'Child Gauge : Child and Adolescent Health' (accessible at http://www.ci.uct.ac.za/cg-2019-child-and-adolescent-health).

[2] Time, '100 photos' (accessible at http://100photos.time.com/photos/kevin-carter-starving-child-vulture).

[3] *Centre for Child Law and Others v Media 24 Limited and Others* [2019] ZACC 46 (*Centre for Child Law v Media 24*) (accessible at http://www.saflii.org/za/cases/ZACC/2019/46.html).

Over the past two decades, organisations like UNICEF and Media Monitoring Africa (MMA) have published and distributed reports and guidelines that have sought to assist the media in reporting on children, and ultimately to find the best nexus between children and the media. These guidelines have determinedly emphasised the rights of children, in particular, the importance of the principle of the best interests of children. They have guided the media on best practices when interviewing children, ensuring that children's voices are promoted and have explained various legal positions relevant to the reporting of children.[4] These reports and guidelines have also navigated complex issues including how to report on children in the context of HIV/AIDS;[5] media coverage of human trafficking and child protection;[6] and unpacking racial and gender representation of children in the media.[7] The common trend and take away from the various guidelines is that informed, sensitive, and professional journalism is key to the promotion and protection of children's rights. Attempts to find the appropriate balance have been enhanced by children themselves. For example, input from children working with MMA resulted in the South African Press Code having a dedicated section on reporting on children.[8]

Purpose of this document

Similarly, to the existing guidelines, this discussion document seeks to assist the media and other stakeholders to understand the scope of children's rights. The purpose of this discussion document is to set out the legal positions that inform how children are reported on in the media, with a particular focus on the issue of identifying children in the media.

It has been argued that "children who are victims, witnesses, or accused of crimes are in an acutely vulnerable position. If their identities are revealed in the media or in other public forums,

[4] See for example UNICEF, 'Guidelines for journalists reporting on children' (accessible at https://www.unicef.org/eca/media/ethical-guidelines); UNICEF, 'Reporting Guidelines' (2003) (accessible at https://www.unicef.org/media/media_tools_guidelines.html); UNICEF 'Children and the Media' (2007) (accessible at https://www.unicef.org/guyana/PDF_Version_-_Children_and_the_Media_-_FINAL(2).pdf); Media Monitoring Africa and Save the Children, 'Editorial Guidelines and Principles for Reporting on Children in the Media' (accessible at https://mma-ecm.co.za/wp-content/uploads/2014/10/mma_editorial_guideline.pdf) and Children's Media Mentoring Project, 'A Resource Kit for Journalists' (accessible at https://www.mediamonitoringafrica.org/images/uploads/childrenmentoring.pdf) For a comprehensive collection of Media Monitoring Africa's reports and guidelines see 'Empowering Children in the Media' (accessible at https://mma-ecm.co.za/reports/).

[5] Children's Institute, the Centre for Social Science Research, the Media Monitoring Project, and the HIV/AIDS and the Media Project, 'Reporting on Children in the Context of HIV/AIDS' (2005) (accessible at https://www.mediamonitoringafrica.org/images/uploads/childrenHIV.pdf).

[6] Media Monitoring Africa, 'A Tangled Web: Human Trafficking, Child Protection and the Media' (2011) (accessible at http://www.mediamonitoringafrica.org/images/uploads/ATangledWeb_WebPDF_.pdf).

[7] Media Monitoring Africa, 'Reporting on Children: Is the coverage getting any better' (2012) (accessible at http://www.mediamonitoringafrica.org/images/uploads/OSF_Children_2012.pdf); Media Monitoring Project, 'Children: Dying to make the news' (2004) (accessible at https://www.unicef.org/southafrica/SAF_publications_childrendying.pdf).

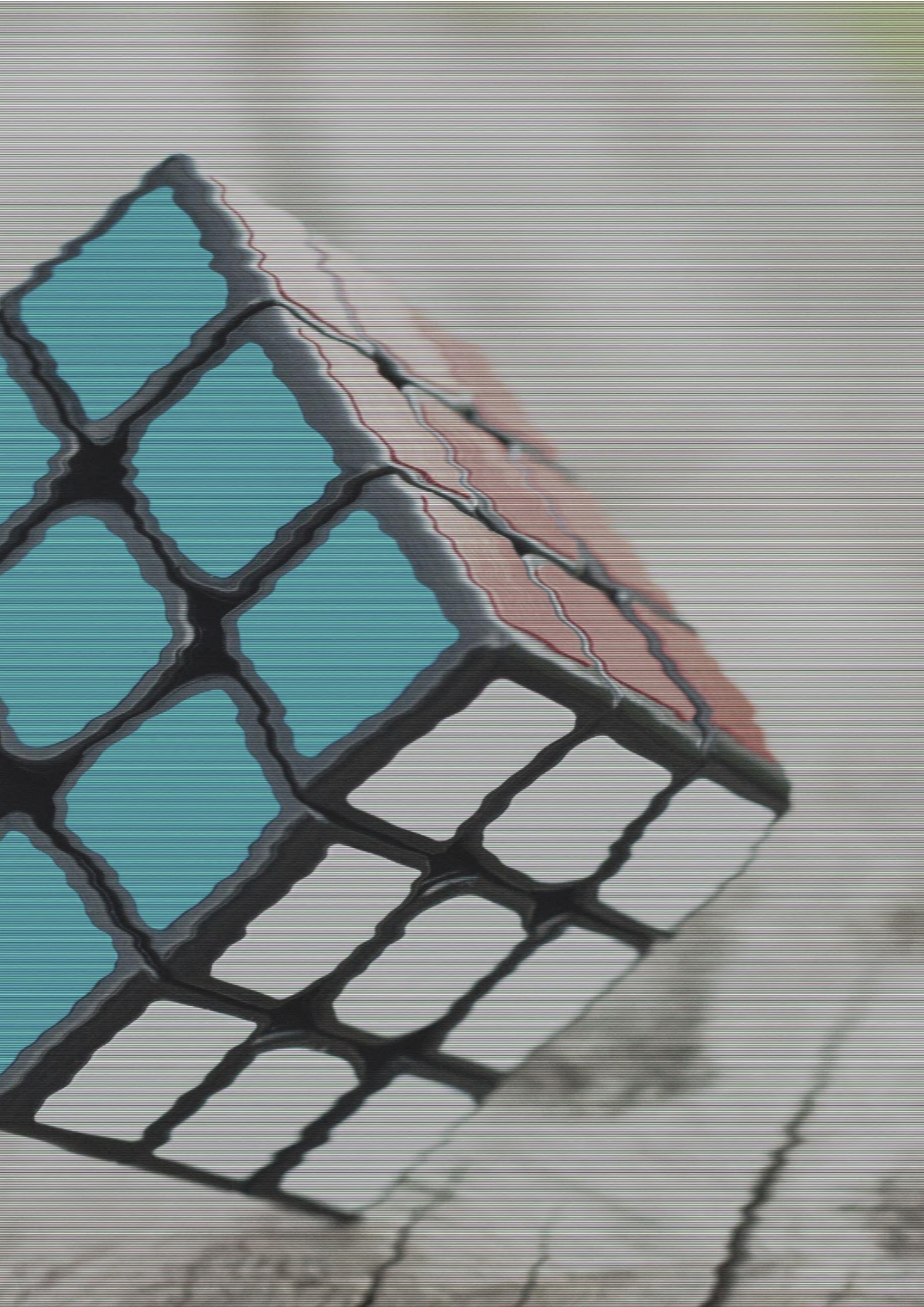
[8] The Press Code of Ethics and Conduct for South African Print and Online Media, 2020 (Press Code) (accessible at http://www.presscouncil.org.za/ContentPage?code=PRESSCODE).

they face severe and life-long harms."[9] Evidence has suggested that "allowing the names of child victims and other identifying information to appear in the media can exacerbate trauma, complicate recovery, discourage future disclosures, and inhibit cooperation with authorities".[10] It has also been established that identifying a child who has committed a crime, could fundamentally undermine their rehabilitation.[11] Recently, the Constitutional Court held that children, as survivors, victims or witnesses of crimes, or those in conflict with the law, can suffer a great deal of harm if they are publicly identified, and are accordingly deserving of certain identity protections.[12]

These developments, while important for protecting the rights and interests of children, have legally altered the ways in which the media can report on children. It is important for the media to understand the various rights at play and the implications of these legal developments. Preventing the media from disclosing the identity of certain groups of children could be perceived as a disjuncture between media freedom and children's rights, however, as will become apparent, harmony between the two groups is attainable. Children can be empowered, and their rights can be respected while the media continues to fulfil its role as the watchdog of our society, creating and shaping opinions and keeping the public informed. The discussion document is structured as follows:

1. An overview of the different rights at play: namely those relevant to children (the best interests of the children) and those that pertain to the media (freedom of expression and open justice).
2. Unpacking the recent case law: the 2019 judgment of the Constitutional Court in *Centre for Child Law and Others v Media 24 Limited and Others.*
3. Implications for the media: explaining what the judgment practically means for the media.
4. Key considerations, points for debate and recommendations: these include the scope of criminal proceedings, identifying features, and the issue of a default position of identity protection beyond the age of 18. This section will also consider various approaches adopted by other countries.

[9] Applicant's written submissions, *Centre for Child Law and Others v Media 24 Limited and Others* (accessible at https://collections.concourt.org.za/bitstream/handle/20.500.12144/36583/Applicants%27%20Heads%20of%20Argument%2028%20February%202018.pdf?sequence=27&isAllowed=y).
[10] *AB v Bragg Communications Inc* [2012] SCR 567 at para 26 (accessible at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/10007/index.do). See further Jones, Finkelhor and Beckwith "Protecting Victims' Identities in Press Coverage of Child Victimisation" (2010) 11 Journalism 347 (accessible at http://unh.edu/ccrc/pdf/CV182.pdf).
[11] *RXG v Minister of Justice* [2019] EWHC 2026 (QB) (accessible at https://www.judiciary.uk/wp-content/uploads/2019/07/RXG-v-MoJ-2019-EWHC-2026-QB-Final-Judgment-as-handed-down-003.pdf).
[12] *Centre for Child Law v Media24* above n 3.



OVERVIEW OF RIGHTS AND PRINCIPLES AT PLAY

Children's rights – the principle of the best interests of the child

The obvious point of departure is the principle of the best interests of the child. Internationally, this principle can be found in the Convention on the Rights of the Child (CRC) which provides that "all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."[13] The CRC is the seminal international instrument that seeks to ensure that laws and policies are enacted to enable the development of children, that there are safeguards to protect children, and that children themselves are heard and are able to participate in their societies. For South Africa, the CRC has particular significance as being the first international treaty to be ratified under the democratic dispensation on 16 June 1995.[14]

The Committee on the Rights of the Child has given further meaning to the notion of the best interests principle, and explains it as a threefold concept:

- A substantive right: Children's best interests must be assessed and taken as a primary consideration when different interests are being considered, and their best interests implemented whenever a decision is to be made concerning them.
- A fundamental, interpretative legal principle: If a legal provision can be interpreted in different ways, the interpretation that most effectively serves the child's best interests should be chosen.
- A rule of procedure: When making a decision that will affect a specific child, an identified group of children or children in general, an evaluation must be made regarding the possible impact – positive or negative – of the decision on the child or children concerned.[15]

The Committee notes further:

> "The best interests of the child is a dynamic concept that encompasses various issues which are continuously evolving. The present general comment provides a framework for assessing and determining the child's best interests; it does not attempt to prescribe what is best for the child in any given situation at any point in time."[16]

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[13] Convention on the Rights of the Child, 1990 at article 3.1 (accessible at https://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf).

[14] https://www.parliament.gov.za/storage/app/media/Pages/2019/november/19-11-2019_30_Year_Commemoration_of_the_United_Nations_Convention_on_the_Rights_of_the_Child/docs/FAST_FACTS_UNCRC_draft_2_19_November_2019final.pdf

[15] Committee on the Rights of the Child, 'General comment No. 14' (2013) at para 6 (accessible at https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf).

[16] Id at para 11.

The African Charter on the Rights and Welfare of the Child (ACRWC), ratified by South Africa in 2000, similarly recognises the importance of protecting children and places obligations on state parties to take steps to ensure the promotion and protection of the rights and welfare of the child.[17] The ACRWC makes provision for this principle in article 4 which states that "[i]n all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration." There are slight differences in the wording between the CRC and ACRWC, the former requires the best interest of the child to be a primary consideration in all actions concerning a child, whereas the latter sets a slightly higher standard as the primary consideration.

Closer to home, an even higher standard is set in section 28(2) of the South African Constitution. It provides that a "child's best interests are of paramount importance in every matter concerning the child."[18] The Children's Act affirms and endorses the principle of the best interests of the child and lists factors that must be considered when determining a child's best interest.[19]

<u>The application and development of the best interests principle</u>

Our courts have applied and developed the principle of the best interests of the child. Below is a brief overview of some of the key judgments that engage with this principle.

In 2000, in *Fitzpatrick*, the Constitutional Court grappled with a case regarding the adoption of a South African child by foreign nationals. The Court made a notable finding that section 28(2) extends beyond the rights exclusively prescribed to children, as it is an independent right.[20] The Court's interpretation of section 28(2) as a right, and as a right that reinforces other rights was an important step for the future application of section 28(2).

The 2003 case of *De Reuck* dealt with the constitutionality of a provision in the Films and Publications Act[21] which related to child exploitation material. The applicant had been charged

[17] African Charter on the Rights and Welfare of the Child, 1990 (accessible at https://au.int/en/treaties/african-charter-rights-and-welfare-child). See List of Countries that have signed and ratified the ACRWC available at https://au.int/sites/default/files/treaties/36804-sl-AFRICAN%20CHARTER%20ON%20THE%20RIGHTS%20AND%20WELFARE%20OF%20THE%20CHILD.pdf.
[18] Constitution of the Republic of South Africa, 1996 (accessible at https://www.justice.gov.za/legislation/constitution/SAConstitution-web-eng.pdf).
[19] Children's Act 38 of 2005 (accessible at https://www.justice.gov.za/legislation/acts/2005-038%20childrensact.pdf). Section 7 of the Children's Act lists a wide range of factors including but not limited to: the nature and relationships between a child and their parent or caregiver; the capacity of the parent or caregiver; the impact on the child should the child's present circumstances change, the child's age, maturity and stage of development, the child's background and the need to protect the child from any physical or psychological harm.
[20] *Minister for Welfare and Population Development v Fitzpatrick and Others* [2000] ZACC 6 at para 17 (accessible at http://www.saflii.org/za/cases/ZACC/2000/6.html).
[21] 65 of 1996.

with possessing and importing sexually abusive images of children.[22] He argued that the relevant section of the Films and Publications Act unjustifiably limited the right to privacy, freedom of expression, and equality. This was the first time that the Constitutional Court was required to engage with the principle of the best interests of the child as a right competing against other rights in the Bill of Rights. The Court emphasised that "constitutional rights are mutually interrelated and interdependent and form a single constitutional value system", and "section 28(2), like the other rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and justifiable".[23] Despite this acknowledgment, the Court found that "[c]hildren's dignity rights are of special importance", and the provision in the Film and Publications Act fulfilled a legitimate purpose that seeks to protect the dignity of children and protect them from harm.[24] The Court ultimately found that the limitations on freedom of expression and the right to privacy were reasonable and justifiable in the circumstances.

A few years later, in 2007, the Constitutional Court in *S v M* was required to determine whether to impose a sentence of imprisonment on the primary caregiver of young children, and the impact thereof on the paramountcy of the best interests of children.[25] Skelton explains that *S v M* has become recognised as a landmark case, not necessarily for its facts, but rather owing to the Court's assertions on the principle of the best interests of the child.[26] Writing for the majority of the Court, Sachs J made some significant pronouncements regarding the principle of the best interests of the child:

"Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them."

"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 bodies, minds and emotions, and above all to learn as they grow how

[22] *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* [2003] ZACC 19 (accessible at http://www.saflii.org/za/cases/ZACC/2003/19.html).
[23] Id at para 55.
[24] Id at paras 63 and 67.
[25] *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18 (accessible at http://www.saflii.org/za/cases/ZACC/2007/18.html).
[26] Skelton, 'Too much of a good thing? Best interests of the child in South African jurisprudence' 2019 *De Jure Law Journal* 557 at 564.

they should conduct themselves and make choices in the wide social and moral world of adulthood."

> And 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, want and avoidable trauma."[27]

Sachs J added to the understanding of the principle in recognising "it is precisely the contextual nature and inherent flexibility of section 28 that constitutes the source of its strength."[28] He went further:

> "A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned."[29]

Madala J, writing for the minority, differed slightly on the application of the principle. He emphasised that "rendering the child's best interests paramount does not necessitate that other competing constitutional rights may be simply ignored or that a limitation of the child's best interest is impermissible".[30] He found that "children's interests must be considered, but this enquiry becomes tainted once those interests are elevated at the expense of other important relevant considerations".[31]

The second significant string of child rights cases centred around children and the criminal justice system. In 2009, in *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development*, a case about the testimony of child victims and child witnesses in sexual offence cases, the Constitutional Court noted the importance of recognising the individuality of children when considering their best interests:

> "What must be stressed here is that every child is unique and has his or her own individual dignity, special needs and interests. And a child has a right to be treated with dignity and compassion. This means that the child must 'be treated in a caring and sensitive manner.' This requires 'taking into account [the child's] personal situation, and immediate needs, age, gender, disability and level of maturity'. In

[27] Id at paras 19 and 20.
[28] Id at para 24.
[29] Id.
[30] Id at para 112.
[31] Id at para 117.

> short, '[e]very child should be treated as an individual with his or her own individual needs, wishes and feelings.' Sensitivity requires the child's individual needs and views to be taken into account."[32]

In 2013, the Court considered the issue of minimum sentencing of children between the ages of 16 and 17. In *Centre for Child Law v Minister of Justice*, Cameron J, writing for the majority captured the innate vulnerability of children:

> "The Constitution draws this sharp distinction between children and adults not out of sentimental considerations, but for practical reasons relating to children's greater physical and psychological vulnerability. Children's bodies are generally frailer, and their ability to make choices generally more constricted, than those of adults. They are less able to protect themselves, more needful of protection, and less resourceful in self-maintenance than adults."[33]

He went further to provide a helpful explanation of the issue of paramountcy: "It means that the child's interests are 'more important than anything else', but not that everything else is unimportant."[34]

That same year the Constitutional Court handed down judgment in the *Teddy Bear Clinic* case, which concerned the criminalisation of consensual sexual conduct between children.[35] The Court began its judgment with the following: "Children are precious members of our society and any law that affects them must have due regard to their vulnerability and their need for guidance. We have a duty to ensure that they receive the support and assistance that is necessary for their positive growth and development."[36] Khampepe J, writing for the Court held that "[w]hat is in the best interests of a child is a balancing exercise and in each case various factors need to be considered."[37]

In *J v National Director of Public Prosecution* the Constitutional Court considered the constitutionality of requiring the inclusion of the particulars of a child offender in the National Register for Sex Offenders.[38] Skweyiya J, for the Court, crafted the best interests principle as follows:

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[32] *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others* [2009] ZACC 8 at para 123 (accessible at http://www.saflii.org/za/cases/ZACC/2009/18.pdf).
[33] Para 26
[34] Id at par 29.
[35] *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* [2013] ZACC 35 at para 1 (accessible at http://www.saflii.org/za/cases/ZACC/2013/35.html).
[36] Id at para 1.
[37] Id para 65.
[38] *J v National Director of Public Prosecutions and Another* [2014] ZACC 13 (accessible at http://www.saflii.org/za/cases/ZACC/2014/13.html).

> "The contemporary foundations of children's rights and the best-interests principle encapsulate the idea that the child is a developing being, capable of change and in need of appropriate nurturing to enable her to determine herself to the fullest extent and to develop her moral compass."[39]

Considering the above there **five salient points regarding the principle of the best interest of the child**

1. **Children** are rights bearers and are also entitled to other rights in the Bill of Rights.

2. The word paramount is **emphatic** – but it does not mean that other rights and considerations can be overlooked.

3. **Protecting children from harm** forms a rudimentary part of ensuring the paramountcy of their best interests.

4. All matters in which a child is involved requires an **understanding** of the unique characteristics of the child and a recognition of their **individual dignity** and circumstances.

5. Children are developing and need appropriate care and protection to ensure they reach their full potential, which includes **enabling them to form opinions, to learn and to participate in their communities.**

[39] Id at para 36.

Media rights – the right to freedom of expression

Under international law, the right to freedom of expression is protected in both the International Convention of Civil and Political Rights (ICCPR)[40] and the African Charter on Human and People's Rights (African Charter).[41] The ICCPR provides for the right to freedom of expression through article 19 which states:

> "(1) Everyone shall have the right to hold opinions without interference.
>
> (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other medium of his choice.
>
> (3) The exercise of the rights provided for in paragraph (2) of this article carries with it special duties and responsibilities. It may therefore be subject to certain restriction, but these shall only be such as are provided by law and are necessary:
>
> (a) For the respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals."

Article 9 of the African Charter states that "[e]very individual shall have the right to receive information" and that "[e]very individual shall have the right to express and disseminate his opinions within the law."

The United Nations Human Rights Committee (UNHRC), through General Comment 34 has given meaningful and helpful content to article 19 of the ICCPR:

> "Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society."[42]

The UNHRC explains further that this "right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others" which includes the following:[43]

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[40] International Convention of Civil and Political Rights, 1976 (accessible at https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx).
[41] African Charter on Human and People's Rights, 1986 (accessible at https://au.int/en/treaties/african-charter-human-and-peoples-rights).
[42] United Nations Human Rights Committee, 'General Comment No. 34' CCPR/C/GC/34 at para 1 (accessible at https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf).
[43] Id at paras 11-12.

Forms of expression	Means of expression
• Political discourse • Commentary on one's own and on public affairs • Canvassing • Discussion of human rights • Journalism • Cultural and artistic expression • Teaching • Religious discourse	• Books • Newspapers • Pamphlets • Posters • Banners • Dress and legal submissions • All forms of audio-visual as well as electronic and internet-based modes of expression

The UNHCR notes the importance of the media in the context of freedom of expression:

> "A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society".[44]

The South African Constitution provides everyone with the right to freedom of expression in terms of section 16, which specifically entrenches freedom of the press:

"(1) Everyone has the right to freedom of expression, which includes—
- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to—
- (a) propaganda for war;
- (b) incitement of imminent violence; or
- (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

Pronouncements by our courts on freedom of expression

Over the past two decades, the Constitutional Court has enthusiastically emphasised the importance of the right to freedom of expression. Below are some notable examples.

In 1999, in *SANDU v Minister of Defence* the Court stated:

[44] Id at para 13.

"Freedom of expression lies at the **heart of a democracy.** It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society

The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters."[45]

In 2011, in *McBride* the Court stated:

> "The importance of the right to freedom of expression cannot be gainsaid. Freedom of expression is an important instrument to a democratic government. It is especially important to our constitutional democracy, which is both representative and participatory. As the Preamble of the Constitution makes plain, ours is "a democratic and open society in which government is based on the will of the people". Free expression of opinion, including critical opinion, is essential to the proper functioning of our constitutional democracy."[46]

On the role of the media in the advancement of freedom of expression, the Court in 2002 in *Khumalo v Holomisa* held:

> "The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the right to freedom of information are respected. The ability of each citizen to be a responsible and effective member of our society depends upon the manner in which the media carry out their constitutional mandate."[47]

A decade later in *Print Media,* the Court reinforced the importance of the media:

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[45] *South African National Defence Union v Minister of Defence* [1999] ZACC 7 at para 7 (accessible at http://www.saflii.org/za/cases/ZACC/1999/7.html).

[46] *The Citizen 1978 (Pty) Ltd and Others v McBride* [2011] ZACC 11 at para 141 (accessible at http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZACC/2011/11.html&query=%20freedom%20of%20expression).

[47] *Khumalo and Others v Holomisa* [2002] ZACC 12 at para 22 (accessible at http://www.saflii.org/za/cases/ZACC/2002/12.html).

> "Embraced by the right is the liberty to express and to receive information or ideas freely. The right also encompasses the freedom to form one's own opinion about expression received, and in this way both promotes and protects the moral agency of individuals. Whether expression lies at the right's core or margins, be it of renown or notoriety, however essential or inconsequential it may be to democracy, the right cognises an elemental truth that it is human to communicate, and to that fact the law's support is owed.
>
> In considering the comprehensive quality of the right, one also cannot neglect the vital role of a healthy press in the functioning of a democratic society. One might even consider the press to be a public sentinel, and to the extent that laws encroach upon press freedom, so too do they deal a comparable blow to the public's right to a healthy, unimpeded media."[48]

The right to freedom of expression has also been developed to incorporate the principle of open justice.[49] Open justice ordinarily requires trial proceedings to be conducted publicly in open court, giving the media the right to "gain access to, observe and report on the administration of justice".[50] This in turn ensures that the public is appropriately informed and educated.[51]

The principle of open justice requires that proceedings must be meaningfully accessible to the public, which includes timeous and accurate dissemination of information.[52]

This principle is equally important for those involved in the trial, as it gives effect to sections 34 and 35 of the Constitution, that give everyone the rights to fair public hearing and trials.[53] This principle enables the media to fulfil its "vital watchdog role in respect of the court process", ensuring transparency of "governmental conduct in all of its many facets (including courts)".[54] It ultimately requires that justice be done in a manner that promotes openness and accountability.

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[48] *Print Media South Africa and Another v Minister of Home Affairs and Another* [2012] ZACC 22 at paras 53-54.
[49] See *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masetlha v President of the Republic of South Africa and Another* [2008] ZACC 6 (*Masetlha*) at para 39 (accessible at http://www.saflii.org/za/cases/ZACC/2008/6.html) and *Van Breda v Media 24 Limited and Others; National Director of Public Prosecutions v Media 24 Limited and Others* [2017] ZASCA 97 at para 11 (accessible at http://www.saflii.org/za/cases/ZASCA/2017/97.html)
[50] *Masetlha* id at para 41.
[51] *City of Cape Town v South African National Roads Authority Limited and Others* [2015] ZASCA 58 (accessible at http://www.saflii.org/za/cases/ZASCA/2017/97.pdf).
[52] *Van Breda* above n 49 at para 46.
[53] *Masetlha* above n 49 at para 39
[54] *Van Breda* above n 49 at para 47.

Open justice and children on trial – finding a middle ground

In 2010, two farmworkers were accused of killing Eugène Terre'blanche, the founder of the Afrikaner Weerstandsbeweging (AWB). One of the accused, PN, was a child at the time of the

murder and the trial. The default position, per section 63(5) of the Child Justice Act,[55] is that proceedings in a trial of a minor accused are to be held in camera, that is to say, that the trial must be held in the absence of any member of the public save for the necessary parties. As an exception to the default position, section 63(5) grants the presiding officer discretion to allow persons to be present during the trial.

The high-profile nature of the case caused media publications, editors, and senior journalists, to approach the High Court seeking permission for journalists to attend the proceedings.[56] The applicants made three main arguments:

1. The trial is in respect of an alleged murder, and concerns issues, of profound public interest.
2. Preventing media access limited the right to freedom to receive information and undermines the principle of open justice.
3. There are mechanisms available to protect the best interests of the minor accused and to ensure the public has access to information.[57]

There was no opposition to the application. MMA intervened as an *amicus curiae* and argued that while freedom of expression and open justice are incredibly important, they are not the only relevant considerations in section 63(5) enquiry. MMA argued that it is equally important to consider the best interests of a child, including their right to privacy, dignity, and a fair trial.[58]

In navigating the complex issues of the matter the High Court emphasised the difference between what is interesting to the public and what is in the public interest, noting that the default position of section 63(5) should not be shifted merely because the matter is newsworthy or controversial.[59] The High Court explained that—

> "A choice will therefore have to made between limiting the rights of the accused to a trial by hearing the matter behind closed doors, and by that limit the rights of the public

[55] 75 of 2008 (accessible at https://www.justice.gov.za/legislation/acts/2008-075_childjustice.pdf).
[56] *Media 24 Limited and Others v National Prosecuting Authority and Others In re: S v Mahlangu and Another* [2011] ZAGPPHC 64 (accessible at http://www.saflii.org/za/cases/ZAGPPHC/2011/64.html).
[57] Id at para 7.
[58] Id at para 10.
[59] Id at para 16.

> or to limit the rights of the accused in terms of section 36 of the Constitution and yield to the rights of freedom to receive information."[60]

The High Court remarked that "[t]o abridge the freedom of the press is to abridge the rights of all citizens and not merely the rights of the press itself"[61], noting that "[f]reedom of expression lies at the heart of democracy and individuals in society need to be able to hear, form and express opinions and views freely on a wide range of matters."[62] The High Court equally acknowledged that a "child accused's dignity, privacy and fair trial interest be protected" noting that children are "susceptible to stigmatization", and domestic and international law seeks to "protect children from the adverse effects that may result from publication in the media and public attendance at trial."[63]

After discussing the various competing interests, the High Court opted for a novel middle-ground approach:

> "Instead of granting permission to the media and the public to sit in an open court where the child accused will be sitting, I am of the view that the media and the public can only be allowed to sit in a close circuit tv room from which they will view the trial."[64]

Accordingly, the High Court ordered:

1. A selection of journalists nominated by the applicants can be present in a room in which they will be able to view and hear the child's testimony on closed circuit television.
2. Four seats will be made available for members of the deceased's family in the closed circuit television room.
3. Sixteen seats will be made available to the members of the public on a first come first serve basis, in the close circuit television room.
4. Should the presence of the above persons impede the child accused's right to privacy, dignity, and/or his rights to a fair trial, that they be directed to leave.
5. Members of the news media and including members of the public are prohibited from publishing in any manner any information which reveals or may reveal the identity of the child accused.

This approach highlights the importance of meeting the needs of open justice and freedom of expression by finding a middle ground where the rights of the child can also be protected.

[60] Id.
[61] Id.
[62] Id at para 21.
[63] Id at para 14 and 19.
[64] Id at para 27.

Interplay between children's rights and freedom of expression

From the above, it is clear that both children and the media are recipients of various rights and freedoms that are protected internationally, regionally, and domestically. Both sets of rights seek to advance important interests. Yet, despite their recognised significance, there are conceivable tensions that can arise.

The issue of identifying children involved in criminal proceedings in the media illustrates a key juncture between the rights of children and those of the media.

On the one hand, there is the hallowed principle of open justice, and on the other, there is a pressing need to ensure that a child's best interests and their dignity and privacy are protected. Naming a child who is involved in criminal proceedings may indeed serve the principle of open justice and advance freedom of expression. It may well inform the public and it may well ensure the effective administration of justice. However, the disclosure of the identity of a child collides with the rights and interests of children, including their right to privacy, dignity, and equality. These rights are briefly explained as follows:

- **Equality:** Section 9(1) of the Constitution states that "[e]veryone is equal before the law and has the right to equal protection and benefit of the law." The right to equality is breached if a law differentiates between people or categories of people and there is no rational connection between the differentiation and a legitimate governmental purpose.[65]
- **Dignity:** Section 10 of the Constitution states that "[e]veryone has inherent dignity and the right to have their dignity respected and protected." The right to dignity speaks to the "intrinsic worth of all human beings".[66]
- **Privacy:** Section 14 of the Constitution gives "[e]veryone the right to privacy". The right to privacy operates along a spectrum – a person has a stronger right to privacy when facts and issues that form part of their inner sanctum and are truly personal. Their expectation of privacy incrementally erodes as they move towards more communal relations and activities, and the scope of their personal space shrinks.[67]

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[65] See *Harksen v Lane N.O.* [1997] ZACC 12 (accessible at http://www.saflii.org/za/cases/ZACC/1997/12.html).

[66] See for *example Dawood and Another v Minister of Home Affairs and Others ; Shalabi and Another v Minister of Home Affairs and Others ; Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936 at para 35 (accessible at http://www.saflii.org/za/cases/ZACC/2000/8.html).

[67] *Bernstein and Others v Bester NO and Others* [1996] ZACC 2 at para 67 (accessible at http://www.saflii.org.za/za/cases/ZACC/1996/2.html).

Fortunately, our rights-based framework caters for tensions, and equally guards against automatic trumps. In the context of freedom of expression and human dignity, the Constitutional Court has held that "the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as the right to freedom of expression".[68] The Constitutional Court has explained that:

> "Rights sometimes compete, as we know. The right to equality, for instance, often competes with the rights to free expression, dignity, privacy and freedom of association. Even values like freedom and equality may compete. Therefore they often have to be weighed, balanced and limited."[69]

In the context of identifying children in the media the competing interests need to be weighed, balanced, and if necessary limited. In December 2019, the Constitutional Court handed down judgment in *Centre for Child Law v Media 24* and squarely tackled the tension between the rights of the children and those of the media, which it described requires a "delicate balancing act between various constitutional rights and interests. On the one hand, the best interests of children and their rights to dignity, equality, privacy and on the other hand, the right to freedom of expression and the principle of open justice."[70]

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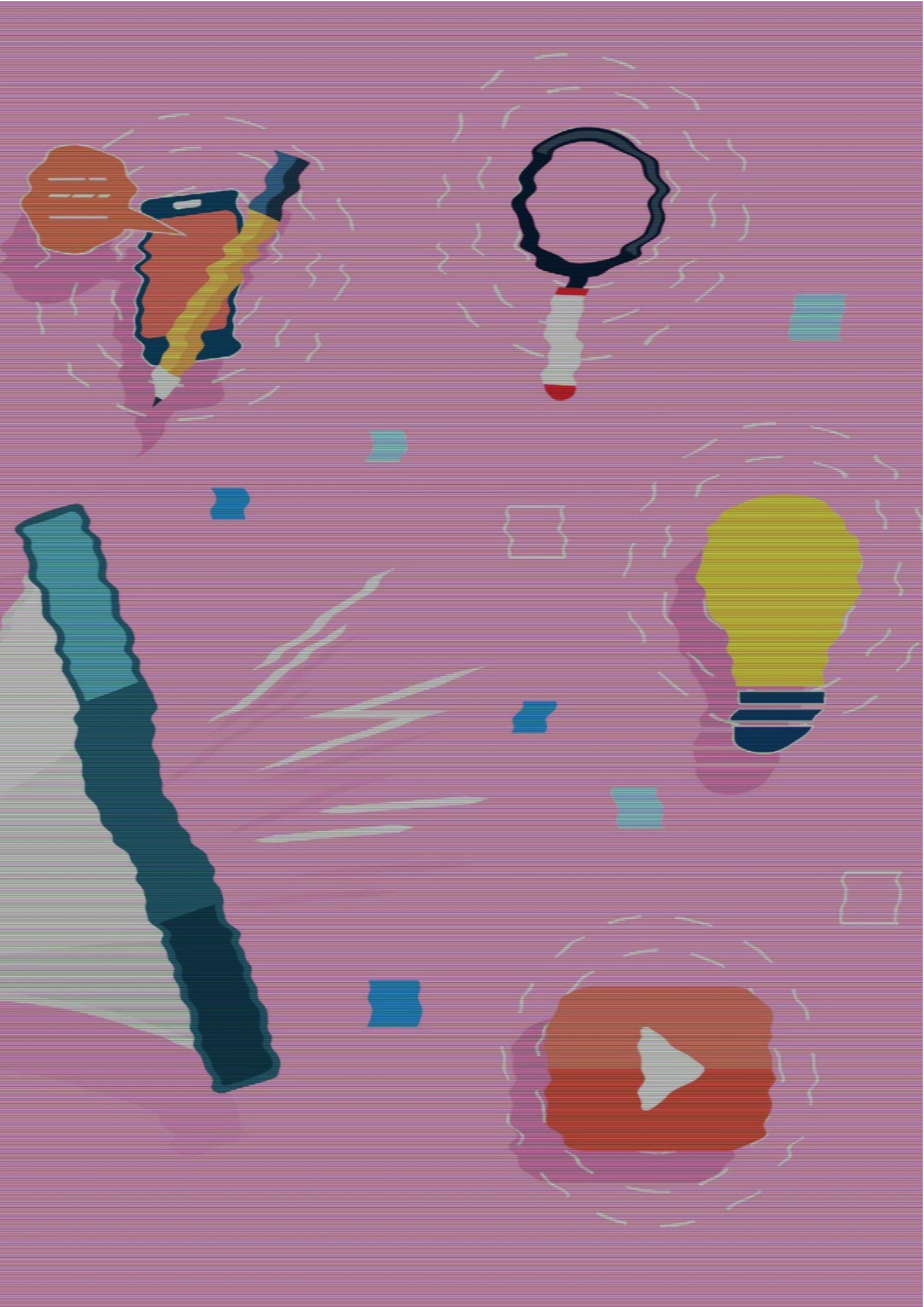
[68] *S v Mamabolo* [2001] ZACC 17 at para 41 (accessible at http://www.saflii.org/za/cases/ZACC/2001/17.html).
[69] *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another* [2015] ZACC 35 at para 77.
[70] *Centre for Child Law v Media24* above n 3 at para 4.



RECENT JURISPRUDENTIAL DEVELOPMENTS

Factual background

The *Centre for Child Law v Media24* case, known by many as the "Zephany Nurse case", began in 1997 when a two-day-old baby girl was abducted from Groote Schuur hospital in Cape Town. Zephany Nurse was the name given to the baby by her biological parents when she was born. Her parents conducted extensive searches for her to no avail. There was widespread media coverage of the abduction. Seventeen years later, in 2015 Zephany was "found" by her biological parents after she befriended her biological sister by chance whilst attending the same high school. Her biological parents made investigative inquiries after suspensions grew about the striking physical resemblance of the girls. The investigations established that Zephany was indeed the missing child. She was informed that the woman she assumed was her mother had abducted her, and as a result, was removed from that woman's care. The woman was criminally charged and prosecuted and Zephany became a potential but unconfirmed witness in the case.

In February 2015, the Beeld newspaper broke the story that Zephany Nurse had been found – this caused a media frenzy with nearly every major print and broadcast media reporting on the story.

The media attention frightened Zephany and she grew increasingly worried that her personal information – the name she grew up with and her birth date – would be published.

Through the assistance of a social worker, Zephany was put in contact with the Centre for Child Law who wrote to all media houses on her behalf seeking an undertaking that they would not disclose her identity. The undertaking was not provided, and some publications responded that they would be permitted to reveal her identity after she turned 18. Zephany's 18th birthday was in April 2015.

As a result of the response of the media, the Centre for Child Law, Zephany Nurse under the pseudonym "KL", Childline South Africa, the National Institute for Crime Prevention and the Reintegration of Offenders, and MMA launched an urgent application in the High Court for an order prohibiting the publication of any information which revealed or may reveal her identity. The applicants also sought a declaration that section 154(3) of the Criminal Procedure Act[71] (CPA) should protect the anonymity of child victims of crimes, in addition to child witnesses and child accused, and that such protection should not fall away after turning 18. Several media publications opposed the application.

[71] 51 of 1977 (accessible at https://www.justice.gov.za/legislation/acts/1977-051.pdf).

The High Court found in favour of the applicants that child victims in criminal proceedings should be afforded the protection of section 154(3), but that this protection is only applicable to persons under the age of 18, reasoning that an open-ended protection would impede the ability of adults to share their experience.[72] The matter was appealed to the Supreme Court of Appeal which found that section 154(3) was unconstitutional as it failed to protect child victims.[73] The Supreme Court of Appeal was however divided on the issue of affording children ongoing protection in terms of section 154(3). The majority found that an extended the protection into adulthood would unjustifiably limit the open justice principle and the right of the media to impart information, whereas the minority reasoned that the protection should be extended and that such an extension would only minimally impact freedom of expression or the principle of open justice.

Findings of the Constitutional Court

The matter came before the Constitutional Court in May 2019, and the Court was asked to consider two key questions:

1. **Victim protection:** Is section 154(3) constitutionally invalid for failing to provide protection to child victims?
2. **Ongoing protection:** Should the protections extend into adulthood for child accused, witnesses and victims

Note on terminology[74]

Victims and survivors

- The Constitutional Court noted that it relied on the terms "child victims" and "child survivors" interchangeably, explaining that both these terms can be used to identify children who have been the subject of crime.
- The Court further noted that it is cognisant of the different connotations and implications that the words "victim" or "survivor" have for those who have experienced some of the most challenging affronts to their dignity and bodily integrity, and acknowledges that there are different contexts and different experiences which lead to different responses.

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[72] *Centre for Child Law and Others v Media 24 Limited and Others* [2017] ZAGPPHC 313 (accessible at http://www.saflii.org/za/cases/ZAGPPHC/2017/313.html).
[73] *Centre for Child Law v Media 24 Limited and Others* [2018] ZASCA 140 (accessible at http://www.saflii.org/za/cases/ZASCA/2018/140.html)
[74] *Centre for Child Law v Media24* above n 3 at fn 4 and 5.

- The Court explained that it by no means seeks to impose a definition, identity, or response on children who have experienced crime.

Child participants

- The Court noted that for purposes of this judgment, "child participants" to criminal proceedings are understood to include children who are accused of committing offences, children who are witnesses at criminal proceedings and children who are victims of crime, including child complainants and child victims who are unconfirmed witnesses or not called as witnesses.

Child accused

- The Court interchangeably relied on the terms "child accused" and "children who are in conflict with the law".

On the issue of victim protection, the Court was unanimous. In coming to its conclusion, it asked and answered the following questions:

Does section 154(3) infringe the right to equality?

- The protection offered by section 154(3) differentiates between categories of children by not affording the same anonymity protection to child victims who are not called as witnesses as it does to victims who are called as witnesses. The Court explained that given that the core purpose of section 154(3) was child protection the arbitrary differentiation between classes of children, serves no legitimate government purpose and accordingly breaches the right to equality.

Does section 154(3) ensure the best interests of the child?

- Relying on expert evidence of a clinical psychologist, as well as case law from other countries, the Court found that child victims are vulnerable to harm if they are publicly identified, and the failure of section 154(3) to protect child victims runs contrary to the best interests of children.

Are the rights to privacy and dignity of a child victim infringed by section 154(3)?

- The right to privacy is particularly pressing when it comes to children because they are still forming their self-identity and it is important to ensure respect for the dignity, personal

> integrity, and autonomy of children. The Court explained that the rights of children and their dignity and privacy are inherently intertwined, and to "lose control over how some of the most traumatic and intimate moments of a child's life are shared with the public strikes at the very core of the child's dignity."[75]

Finding that section 154(3) does limit these rights, the Court went on to consider whether the limitations are reasonable and justifiable.

Overview of limiting constitutional rights

As is clear from the cases above rights contained in the Bill of Rights are not absolute and can be limited under certain circumstances. Section 36 of the Constitution is known as the "limitations clause" and allows for rights to be limited if the limitation is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". Section 36 lists several factors that need to be taken into account when determining whether a justification is reasonable and justifiable:

- the nature of the right
- the importance of the purpose of the limitation
- the nature and extent of the limitation
- the relation between the limitation and its purpose
- less restrictive means to achieve the purpose

The importance of the purpose of the limitation was arguably the more complex factor for the Court to debate. Freedom of expression and the principle of open justice were taken to be the purpose of the limitation. The Court acknowledged that these "principles are essential to a free and fair democracy".[76] Notwithstanding the importance of the rights and principles at play, the Court took the view that including child victims in the protection of section 154(3) would not significantly diminish the ability of the media to fully and accurately report on a story. The Court explained that the anonymity protections for child witnesses and accused already encroaches on

[75] Id at para 50.
[76] Id at para 56.

media freedom and open justice and including child victims "only marginally expands this encroachment".[77]

The Court found that excluding victims from section 154(3) was constitutionally invalid and ordered Parliament to remedy this within 24 months. The Court further ordered that while Parliament attends to the amendment, victims will be included in the protections afforded by section 154(3).

The issue of providing ongoing protection proved to be a more challenging determination for the Court resulting in some divergent views from the bench. Three judgments were written on this issue: the majority by Mhlantla J,[78] a partial dissent by Cameron J and Froneman J and a partial dissent by Jafta J.

The majority judgment tackled the issue of ongoing protection in three stages:

Establishing if the current construction of section 154(3) infringes constitutional rights.

- The majority considered the rights to dignity and privacy and the principle of the best interests of children. The majority explained that the issue is whether a lack of ongoing protection infringes the best interests of the child when the victims, witnesses, and accused are *still children*. Again, addressing the purpose of section 154(3) as it relates to the protection of children, the majority held that anticipation of identification harms children. Relying on expert evidence the majority explained that the fear of identification can jeopardise the long-term healing process of a victim, witness, or accused and could cause further trauma and obstruct rehabilitation. The majority expressed concerns regarding the ticking clock effect which potentially compromise the integrity of the criminal justice system as "the potential of identification upon turning 18, may cause a child accused to plead guilty or curtail the length of a trial in other ways or inhibit a child's participation in the trail."[79] The majority further found that the rights to dignity and privacy were equally implicated in relation to the issue of ongoing protection.

Broader considerations that inform the debate.

- The majority considered the principle of restorative justice, concerns regarding the perpetuation of the stigma that attaches to victimhood, criminality, and participation in the criminal process, and the importance of agency. The majority explained that establishing a default position of ongoing protection would give effect to a restorative justice approach which for children, and their development, rehabilitation, and reintegration is imperative. On the issue of stigma and agency the majority made the following observations:

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[77] Id.
[78] The majority judgment was concurred in by Mogoeng CJ, Khampepe J, Ledwaba AJ, Madlanga J, Mhlantla J, Nicholls AJ, and Theron J.
[79] Id at para 69.

There should be **no shame** in surviving or witnessing a crime. But unfortunately, society at large has in many ways betrayed those who have survived or witnessed violence, be it sexual, physical or psychological. **Social contexts have shaped how survivors judge themselves and how they are judged by others."**

> While I appreciate that crafting further protection and anonymisation may feed into the unwarranted stigma of victimhood that currently invades social thought, I am more compelled to see this step as providing an opportunity for child survivors to exercise agency and take ownership of their experience. This Court should do all it can to avoid propagating stigmas, but it should respond to the current needs of society instead of applying only a normative approach to shame and stigma. In any event, if we accept the pervasiveness of stigma and how it operates in our society, then it is doubtful that merely publishing identifying information would have the direct result of reducing or eliminating stigma."[80]

The majority took the view that ongoing protection as the default position – not the blanket rule – could enable people to exercise autonomy and agency and allows them to control the narrative of if and how the most intimate details of their lives are shared with the world. It is necessary to emphasise that while autonomy and agency are profoundly important, they are not unwavering factors. The media retains the right to approach a competent court for an order allowing the name and identity of the affected person to be revealed.

Whether the limitation of rights is reasonable and justifiable:

- As with the issue of victim protection, the importance and purpose of the limitation – freedom of expression and open justice – warranted extensive consideration. The majority gave significant credit to the importance of open justice and its vital role in our democracy but emphasised an important distinction between public interest and what is interesting to the public. The majority held that the public interest can "still be served and protected without revealing the names and identities of child participants in criminal proceedings."[81] The majority acknowledged that ongoing protection would curtail the principle of open

[80] Id at para 83.
[81] Id at para 100.

justice and freedom of expression, but that the curtailment would be minimal, particularly when juxtaposed against the serious harm and impact on child participants.

- Ultimately, the majority found that ongoing protection "neither disregards the principle of open justice nor prevents the media from accurately reporting on a matter."[82] Here the majority stated that "(a) the story can still be told; (b) the protection is not necessarily permanent; and (c) this is not a novel approach to the issue."[83]

The majority of the Court declared section 154(3) unconstitutional to the extent that it does not provide ongoing protection and gave Parliament 24 months to remedy the defect, during which time section 3A would form part of section 154(3):

> "(3A) An accused person, a witness or victim referred to in subsection 3 does not forfeit the protections afforded by that subsection upon reaching the age of eighteen years but may consent to the publication of their identity after reaching the age of eighteen years, or if consent is refused their identity may be published at the discretion of a competent court."

Overview of the partial dissents

Cameron J and Froneman J differed on the issue of a default position of ongoing protection with the major concern being the perpetuation of stigma. They reasoned:

> "There should be no shame in being a victim of a crime. No shame in being witness to a crime. By contrast there is shame in having perpetrated a crime, and the stigma society attaches to it may have to be justly borne. That may depend on how close the perpetrator was to adulthood at the time. But should we countenance a general rule, banning dissemination of identity and identifying details once victim, witness and perpetrator have turned 18, requiring judicial order to reverse it? That seems to us to place the balance wrongly."[84]

They concluded:

> "We should use state power to limit knowledge with caution. Justifying indefinite anonymisation in the case of adults who were, when children, witnesses to or victims of or accused of crimes points our hard-won process protections in an untoward direction.

[82] Id at para 107.
[83] Id.
[84] Id at para 147

Where the scales are so evenly balanced, where a judicial decree can, either way, remedy the wrong that the default position may wreak, we should rather take the risk of erring in the cause of openness and knowledge, and against stigma and shame."[85]

Jafta J noted two overarching disagreements:

- The first related to victim protection. On this point, Jafta J found that section 154(3) is unconstitutional because it infringes the right to equality, but diverges with the finding of the majority that privacy, dignity, and the rights guaranteed by section 28(2) of the Constitution are implicated.
- His second disagreement related to the issue of ongoing protection, here Jafta J reasoned that "is not permissible to extend children's rights to persons who are not children as defined in section 28".[86] He further held that the rights to dignity and privacy are not limited and therefore a limitations analysis is unnecessary.

Both partial dissents agreed with the order for victim protection, and both partial dissents would have dismissed the appeal for ongoing protection.

[85] Id at para 140-141.
[86] Id at para 163.

IMPLICATIONS FOR THE MEDIA

The findings of the Constitutional Court have implications for the media. In short, the Constitutional Court ruling has changed the way in which the media can identify children and adults under certain circumstances.

These are legal changes as opposed to guidelines or suggestions and can attach criminal liability if not complied with. Accordingly, the media must understand what is permissible and what is not, as well as the consequences involved for non-compliance.

Textual changes to section 154(3)

As of 3 December 2019, section 154(3) reads as follows:

> No person shall publish in any manner whatever any information which reveals or may reveal the identity of an accused person under the age of eighteen years or of a witness or of a victim at or in criminal proceedings who is under the age of eighteen years: Provided that the presiding judge or judicial officer may authorise the publication of so much of such information as he may deem fit if the publication thereof would in his opinion be just and equitable and in the interest of any person.
>
> (3A) An accused person, a witness or victim referred to in subsection 3 does not forfeit the protections afforded by that subsection upon reaching the age of eighteen years but may consent to the publication of their identity after reaching the age of eighteen years, or if consent is refused their identity may be published at the discretion of a competent court.

Parliament has 24 months to attend to the issues of constitutional invalidity in the section. If Parliament does not remedy the constitutional defects within 24 months from the date of the order, the above wording shall continue to apply. This does not mean that this wording is final – Parliament is entitled to amend the CPA at any time, during or after the 24-month time frame in line with is constitutional mandate.

Before this judgment, it was largely up to the editorial discretion of the media when it came to publishing the identity of child victims. Fortunately, the acknowledgement that children who are victims of crime are equally vulnerable and deserving of identity protection is not novel to the media.

The Press Code, provides that the media (who are bound by the Press Code) shall—

> "not identify children who have been victims of abuse or exploitation, or who have been charged with or convicted of a crime, without the consent of their legal guardians (or a similarly responsible adult) and the child (taking into consideration the evolving capacity of the child), a public interest is evident and it is in the best interests of the child."[87]

The Editorial Guidelines and Principles on Reporting on Children in the Media highlighted the carved out the following principles:

> "Children involved in legal proceedings need even more protection, and are at greater risk so make sure to always protect their identity. In all stories in which a child has been involved in a crime, either as a witness, victim or perpetrator, unless exceptional circumstances prevail and then only if there is informed consent from the child involved and the child's caregiver, the child's identity will not be revealed either directly or indirectly.
>
> If you want to name or show a child, make sure you are allowed to do so by law, that you have informed consent from both the child and caregiver and that you still protect them from potential harm. Whenever the identity of a child is disclosed, whether pictorially or in print:
>
> - The statutory restrictions on the naming or identification of a child shall be observed and adhered to;
> - The informed consent of the child and caregiver6 of any child shall be sought in all cases;
> - Even if a child's caregiver consents to disclosure of the identity of a child, a journalist must exercise a cautious discretion, as it may nevertheless be harmful to the child to publish the identity of the child."[88]

What the media cannot publish

The new statutory position is not that divergent from the former position. In terms of the current reading of section 154(3) the media is prohibited from publishing identifying information of the following groups of children:

- Victims and survivors of criminal acts
- Witnesses of criminal acts
- Children in conflict with the law

[87] Press Code above n 8 at clause 8.
[88] Editorial Guidelines above n 4.

At this stage, section 154(3) is only applicable in the context of criminal proceedings. The Constitutional Court did not pronounce on the issue of identifying children who are victims, witnesses, or in conflict with the law, if there are no criminal proceedings. This will be discussed further below. However, the above guidelines should be considered and the overarching principle of the best interests of the child must always be the central consideration when reporting on children.

Further to this and in line with the Court's findings on ongoing protection, the media cannot disclose the identity or identifying information of an adult who as a child was:

- A victim or survivor of a criminal act
- A witness of a criminal act
- In conflict with the law

While this is the current default position, this is not, as the majority Court explained "a blanket ban", that creates a permanent, lifelong prohibition on identity.[89] As will be discussed below, there are certain circumstances under which this prohibition can be departed from.

What the media can publish

Stories:

- The Constitutional Court held that the "stories can still be told, the public will remain informed. The identity of the child participant is not essential for advancing freedom of expression and open justice."[90] The Court explained further "the public will still be informed and will be in a position to assess whether justice is being properly administered. The stories of child participants in criminal proceedings will still be published; it is only their identity that is protected."[91]
  It is clear that the media is still permitted to publish stories about children who are involved in criminal proceedings. The media can still disclose the facts of the case (provided that the facts do not include identifying information or features). The media can still report on the criminal proceedings – to the extent possible, as most matters involving children are done in-camera. The media can still report on the outcome of the criminal proceedings
- It is necessary to reiterate that the above guidelines (to the extent they are consistent with the current legal position) and ultimately the principle of the best interests of the child should continue to inform how the media elects to report the story.

Consent:

- An adult who as a child was a victim, witness or accused in criminal proceedings, can consent to their identity being disclosed by the media. The consenting adult can approach the media with this election, alternatively, the media can approach the adult and request their consent. The media should always approach the adult for consent before approaching a court. Should the media approach the adult seeking consent, the principles of informed consent should apply:
    - The media should disclose all relevant facts regarding the publication, including the topic and purpose of the publication and where the information will be published or aired and who is likely to receive the information.
    - The journalist should take reasonable steps to show the adult in question the article before it is published.
- The majority of the Court held that the new default position differs from the former position which expected a child to pre-emptively approach a court to prevent publication. The majority further held that the "default position takes into account the uneven power dynamics and opens an avenue for those who are ready to share their story, to do so. The ability to consent empowers individuals, allowing them to exercise their agency."[92]
- The Constitutional Court judgment did not engage with the issue of whether parents or guardians can consent to the disclosure of the identity of their child or children.

Judicial discretion:

- The media can publish the identity of child participants if the judge presiding over the criminal matter is of the view it is just and equitable and in the interest of any person. This determination cannot be made by the media and can only be made by the judge presiding in the criminal case.
- In the event that an adult, who as a child was a victim, witness or accused in criminal proceedings, does not consent to the publication of information which reveals or may reveal their identity, the media is permitted to approach a competent court seeking an order granting permission for the publication. The adult will be entitled to oppose the application. The Court, whether the application is opposed or unopposed must make a determination in the interests of justice.

[92] Id at para 125.

Factors that guide the interests of justice

The Constitutional Court did not prescribe what factors would inform a decision in the "interests of justice". This is not unusual, as ordinarily, considerations that are in the "interests of justice" are not neatly defined in a prescribed list, but rather include various factors that can assist a court in determining an issue. Determinations made in the "interests of justice" can relate to condoning non-compliance with the procedural court rules,[93] it can relate to granting bail to an accused,[94] and it can relate to the granting of leave to appeal.[95]

In this context, it is about whether the identity of the affected adult should be published. Below are some suggested considerations for a court making this determination:

- What are the competing rights and interests at stake?
- How should these be weighed?
- What is the purpose of disclosure at this stage?
- What are the consequences for the affected adult?
- Are there children or other adults who may be affected by the publication?
- Are there public interest considerations?

This last point requires further explanation. What is interesting to the public and what is in the public interest are distinct enquiries, the former should not have a bearing on the court's

consideration of the interests of justice. It is imperative to understand the difference between the two. The Constitutional Court explained that "[t]here may be a temptation to feed public titillation with scandalous and sordid details, but there are also stories of consequence and impact which concern the public that ought to be reported."[96] Public interest considerations are based on facts and contribute towards the advancement of the public's constitutional right to be informed".[97]

[93] See for example *Liesching and Others v S* (CCT304/16) [2018] ZACC 25 (accessible at http://www.saflii.org/za/cases/ZACC/2018/25.html); *Liesching and Others v The State and Another* [2016] ZACC 41 (accessible at http://www.saflii.org/za/cases/ZACC/2016/41.html).

[94] *Dlamini v S; S v Dladla and Others; S v Joubert; S v Schietekat* [1999] ZACC 8 (accessible at http://www.saflii.org/za/cases/ZACC/1999/8).

[95] See for example the recent discussions by the Constitutional Court in *General Council of the Bar of South Africa v Jiba and Others* [2019] ZACC 23 and *Jacobs and Others v S* [2019] ZACC 4 (http://www.saflii.org/za/cases/ZACC/2019/4.html#_ftnref15)

[96] *Centre for Child Law v Media24* above n 3 at para 108.

[97] Id at para 100.

Courts should guard against the "real risk of trivialising complex issues and converting what should be public education into public entertainment."[98]

[98] *South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others* [2006] ZACC 15 at para 69 (accessible at http://www.saflii.org/za/cases/ZACC/2006/15.html)

In short, at this stage, and in the context of criminal proceedings the following table can guide the media:

Can the media publish:	Yes: ✓ No: ×
Identity / identifying features of child victims and survivors of criminal acts, children who witness criminal acts, and children who are or have been in conflict with the law.	×
Identity of an adult who as a child was a victim or survivor of a criminal act, a witness of a criminal act, was in conflict with the law.	×
Facts of the case and the outcome of the case, provided the story does not allow for the child to be easily recognised.	✓
The identity of the above-listed children if the judge presiding over the criminal matter is of the view that it is just and equitable and in the interest of the child that their identity be published.	✓
The identity of an adult, who as a child was one of the listed categories, provided the adult consents to the publication of their identity.	✓
The identity of an adult, who as a child was one of the listed categories, if the adult does not consent, but a judge finds it is in the interests of justice to publish their identity.	✓

The order of the Constitutional Court preserves the criminal liability for non-compliance with section 154(3). Any person who publishes information in contravention of this section is liable to a fine or to imprisonment for a period not exceeding five years or to both a fine and imprisonment. This means that if members of the media fail to adhere to these obligations and publish the identity of children or adults who fall within these categories, they will be in contravention of the law and can be held criminally liable.

As stated above, the Constitutional Court has given Parliament 24 months from 3 December 2019 to remedy the defect. Remedying a constitutional defect could mean that Parliament amends a section or sections of an Act, in doing so Parliament can consider, pass, amend or reject any legislation before it. Alternatively, Parliament can adopt new legislation. If Parliament complies with the order of the Constitutional Court, it is likely that it will consider an amendment to the CPA.

Given the importance of the issues currently presented and the complex matrix of rights implicated, the expertise and practical experiences of the media can be of great assistance to Parliament through this amendment process. The media could make submissions to Parliament on their industry perspectives of the issues, the practical implications, and their recommendations on how the law could be envisaged.

POINTS FOR CONSIDERATION, DEBATE AND RECOMMENDATIONS

The order of the Constitutional Court and the current reading of section 154(3) is arguably a step in the right direction, however further clarity and particularity is needed. Below are some factors that might warrant further consideration as well as MMA's recommendations on certain points.

What forms of media are implicated?

Section 154(3) provides that "[n]o person shall publish in any manner" the information contemplated in the sub-section. While this is broad, it is not clear whether this is limited to traditional forms of media publications – such as a journalist publishing the identity of an affected person in a newspaper or news broadcast, or whether it extends to posts on social media and other online platforms.

While the Constitutional Court did not squarely address this issue, its references to the "age of social media", "the immediate and far-reaching dissemination of information", and the "modern day, 24-hour media cycle" suggests that it envisaged protection in relation to contemporary forms of media.[99]

Recommendation 1: specific inclusion of social media and online platforms

In line with this interpretation of the judgment, MMA submits that it is necessary to clearly state that the provision applies to social media and other online platforms.

The scope of criminal proceedings – when does the provision kick in?

The CPA defines criminal proceedings as "including a preparatory examination under Chapter 20" which deals with a preparatory examination in a magistrate's court into the allegations against the accused, which would precede the trial in a superior court. The definition of criminal proceedings is not particularly helpful for current purposes. For the media to be in a position to comply with the law, there needs to be a clear understanding of when this provision comes into effect. The scope of criminal proceedings in respect of a trial is clear, however, notwithstanding the preparatory examination phase, other stages might form part of the scope of "criminal proceedings". This could range from the commission of the crime to the reporting of a crime.

[99] *Centre for Child Law v Media24* above n 3 at para 86.

A brief overview of some of the stages leading up to a criminal trial

- Commission of the crime: the moment a person commits an unlawful act which is prescribed as a criminal offence by law.
- Reporting a crime: this requires going to the police station and informing a police official of the commission of a crime. A statement will be taken, a case docket will be opened, a CAS number will be assigned, and the crime will be investigated.
- Investigation: a police detective will receive a completed docket and will carry out an investigation. After the investigation, the docket will be sent to the National Prosecuting Authority and a decision on whether to prosecute will be taken.
- Arrest: this can be done with a warrant (obtained from a judicial officer by way of written application setting out the offence alleged to have been committed) or without a warrant subject to certain conditions.
- Bail: an accused who is in custody can be released subject to certain furnishings and conditions.
- Summons: once the prosecutor has elected to proceed with the prosecution of an offence, and the accused has not been arrested, and no warrant for arrest has been issued, the accused will be served with a summons containing information regarding what they have been charged for as well as information regarding the place, date and time for the appearance of the accused in court on such charge.
- Summary trial: when an accused is to be tried, they are first to be tried at a summary trial. For accused persons in custody, the summary trial will commence by lodging a charge-sheet with the court and serving an indictment on the accused.
- Charge and plea: the charge shall be put to the accused by the prosecutor before the trial of the accused is commenced, and the accused shall be required to provide a plea in response to the charge. An accused may, before pleading to the charge, object to the charge.[100]

Further issues arise around unreported crimes or crimes that are not prosecuted.

[100] For further detail see chapters 4 – 16 of the CPA. On reporting see SAPS, 'Reporting a Crime' (accessible at https://www.saps.gov.za/services/report_crime.php) and NPA 'Prosecution Policy' (accessible at https://www.npa.gov.za/sites/default/files/Library/Prosecution%20Policy%20%28Final%20as%20Revised%20in%20June%202013.%2027%20Nov%202014%29.pdf).

The impact of identification on reporting

In 1988 in case about media freedom and the identity protection of victims of sexual offences, the Canadian Supreme Court made the following observation:

> "When considering all of the evidence adduced by appellant, it appears that, of the most serious crimes, sexual assault is one of the most unreported. The main reasons stated by those who do not report this offence are fear of treatment by police or prosecutors, fear of trial procedures and fear of publicity or embarrassment. Section 442(3) is one of the measures adopted by Parliament to remedy this situation, the rationale being that a victim who fears publicity is assured, when deciding whether to report the crime or not, that the judge must prohibit upon request the publication of the complainant's identity or any information that could disclose it. Obviously, since fear of publication is one of the factors that influences the reporting of sexual assault, certainty with respect to non-publication at the time of deciding whether to report plays a vital role in that decision. Therefore, a discretionary provision under which the judge retains the power to decide whether to grant or refuse the ban on publication would be
>
> counterproductive, since it would deprive the victim of that certainty. Assuming that there would be a lesser impairment of freedom of the press if the impugned provision were limited to a discretionary power, it is clear, in my view, that such a measure would not, however, achieve Parliament's objective, but rather defeats it."[101]

Given the prevalence of unreported cases in South Africa (specifically sexual violence cases and cases regarding children),[102] particular care and consideration should be given when considering the impact of identifying children who wish to report crimes.

It is clear that there are several stages before a matter reaches the trial stage. The current construction of section 154(3) does not appear to envisage the earlier stages of criminal proceedings that might warrant a certain degree of protection for children involved. However, looking to other provisions, legislation, and case law, domestically and abroad might provide some

[101] *Canadian Newspapers Co. v. Canada (Attorney General)* [1988] 2 SCR 122 at 131 – 132 (accessible at https://scc-csc.lexum.com/scc-csc/scc-csc/en/357/1/document.do).
[102] See for example Africa Check, 'War on women or crime under control? The two stories of South Africa's rape stats' (2019) (accessible at https://africacheck.org/2019/05/28/the-two-stories-of-south-africas-rape-stats/) and Institute for Security Studies, 'Why are South Africans underreporting on crime?' (2017) (accessible at https://issafrica.org/iss-today/why-are-south-africans-underreporting-on-crime).

guidance. It is necessary to note that not all these examples are directly applicable, but they can provide food for thought when considering the nuances of this issue.

Section 154(2)(b) of the CPA provides the following:

> "No person shall at any stage before the appearance of an accused in a court upon any charge referred to in section 153(3) or at any stage after such appearance but before the accused has pleaded to the charge, publish in any manner whatever any information relating to the charge in question."

While this does not explicitly require the protection of the identity of an accused it demonstrates an intention by the legislature to protect certain aspects of a criminal matter during the early stages. The Police Services Act prohibits the making of sketches or taking of photographs as well as their publication of any person who is, in relation to criminal proceedings, detained in custody.[103] From this, we can glean that there are identity protection considerations at the detention and custody stage of criminal proceedings.

The Children's Act prohibits the publication of the identity of children who are a party or witness in proceedings in the Children's Court, section 74 provides:

> "No person may, without the permission of a court, in any manner publish any information relating to the proceedings of a children's court which reveals or may reveal the name or identity of a child who is a party or a witness in the proceedings."[104]

This section envisages judicial discretion as well as proceedings of a children's court, which does not account for identity protections during earlier stages of the administration of justice. Section 45 of the Child Justice Act is linked to section 154 of the CPA and states:

> "(1) Section 154 of the Criminal Procedure Act relating to the publication of information that reveals or may reveal the identity of a child or a witness under the age of 18 years applies with the changes required by the context to proceedings at a preliminary inquiry.
>
> (2) No information furnished by any person at a preliminary inquiry in relation to the child may be used against that child in any bail application, plea, trial or sentencing proceedings."[105]

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[103] Police Service Act 68 of 1995 at section 69 (accessible at https://www.gov.za/sites/default/files/gcis_document/201409/act68of1995.pdf).
[104] Children's Act above n 19.
[105] Child Justice Act above n 55.

Section 63(5) of the Child Justice Act further prevents a person from being present at a child justice court unless they are granted permission by the pressing officer or their presence is necessary for purposes of the proceedings.

From the Child Justice Act above we can note that there are some existing measures both during the pre-trial stages (preliminary inquiry) and the trial phase of children's court proceedings.

In *Johncom Media Investments* the Constitutional Court ordered that the "publication of the identity of, and any information that may reveal the identity of, any party or child in any divorce proceeding before any court is prohibited."[106] This is, however, a slightly different context but can be noted as relating specifically to judicial proceedings and not anything prior.

Lessons from India

Section 228A of the Indian Penal Code provides, in general terms, identity protection for victims of sexual offences, including child victims.[107] The section further provides instances where

publication is allowed, for example, if the printing or publication is "by or under the order in writing of the officer-in-charge of the police station or the police officer making the investigation into such offence acting in good faith for the purposes of such investigation".

The exception illustrates that section 228A caters for identity protection during the investigative stage. The section continues to attach criminal liability to anyone who prints or publishes any matter concerning any proceeding before a court with respect to a sexual offence, without the previous permission of such court. The section includes an explanation: The printing or publication of the judgment of any High Court or the Supreme Court does not amount to an offence. Accordingly, section 228A appears to provide protection starting from the investigative stage through to the trial stage.

The Indian Juvenile Justice (Care and Protection of Children) Act prohibits the "identification of a child in conflict with law or a child in need of care and protection or a child victim or witness of a crime, involved in such matter".[108] The Juvenile Justice Board or Child Welfare Committee may permit such disclosure, if in its opinion such disclosure is in the best interests of the child. Contravention of this prohibition is punishable with imprisonment or a fine. The inclusion of a

[106] *Johncom Media Investments Limited v M and Others* [2009] ZACC 5 at para 2 of the order of the Court (accessible at http://www.saflii.org/za/cases/ZACC/2009/5.html).
[107] Indian Penal Code, 1860 (accessible at https://indiacode.nic.in/bitstream/123456789/2263/1/A1860-45.pdf).
[108] Indian Juvenile Justice (Care and Protection of Children) Act 2 of 2016 at section 74 (accessible at http://cara.nic.in/PDF/JJ%20act%202015.pdf).

child in need of care and protection is noteworthy for broader considerations concerning the identification of children in the media. Markedly, the scope of "such matter" does not limit the identification solely to criminal proceedings.

The CPA, the Police Services Act, the Child Justice Act and the insights from India, if pieced together, seem to err on the side of a more expansive understanding of criminal proceedings, rather than limiting the protections only to the trial phase. This would accord with the reasoning of the Constitutional Court which focused on the protective purpose of section 154. While the Court did not give definitive guidance on this point, it did scratch the surface of this issue:

> "While there may be multiple purposes inherent in section 154(3), the dominant purpose of the provision is child protection. Participants who are under 18 have been singled out for special anonymity protection on the basis that children participating in criminal proceedings are in a vulnerable position. Although child accused and witnesses may be active child participants in criminal proceedings by default, child victims are also necessarily participants, active or inactive, by being part of the conduct of criminal proceedings at each stage and experience a particular type of vulnerability. This particular type of vulnerability also warrants protection, and this is in line with the protective purpose of the impugned provision."[109]

There are a few points to note here: the Court clearly envisaged the trial stage of criminal proceedings through its explicit mention of "participating", it does, however, also appear to acknowledge that child victims – who ultimately might never be part of the trial, as "inactive" participants are equally deserving of protection. The acknowledgement of "each stage" is also an indication that the Court intended that protection is not limited to the trial. Ultimately and placing the best interests of children at the fore, there appears to be little value in distinguishing between the processes leading up to the trial and the trial itself.

Recommendation 2: protections should apply from the earliest possible stage

MMA submits that protections should be afforded from the earliest possible stage. If, for example, criminal proceedings were deemed to only begin once the trial has started, this may be too late to ensure that the identity of the child has been adequately protected, and would be contrary to the best interests of the child. This may differ depending on the category of the

[109] *Centre for Child Law v Media24* above n 3 at para 33.

person, namely whether they are an accused, victim, or witness. In this regard, MMA recommends the following:

- In respect of an accused or a victim under the age of eighteen years, we submit that criminal proceedings should be deemed to begin from the moment that the charge has been laid.
- In respect of a witness under the age of eighteen years, we submit that criminal proceedings should be deemed to begin from the moment that the person is first selected and listed as a witness by either the prosecution or the defence teams.

This should be clearly stipulated in any amendment to section 154(3) so that there is no uncertainty or confusion in respect of when the protections contained in this provision begin to apply.

MMA supports the need for there to be legal protections that apply to protect the identity of an accused, victim or witness under the age of eighteen years well before the start of criminal proceedings, to ensure that this protection is meaningful and effective, and truly safeguards the identity of the affected child. However, it is necessary to note that amendments to section 154(3) are specific to the CPA, and therefore are bound in its application to criminal proceedings.

In order to protect the best interests of the child, relevant law-makers should equally have regard to other possible amendments that may need to be effected to deal with the protection

of children prior to the commencement of criminal proceedings, such as in the Children's Act, 2005 or the Child Justice Act, 2008.

How are victims of kidnapping and abduction protected?

The complications of the timing of section 154(3) can be illustrated by the complexities of reporting on a child who has been abducted. Neither the Constitutional Court, nor the existing legal frameworks provide clear guidance on publishing the identity of a child who has been abducted but not yet found. In grappling with this point, there are three overarching questions to consider: first, does reporting an abduction trigger criminal proceedings? Second, would disclosing the identity of the child who has been abducted be in their best interests for purposes of the criminal investigation? Third, would the order of the Constitutional Court come into effect if the missing child is found alive?

In answer to the first question, if criminal proceedings are deemed to begin when a crime is reported, it would mean that the identity of a child who has been abducted but not yet found would

not be protected by section 154(3). However, this interpretation might not be in the best interests of the child. This leads to the second question. There are instances where "using a child's identity (their name and/or recognisable image) is in the child's best interests."[110]

Reporting on a child who has been abducted is arguably an instance where disclosure of identity might be in the best interests of the child.

Addressing the third question the Editorial Guidelines note that "[j]ust, because a child's name has already been reported, is not an ironclad reason to continue reporting the name".[111] Arguably, it is likely that if the child is found alive, the order of the Constitutional Court would kick in and the identity of the child may no longer be disclosed as the child becomes a victim or survivor of a crime. The third question appears to be easier to answer once a trial has begun. In January 2020, News24 published an article titled 'Vanderbijlpark teacher and co-accused await trial date in case of 6-year-old girl's kidnapping'. The article did not identify the girl who had been abducted, and explicitly stated that it was not naming the girl following the Constitutional Court ruling.[112] Notwithstanding News24's commendable response, there is some uncertainty regarding the reporting the identity of a child who has been abducted.

Recommendation 3: special dispensation for children who are victims of kidnapping or abduction

MMA submits that a particular dispensation in respect of children who are victims of kidnapping or abduction should be included in the revised section 154(3). MMA is of the view that it may be necessary and helpful to the law enforcement efforts to publish the identities of such children in order for the South African Police Service and other social initiatives – such as the services via Missing Children South Africa an Amber Alert on Facebook – to assist in locating the missing children through mass awareness campaigns.

In such circumstances, a charge may be laid that triggers the commencement of criminal proceedings, but the matter may not yet be before a presiding judge or judicial officer to authorise the publication of information pertaining to the kidnapping or abduction. In such

[110] UNICEF, 'Guidelines for journalists reporting on children' above n 4.
[111] Editorial Guidelines above n 4.
[112] News24, 'Vanderbijlpark teacher and co-accused await trial date in case of 6-year-old girl's kidnapping' (9 January 2020) (accessible at https://www.news24.com/SouthAfrica/News/vanderbijlpark-teacher-and-co-accused-await-trial-date-in-case-of-6-year-old-girls-kidnapping-20200109.)

cases, a parent or caregiver should be permitted to consent to the disclosure of the identity of the child for the purposes of locating the child's whereabouts. This authorisation to publish the identity of the child should automatically cease on notification that the child has been found, or on the withdrawal of consent by the parent or caregiver. MMA submits that such a dispensation would be in the public interest and interests of justice, as well as the best interests of the child, and would serve to facilitate the location of children in vulnerable or compromised positions that have been kidnapped or abducted.

Understanding what constitutes revealing information

In 1980, the then Transvaal Division of the High Court found that "information" in the context of section 154(3) of the CPA, can be tested as follows:

> "In my judgment, the proper approach to be adopted in determining whether there was any contravention of the provisions of s 154(3) is to inquire whether the articles in question either reveal or may reveal the identity of CH as the accused person to a hypothetical ordinary, average reader of the newspaper articles in question who has no prior or special knowledge of any of the incidents or persons referred to in the article, and who therefore reads each article as a separate news item divorced from anything that may previously have been published about such incidents or persons."[113]

While the hypothetical ordinary, average reader test provides some guidance, further consideration of the extent of what constitutes identifying features, and possible further legal clarity might be warranted. Below are some examples of how identifying features have been defined elsewhere:

- UNICEF has explained that a child's identity includes their name and/or recognizable image.[114] Other resources for journalists have noted that "[r]evealing the name of a child's school, home, or teacher, for example, may indirectly identify a child."[115]
- The Canadian Youth Criminal Justice Act provides certain privacy protections for children.[116] Section 110(1) protects the identity of a child in conflict with the law prohibiting the publication of their name or any other information related to them. This is a fairly broad inclusion, which will likely result in solid protections for children, but might create challenges for the media.

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[113] S v *Citizen Newspapers (Pty) Ltd and Another; S v Perskorporasie van Suid-Afrika Bpk* 1980 (3) SA 889 (T).
[114] UNICEF, 'Guidelines for journalists reporting on children' above n 4.
[115] A Resource Kit for Journalists above n 4.
[116] Youth Criminal Justice Act, 2002 (accessible at https://www.canlii.org/en/ca/laws/stat/sc-2002-c-1/latest/sc-2002-c-1.html).

- In Brazil the Estatuto da Criança e do Adolescente (Child and Adolescents' Statute), enacted in 1990, provides for the promotion and protection of children's rights.[117] Notably, it provides for the anonymity protection to children who are involved in judicial, police, and administrative acts. The 2003 amendment to the Child and Adolescents' Statute prohibits the publication of news about children involved in the above, including photographs, references to name, surname, nickname, affiliation, relationship, residence, and even initials of their name and surname.[118]
- In the United Kingdom the Youth Justice and Criminal Evidence Act, in the context of restrictions on reporting alleged offences involving persons under 18, recognises certain features that are likely to lead members of the public to identify the child involved. These include the name, address, identity of any school or other educational establishment attended by the child and the identity of any place of work.[119]
- The Indian Protection of Children from Sexual Offences Act provides extensive and wide-ranging protection for children from identification in the media and details identifying factors including:

> "name, address, photograph, family details, school, neighbourhood or any other particulars which may lead to disclosure of identity of the child: Provided that for reasons to be recorded in writing, the Special Court, competent to try the case under the Act, may permit such disclosure, if in its opinion such disclosure is in the interest of the child."[120]

Exhaustive lists, while providing definitive guidance, are not always helpful and can often be restrictive, or alternatively, could omit an important factor resulting in harm to children. That being said, to fully strike the appropriate balance between freedom of expression and the best interests of children, some level of appropriate guidance is necessary. It appears from all the above that the standard would be any information that would cause members of the public to identify the child involved. In other words, the media cannot describe the child or adult in a way in which they would be easily recognisable by readers.

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[117] Statute of the Child and Adolescent 8069 of 1990 (accessible at http://www.planalto.gov.br/ccivil_03/leis/l8069.htm).

[118] Article 143 per Law nº 10.764, of 11/12/2003). See further Internews Europe 'Protecting the rights of children: the role of the media lessons from Brazil, India and Kenya' (2014) at 21 (accessible at https://internews.org/sites/default/files/resources/InternewsEurope_ChildRightsMedia_Report_2014.pdf) and L aw Library of Congress 'Brazil, Children's Rights: International and National Laws and Practice' (2007) at 17 (accessible at https://www.loc.gov/law/help/child-rights/pdfs/Children's%20Rights-Brazil.pdf).

[119] Youth Justice and Criminal Evidence Act, 1999 at section 44 (accessible at http://www.legislation.gov.uk/ukpga/1999/23/part/II/chapter/IV/crossheading/reports-relating-to-persons-under-18).

[120] The Protection of Children from Sexual Offences Act, 2012 at section 23 (accessible at https://wcd.nic.in/sites/default/files/POCSO%20Act%2C%202012.pdf).

Recommendation 4: Identifying features

MMA submits that an exhaustive list is not necessary, but rather a reasonable interpretation of identifying features which includes any features likely to lead members of the public to identify and recognise the child involved would be a sufficient interpretation.

Ongoing protection – a default position

The extension of identity protection into adulthood was and remains a controversial and complex issue. Two main debates arise. The first relates to the debate around stigma and agency. The arguments of this debate were ventilated in the judgment, specifically in the deliberation and reasoning of the majority judgment and the partial dissent of Cameron J and Froneman J. The second debate, which indeed ties to the first, and will be discussed further is that of the default position of ongoing protection.

The majority judgment captured the key questions of the debate as follows:

- Should the default position be one of ongoing protection where such protection may be lifted by consent, or if consent is refused, through a court order?
- Or one of a case-by-case protection determined by the courts upon application?[121]

Below are some direct snippets of the reasoning of the Court:

In favour of a default position	Against a default position
• The default position of ongoing protection is to ensure that the best interests of some of the most vulnerable members of our society are given the protection they are entitled to. If the section fails to afford this, the protection would be rendered hollow.[122] • Ongoing protection as the default position – not the blanket rule – should enable child survivors, even when they become adults, to consider how best to counteract stigma	• There is however a particular reason for eschewing default anonymity in our country. The first judgment acknowledges it. It is stigma, that social branding of condemnation, denunciation, ostracism and judgment we place upon the brow of the rejected other. Stigma, with its closely allied internalised collaborator, shame – the ignominy experienced internally of bearing a social marking of rejection – afflicts us in our HIV status, our sexual

[121] *Centre for Child Law v Media24* above n 3 at para 61.
[122] Id at para 71.

and whether publicity is a worthy means to do so.[123] • However, a default position against anonymity seems to only further stigmatise and oppress those who live at those same intersecting axes of discrimination that often brought them into contact with a crime either as accused, victims or witnesses in the first place.[124] • In my view, default ongoing protection is a valuable means to create a more meaningful engagement with agency, enabling personal choice and giving effect to restorative justice. Ongoing protection as the default position accounts for adequate protection as well as evolving capacities and fosters conditions that allow children to maximise opportunities and lead happy and productive lives.[125] • The introduction of the default position neither diminishes the right of the public to be informed, nor reduces the ability of the media to report. This is a subtle intrusion into the domain of freedom of expression and open justice.[126] • The default position considers the uneven power dynamics and opens an avenue for those who are ready to share their story, to do so. The ability to consent empowers individuals, allowing them to exercise their agency.[127]	orientation, our cross-border migrant status, our race.[128] • There should be no shame in being a victim of a crime. No shame in being witness to a crime. By contrast there is shame in having perpetrated a crime, and the stigma society attaches to it may have to be justly borne. That may depend on how close the perpetrator was to adulthood at the time. But should we countenance a general rule, banning dissemination of identity and identifying details once victim, witness and perpetrator have turned 18, requiring judicial order to reverse it? That seems to us to place the balance wrongly.[129] • We should use state power to limit knowledge with caution. Justifying indefinite anonymisation in the case of adults who were, when children, witnesses to or victims of or accused of crimes points our hard-won process protections in an untoward direction.[130] • Where the scales are so evenly balanced, where a judicial decree can, either way, remedy the wrong that the default position may wreak, we should rather take the risk of erring in the cause of openness and knowledge, and against stigma and shame.[131]

[123] Id at para 84.
[124] Id at para 86.
[125] Id at para 87.
[126] Id at para 108.
[127] Id at para 125.
[128] Id at para 136.
[129] Id at para 140.
[130] Id at para 141.
[131] Id at para 141.

The Court ultimately found in favour of the default position of protection, which would mean that an adult who as a child was a victim, witness or accused, would continue to receive identity protection into adulthood unless the affected adult consents to the publication of their identity or competent court lifts the identity publication ban if it is in the interests of justice to do so.

How Parliament ultimately decides to frame this, will determine the practicalities for the media. For purposes of this discussion, the positions of Canada and the United Kingdom provide some interesting insight.

Canada indeed promotes the position of agency.[132] It caters for a default position with a consent-based exclusion. The Canadian Youth Criminal Justice Act provides for two exceptions that enable ongoing protection.[133] Section 110(1) protects the identity of a child offender, and section 110(3) provides:

> "A young person referred to in subsection (1) may, after he or she attains the age of eighteen years, publish or cause to be published information that would identify him or her as having been dealt with under this Act or the Young Offenders Act, chapter Y-1 of the Revised Statutes of Canada, 1985, provided that he or she is not in custody pursuant to either Act at the time of the publication."

Section 111(1) covers the identity protection of victims and witness and section 111(2) states:

> "Information that would serve to identify a child or young person referred to in subsection (1) as having been a victim or a witness may be published, or caused to be published, by
> (a) that child or young person after he or she attains the age of eighteen years or before that age with the consent of his or her parents; or
> (b) the parents of that child or young person if he or she is deceased."

Given that ongoing protection is now the default position in South Africa, with an exception of consent being granted by the affected adult or authorisation by a competent court, the wording of the above provisions might be of use during the law reform process to make section 154(3A) clear and coherent.

The Youth Justice and Criminal Evidence Act in the United Kingdom provides certain restrictions on the reporting of children in the media.[134] Section 44 prohibits the publication of information of alleged offences involving persons under the age of18 that it is likely to lead members of the public to identify them as a person involved in the offence. Section 45 caters for judicial discretion to restrict the reporting of criminal proceedings involving persons under the age of 18. Notably,

[132] Id at para 111.

section 45A gives the court the power to restrict reporting of criminal proceedings for lifetime of witnesses and victims under 18:

> "The court may make a direction ('a reporting direction') that no matter relating to a person mentioned in subsection (3) shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as being concerned in the proceedings."

A reporting direction clearly supports the position of ongoing protection; however, this differs from the Canadian, and now South African, position of a default ongoing protection.

RXG v Ministry of Justice – lifelong anonymity

In 2019, the High Court of Justice in the United Kingdom was confronted with the issue of ongoing protection. The matter of *RXG v Ministry of Justice* is an interesting case study for the case-by-case approach of ongoing protection.[135] In 2015 a 14-year-old boy, RXG, pled guilty to two offences of inciting terrorism. His case received widespread international media attention. During the trial, RXG was afforded the identity protections of section 45 of the Youth Justice and Criminal Evidence Act, despite efforts of the media to reveal his identity. In 2018, RXG would become an adult, and knowing his identity protections would come to an end, he approached the court to extend the reporting restrictions beyond his 18th birthday.

He argued that he would be exposed to serious harm and would risk attack by third parties which would have a deeply adverse impact on his psychological well-being. He also argued that his rehabilitation will be jeopardised if he is identified, and his family would be at risk should his identity become known to the public. The High Court considered extensive expert evidence on the likelihood of harm to RXG and the extent of any impediments to his rehabilitation. In its reasoning, the High Court balanced RXG's rights against the rights of the public and the principle of open justice. The Court noted there is a "fundamental public interest in unfettered reporting of the trials of those charged with criminal offences" and a "clear public interest in understanding how a child of 14 could have incited what would have been an appalling terrorist atrocity had his efforts not been thwarted."[136] However, the Court found that based on the evidence there is a "likely impact upon his mental health if he is now identified". The Court also grappled with the issue of stigma:

[135] *RXG v Minister of Justice* above n 11.
[136] Id at para 69.

> "The principal reason for imposing the original reporting restriction protecting RXG's identity was to promote RXG's rehabilitation, to avoid 'criminalising' or stigmatising him, to support his re-integration into society and to recognise that his offending took place when he was only 14. The evidence demonstrates that the loss of anonymity will present significant challenges and threats to RXG in terms of his rehabilitation and reintegration to society when released. With anonymity removed, his historic offending will remain a facet of his public identity, which he will have to confront. If he is publicly named, the evidence demonstrates that he risks social ostracism and his further rehabilitation is jeopardised."[137]

The Court ultimately found that RXG's case is an exceptional one and granted an order "extending the reporting restrictions which prohibit the identification of RXG until further order".[138]

The Canadian and United Kingdom examples, the former of default and the latter of case-by-case, both support the position of ongoing protection and accept the challenges children face when threatened with future exposure. While our Parliament embarks on the process of law reform, the reasoning of the Constitutional Court and the above examples can provide valuable insight into the need for ongoing protection.

Beyond this and linked to the above discussion on public interest considerations, it may be necessary for purposes of clarity to ensure that section 154(3) is considered within the realm of public interest considerations.

Recommendation 5: disclosure in the public interest

MMA supports the default position of ongoing protection but is of the view that any amendments to section 154(3) should clearly include a public interest caveat. MMA is of the view that it is necessary to stipulate that the disclosure of the identity of the affected person should be in the public interest, and not just matters that are interesting to the public. Such caveat will serve to safeguard against publications that simply satisfy the interests of entertainment and curiosity, but do not serve a broader public interest purpose in disclosure.

[137] Id at para 61.
[138] Id at para 71.

CONCLUSION

The best interests of children and the media's right to freedom of expression might appear to compete, but rather, in many ways accord with one another. The principle that the best interests of children is a primary consideration, or of paramount importance in all and every matter concerning the child is well established. The concept of "the best interests of the child" has been described as "[a] golden thread which runs throughout the whole fabric of our law relating to children".[139] The media must always ensure that the best interests of the child or children involved are respected. This means that the best interests of children are the most important consideration and outweigh other considerations ranging from generating a profit, telling an important story about children, or even advocating for children's issues. This by no means detracts from the media's right to freedom of expression. The media can and must continue to fulfil its role of informing and enlightening the public and enhancing our constitutional democracy.

The recent developments illustrate that how children are identified, portrayed, and reported on can have an empowering and positive impact. The judgment of the Constitutional Court requires the media to marginally recalibrate. The media, in its current and future considerations, are required to shift its approach in reporting, but this should not deter the media, it should encourage the media to meaningfully engage with issues around trauma, rehabilitation, stigma, and agency. This shift presents a new opportunity for the media to encourage debate, change narratives, empower individuals, and ultimately tell stories that ought to be told. The law reform process provides an important opportunity for the media to contribute and inform the nuanced and complexities of the identification of children in the media. There are creative ways in which existing legal positions can be weaved together to provide further clarity on the practicalities of identification and there are valuable insights from other countries that could further inform the debate going forward.

Children's experiences shape their development and impact the adults they will become and determine what type of members of society they will be. The media can have an immense impact on how society views children and how children view themselves. Ultimately, and as captured by the Court:

> "Stories matter. Many stories matter. Stories have been used to dispossess and to malign. But stories can also be used to empower, and to humanise. Stories can break the dignity of people. But stories can also repair that broken dignity."[140]

[139] *Kaiser v Chambers* 1969 (4) SA 224 (C).
[140] *Centre for Child Law v Media24* at para 1 quoting Chimamanda Ngozi Adichie "The Danger of a Single Story" TEDGlobal (2009).

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