



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 12/13  
[2013] ZACC 35

In the matter between:

THE TEDDY BEAR CLINIC FOR ABUSED CHILDREN First Applicant

RAPCAN Second Applicant

and

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT First Respondent

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Second Respondent

and

JUSTICE ALLIANCE OF SOUTH AFRICA First Amicus Curiae

TRUSTEES FOR THE TIME BEING OF THE WOMEN'S LEGAL CENTRE TRUST Second Amicus Curiae

TSHWARANANG LEGAL ADVOCACY CENTRE Third Amicus Curiae

Heard on : 30 May 2013

Decided on : 3 October 2013

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JUDGMENT

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KHAMPEPE J (Mogoeng CJ, Bosielo AJ, Froneman J, Jafta J, Mhlantla AJ, Nkabinde J, Skweyiya J and Zondo J concurring):

*Introduction*

[1] 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. Indeed, this Court has recognised that children merit special protection through legislation that guards and enforces their rights and liberties.<sup>1</sup> We must be careful, however, to ensure that, in attempting to guide and protect children, our interventions do not expose them to harsh circumstances which can only have adverse effects on their development.

[2] This is an application for confirmation of a ruling by the North Gauteng High Court, Pretoria (High Court) that certain provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act<sup>2</sup> relating to the criminalisation of consensual sexual conduct with children of a certain age, are constitutionally invalid. In terms of section 172(2)(a) of the Constitution, the High Court's ruling has no force unless and until confirmed by this Court.

[3] At the outset it is important to emphasise what this case is not about. It is not about whether children should or should not engage in sexual conduct. It is also not

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<sup>1</sup> *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others* [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) at para 63.

<sup>2</sup> 32 of 2007 (Sexual Offences Act).

about whether Parliament may set a minimum age for consensual sexual conduct. Rather, we are concerned with a far narrower issue: whether it is constitutionally permissible for children to be subject to criminal sanctions in order to deter early sexual intimacy and combat the risks associated therewith.

*Parties*

[4] The first applicant is The Teddy Bear Clinic for Abused Children, a not-for-profit company that provides a wide range of medical and related services to abused children and coordinates programmes to divert young sex offenders from the criminal justice system.

[5] The second applicant, likewise a not-for-profit company, is RAPCAN, an acronym for “Resources Aimed at the Prevention of Child Abuse and Neglect”. It is dedicated to the prevention of child victimisation and the promotion of children’s rights, which it does by, amongst other things, developing best practices in relation to child victims and witnesses in the criminal justice system and by advocating legal and policy reforms to protect children from abuse, exploitation and neglect.

[6] Both applicants have over twenty years’ experience in attempting to curb the scourge of sexual abuse of children, and in dealing with its consequences.

[7] The first respondent is the Minister of Justice and Constitutional Development (Minister), cited in his capacity as the Minister responsible for the administration of

the Sexual Offences Act. The second respondent is the National Director of Public Prosecutions (NDPP), cited because of the powers and obligations conferred on that office by the Sexual Offences Act.

[8] The first amicus is the Justice Alliance of South Africa (JASA). JASA has an interest in this matter by virtue of its aim to uphold and develop Judeo-Christian values, the Constitution and the law of South Africa by means of litigation.

[9] The Women's Legal Centre Trust and the Tshwaranang Legal Advocacy Centre were admitted to make joint submissions as the second and third amici. Both organisations were established in order to advance the human rights of women in South Africa.

*The scheme of the Sexual Offences Act*

[10] The Act, in force with effect from 16 December 2007, represents a comprehensive legislative reform of both statutory and common-law criminal liability in relation to the commission of sexual offences. As set out in the introductory text of the statute, its purpose is to—

“comprehensively and extensively review and amend all aspects of the laws and the implementation of the laws relating to sexual offences, and to deal with all legal aspects of or relating to sexual offences in a single statute, [including] by . . . enacting comprehensive provisions dealing with the creation of certain new, expanded or amended sexual offences against children and persons who are mentally disabled . . . despite some of the offences being similar to offences created in respect of adults as the creation of these offences aims to address the particular vulnerability of children

and persons who are mentally disabled in respect of sexual abuse or exploitation; eliminating the differentiation drawn between the age of consent for different consensual sexual acts and providing for special provisions relating to the prosecution and adjudication of consensual sexual acts between children older than 12 years but younger than 16 years; . . . [and] creating a duty to report sexual offences committed with or against children or persons who are mentally disabled”.

[11] This case is primarily concerned with Part 1 of Chapter 3 of the Sexual Offences Act, which criminalises the performance of certain consensual sexual acts (by adults and children) with children who are between 12- and 16-years old (adolescents).<sup>3</sup> Section 15 deals with the offence of “statutory rape”:

**“Acts of consensual sexual penetration with certain children (statutory rape)**

- 15 (1) A person (‘A’) who commits an act of sexual penetration with a child (‘B’) is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child.
- (2) (a) The institution of a prosecution for an offence referred to in subsection (1) must be authorised in writing by the National Director of Public Prosecutions if both A and B were children at the time of the alleged commission of the offence: Provided that, in the event that the National Director of Public Prosecutions authorises the institution of a prosecution, both A and B must be charged with contravening subsection (1).
- (b) The National Director of Public Prosecutions may not delegate his or her power to decide whether a prosecution in terms of this section should be instituted or not.”

[12] The Act gives the term “sexual penetration” a wide definition, including—

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<sup>3</sup> It is important to note that the commission of non-consensual sexual offences, including rape and sexual assault, whether committed by adults or children, is dealt with by Parts 1 and 2 of Chapter 2. The criminalisation of such conduct is not under challenge in these proceedings.

“any act which causes penetration to any extent whatsoever by—

- (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;
- (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or
- (c) the genital organs of an animal, into or beyond the mouth of another person”.

[13] Section 16 of the Act imposes criminal liability for committing “statutory sexual assault”:

**“Acts of consensual sexual violation with certain children (statutory sexual assault)**

- 16 (1) A person (‘A’) who commits an act of sexual violation with a child (‘B’) is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual violation with a child.
- (2) (a) The institution of a prosecution for an offence referred to in subsection (1) must be authorised in writing by the relevant Director of Public Prosecutions if both A and B were children at the time of the alleged commission of the offence: Provided that, in the event that the Director of Public Prosecutions concerned authorises the institution of a prosecution, both A and B must be charged with contravening subsection (1).
- (b) The Director of Public Prosecutions concerned may not delegate his or her power to decide whether a prosecution in terms of this section should be instituted or not.”

[14] The Act in turn defines “sexual violation” in very broad terms to include—

“any act which causes—

- (a) direct or indirect contact between the—

- (i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;
- (ii) mouth of one person and—
  - (aa) the genital organs or anus of another person or, in the case of a female, her breasts;
  - (bb) the mouth of another person;
  - (cc) any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could—
    - (aaa) be used in an act of sexual penetration;
    - (bbb) cause sexual arousal or stimulation; or
    - (ccc) be sexually aroused or stimulated thereby; or
  - (dd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or
- (iii) mouth of the complainant and the genital organs or anus of an animal;
- (b) the masturbation of one person by another person; or
- (c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person, but does not include an act of sexual penetration”.

[15] Although in terms of the Constitution,<sup>4</sup> and in relation to most provisions of the Act, a “child” is any person under the age of 18 years, for the purposes of sections 15 and 16 of the Sexual Offences Act a “child” is defined as “a person 12 years or older but under the age of 16 years”.<sup>5</sup> In other words, statutory rape or statutory sexual assault can only be perpetrated against a child between the ages of 12 and 15 years (inclusive).

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<sup>4</sup> Section 28(3).

<sup>5</sup> For ease of reference, and as indicated in [11] above, I shall refer to children who fall within this category as “adolescents” throughout this judgment.

[16] Although not contained in Part 1 of Chapter 3 of the Sexual Offences Act, section 56(2) and (3) introduces statutory defences that are relevant to a charge of statutory rape or statutory sexual assault:

- “(2) Whenever an accused person is charged with an offence under—
- (a) section 15 or 16, it is, subject to subsection (3), a valid defence to such a charge to contend that the child deceived the accused person into believing that he or she was 16 years or older at the time of the alleged commission of the offence and the accused person reasonably believed that the child was 16 years or older; or
  - (b) section 16, it is a valid defence to such a charge to contend that both the accused persons were children and the age difference between them was not more than two years at the time of the alleged commission of the offence.
- (3) The provisions of subsection (2)(a) do not apply if the accused person is related to the child within the prohibited incest degrees of blood, affinity or an adoptive relationship.”

[17] Certain other sections of the Sexual Offences Act are relevant for present purposes. Chapter 6 of the Act establishes the National Register for Sex Offenders (Register), a compendium containing, amongst other things, the particulars of persons convicted of any sexual offence against a child.<sup>6</sup> In terms of section 50(2)(a)(i), a court that convicts a person of a sexual offence against a child “must make an order that the particulars of the person be included in the Register.”

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<sup>6</sup> Sections 42(1) and 50(1)(a)(i).

[18] Finally, section 54 of the Sexual Offences Act creates an obligation and an offence in relation to the reporting of, or failure to report, sexual offences against children:

- “(1) (a) A person who has knowledge that a sexual offence has been committed against a child must report such knowledge immediately to a police official.
- (b) A person who fails to report such knowledge as contemplated in paragraph (a), is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.”

*The import of the impugned provisions*

[19] Before proceeding to consider the challenge currently before us, it would be appropriate to set out the meaning of sections 15 and 16 of the Sexual Offences Act in practical terms.

[20] Section 15(1) creates the offence of statutory rape in relation to the commission of “sexual penetration”. “Sexual penetration” includes vaginal, anal and oral sexual intercourse, as well as some forms of masturbation by another person.

[21] Statutory rape is committed if (a) an adult or a child who is 16 years or older engages in consensual sexual penetration with an adolescent; or (b) adolescents engage in consensual sexual penetration with each other. In the case of (b), if a prosecution is instituted for a charge of statutory rape, both of the children involved

must be prosecuted. Put differently, if two adolescents engage in sexual penetration with one another, each will be guilty of having statutorily raped the other.

[22] Section 16(1) creates the offence of statutory sexual assault in relation to the commission of “sexual violation”. That term, with its broad references to “direct or indirect contact”, includes some forms of masturbation by another person, petting, kissing and hugging.

[23] Similar to the case of statutory rape, statutory sexual assault is committed if (a) an adult or a child who is 16 years or older engages in consensual sexual violation with an adolescent; or (b) adolescents engage in consensual sexual violation with each other. In the case of (b), if a prosecution is instituted for a charge of statutory sexual assault, both of the children involved must be prosecuted.

[24] A “close-in-age” defence is available to a child who has been charged with statutory sexual assault, but not to a child who has been charged with statutory rape.<sup>7</sup> In terms thereof, it is a valid defence for the accused child “to contend that both the accused persons were children and the age difference between them was not more than two years at the time of the alleged commission of the offence.” Because the close-in-age defence is located in section 56 of the Sexual Offences Act (which has the same definition of “child” as the Constitution), it seems that the defence is

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<sup>7</sup> Section 56(2)(b) of the Sexual Offences Act.

available to persons under the age of 18 years.<sup>8</sup> If sexual violation has been committed and the parties have an age difference of more than two years between them, no defence lies. In other words, if a 12-year old and 15-year old engage in kissing or petting or mutual masturbation, both commit an offence in terms of section 16. Furthermore, if the 15-year old is prosecuted, the 12-year old must be prosecuted too, and neither may claim the close-in-age defence.

### *High Court proceedings*

[25] In the High Court, the applicants argued that, on the common-cause evidence before the Court, the impugned provisions of the Sexual Offences Act infringe children's constitutional rights to dignity,<sup>9</sup> privacy<sup>10</sup> and bodily and psychological integrity,<sup>11</sup> as well as their right in terms of section 28(2) of the Constitution to have their best interests treated as being of paramount importance in all matters concerning them.<sup>12</sup> They contended that these infringements could not be justified in terms of section 36 of the Constitution because the expert evidence tendered demonstrated that the provisions were not rationally related to their stated purposes, and because less restrictive means could have been employed by the state to achieve those purposes.

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<sup>8</sup> This is not entirely clear. The defence only applies to offences committed under section 16, for purposes of which only minors under the age of 16 years are children. Furthermore, the defence only applies if "both the accused persons" were charged, and it is only in situations where the parties are children under the age of 16 years that both will be charged. Where one party is younger than 16 years and the other party is 16 years or older, it is only the latter who has committed an offence.

<sup>9</sup> In terms of section 10 of the Constitution.

<sup>10</sup> In terms of section 14 of the Constitution.

<sup>11</sup> In terms of section 12(2) of the Constitution.

<sup>12</sup> For ease of reference I shall refer to the principle in section 28(2) of the Constitution requiring that the best interests of a child must be paramount in any matter relating to the child as the "best-interests principle".

[26] While the NDPP elected to abide the decision of the High Court, the Minister actively opposed the declaratory relief sought by the applicants.

[27] The High Court (per Rabie J) upheld the applicants' challenge and ruled that the impugned provisions violated all of the rights cited. Further, the High Court held that these violations were not justifiable in terms of section 36 of the Constitution. It therefore made the following order:

“1. It is hereby declared that sections 15 and 56(2)(b) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ('the Act') and the definition of 'sexual penetration' in section 1 of the Act are inconsistent with the Constitution of the Republic of South Africa, 1996 ('the Constitution') and invalid, to the extent that they:

1.1. criminalise a child ('A') who is between twelve and sixteen years of age for engaging in an act of consensual sexual penetration with another child ('B') between twelve and sixteen years of age;

1.2. criminalise a child ('A') who is between sixteen and eighteen years of age for engaging in an act of consensual sexual penetration with a child ('B') who is younger than sixteen years of age and is two years or less younger than A.

2. It is hereby declared that, to remedy the defects set out in paragraph 1 above, section 15 of the Act shall read as though it provides as follows:

'A person ('A') who commits an act of sexual penetration with a child ('B') is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child, unless at the time of the sexual penetration (i) A is a child; or (ii) A is younger than eighteen years old and B is two years or less younger than A at the time of such acts.'

3. It is hereby declared that sections 16 and 56(2)(b) of the Act and the definition of ‘sexual violation’ in section 1 of the Act are inconsistent with the Constitution and invalid, to the extent that they criminalise a child (‘A’) who is between twelve and sixteen years of age for engaging in an act of consensual sexual violation with another child (‘B’) between twelve and sixteen years of age, where there is more than a two year age difference between A and B.
4. It is hereby declared that to remedy the defects set out in paragraph 3 above section 16 of the Act shall read as though it provides as follows:

‘A person (‘A’) who commits an act of sexual violation with a child (‘B’) is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual violation with a child, unless at the time of the sexual violation A is a child.’” (Emphasis in original.)

#### *Submissions in this Court*

[28] While the applicants acknowledge that the impugned provisions were enacted to protect children, they contend that the breadth and formulation of those provisions harm the very children they were intended to safeguard. Sections 15 and 16 of the Sexual Offences Act, so it is argued, have a series of harmful effects. These effects arise largely from the exposure of minors to the harshness of the criminal justice system, and the chilling effect of such exposure on the development of a proper understanding of, and healthy attitudes to, sexual behaviour. The impact of these provisions is heightened, in the applicants’ view, when considered in conjunction with the reporting obligations contained in section 54(1)(a) and the provisions regarding the Register contained in Chapter 6 of the Act.

[29] The applicants submit that these adverse consequences show that sections 15 and 16 of the Sexual Offences Act infringe a range of children's constitutional rights, namely their rights to human dignity, privacy and bodily and psychological integrity, as well as the best-interests principle.

[30] According to the applicants the limitations of these fundamental rights fail to meet the requirements of section 36 of the Constitution because the limitations are not properly related to the purposes they seek to achieve. Furthermore, so the applicants contend, there are less restrictive means available to achieve these purposes.

[31] The respondents argue that the impugned provisions do not infringe any of the rights alleged by the applicants. Rather, the statutory prohibitions function to advance and protect those rights by delaying the choice to engage in consensual sexual activities. However, should the Court find that such infringements exist, the respondents contend that they are reasonable and justifiable within the meaning of section 36. In this regard the respondents emphasise that the limitation of children's rights by means of prohibitions similar to those contained in sections 15 and 16 of the Sexual Offences Act is not uncommon in other open and democratic societies.

[32] In addition, the respondents argue that the prohibitions have been narrowly tailored and may only be implemented after due consideration of the affected child's interests. The prohibitions must be put into practice together with other legislative

instruments, such as the Child Justice Act<sup>13</sup> and the Children's Act,<sup>14</sup> as well as other measures that protect the interests of the child, such as the diversion of children from the formal criminal justice system in certain circumstances.<sup>15</sup> These factors, so the argument goes, demonstrate that there are no other less restrictive means to achieve the purpose of the prohibitions. Furthermore, the respondents contend that there is a close relationship between the statutory prohibitions and the purpose sought to be achieved by the Act: protecting children from the risks associated with sexual acts even where the acts are consensual.

[33] If this Court upholds any of the applicants' attacks, the respondents submit that it would be just and equitable to suspend the order of invalidity and direct Parliament to remedy the defect identified. They argue that the remedy of reading-in granted by the High Court constitutes a judicial choice on a matter of policy, which would require consideration of facts and other factors which are not readily available to this Court.

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<sup>13</sup> 75 of 2008.

<sup>14</sup> 38 of 2005.

<sup>15</sup> In terms of Chapter 8 of the Child Justice Act a prosecutor may seek the "diversion of a matter involving a child away from the formal court procedures in a criminal matter". Possible diversion procedures include requiring that the relevant child make an oral or written apology, be placed under a guidance or supervision order, receive counselling or therapy, make restitution to the victim of his or her offence and refrain from visiting a particular place. The objects of relying on diversion proceedings rather than the ordinary processes of the criminal justice system include "[promoting] the reintegration of the child into his or her family and community", preventing the stigmatisation of the child, "[preventing the child from suffering] the adverse consequences flowing from being subject to the criminal justice system" and "[promoting] the dignity and well-being of the child".

[34] JASA broadly supports the stance adopted by the applicants in relation to sections 16, 50(1)(a)(i), 50(2)(a)(i) and 54(1)(a) of the Sexual Offences Act.<sup>16</sup> However, JASA submits that section 15, save for the proviso in subsection 2(a) which makes the prosecution of both children obligatory, is constitutionally sound.

[35] The defence of section 15 of the Act is based on the best-interests principle. JASA submits that allowing sexual penetration between children is not in the best interests of the child because children are unable to give informed consent. The freedom to engage in a prospectively perilous activity (such as sexual penetration) in circumstances where the capacity for informed consent is absent is not a freedom that the law should recognise.<sup>17</sup>

[36] In addition to the infringements of rights relied upon by the applicants, the second and third amici argue that the right to equality guaranteed in section 9 of the Constitution is infringed, as the impugned provisions disproportionately affect girls. Accordingly, the provisions indirectly discriminate on the listed ground of sex. Furthermore, the second and third amici submit that the right of girls to access health care services in terms of section 27 of the Constitution, and reproductive health care (in the form of terminations of pregnancy) in particular, is violated.

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<sup>16</sup> That is, the applicants' submissions regarding the criminalisation of consensual "sexual violation", the inclusion of children in the Register and the reporting provisions regarding the commission of offences in terms of sections 15 and 16 of the Sexual Offences Act.

<sup>17</sup> In the alternative, and to the extent that section 15 of the Act (shorn of subsection 2(a)) infringes upon the constitutional rights of children, JASA submits that such infringement is reasonable and justifiable under section 36 of the Constitution.

*Issues for determination*

[37] The primary question for determination is whether the impugned sections are inconsistent with the Constitution insofar as they impose criminal liability on children for engaging in consensual sexual conduct. Answering this question requires us to investigate whether the impugned provisions limit any fundamental rights. If so, the respondents are required to demonstrate that the limitations are reasonable and justifiable in an open and democratic society. This application thus raises three broad issues for determination:

- (a) Are any rights limited by the impugned provisions?
- (b) If so, are these limitations reasonable and justifiable in terms of section 36 of the Constitution?
- (c) If not, what is the appropriate remedy?

*The rights of children*

[38] Before considering the alleged infringements of the aforementioned constitutional rights, I wish to explicate the manner in which courts should approach children's rights in general. In my view, the correct approach is to start from the premise that children enjoy each of the fundamental rights in the Constitution that are granted to "everyone" as individual bearers of human rights. This approach is consistent with the constitutional text, and gives effect to the express distinction that the Bill of Rights makes between granting rights to "everyone" on the one hand, and to adults only on the other hand. For instance, the right to vote is expressly limited to

adult citizens in terms of section 19(3) of the Constitution, whereas there is no such limitation in relation to the rights to dignity and privacy.<sup>18</sup>

[39] If we determine that constitutional rights have been limited, we are then required to engage in a justification analysis in terms of section 36.<sup>19</sup> Of course, there may be legitimate reasons for limiting a child’s fundamental rights in particular circumstances, due to the stage of his or her development and in order to protect him or her. However, this determination does not occur at the stage of defining the content of a right or determining whether a right has been infringed. Rather, we make this determination when deciding whether the particular limitation is reasonable and justifiable in our constitutional democracy.

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<sup>18</sup> Section 10 reads as follows:

“*Everyone* has inherent dignity and the right to have their dignity respected and protected.”  
(Emphasis added.)

Section 14 states in relevant part that “[*e*]veryone has the right to privacy”. (Emphasis added.)

<sup>19</sup> Section 36 of the Constitution reads as follows:

**“Limitation of rights**

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
  - (a) the nature of the right;
  - (b) the importance of the purpose of the limitation;
  - (c) the nature and extent of the limitation;
  - (d) the relation between the limitation and its purpose; and
  - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

[40] This approach is consistent with the jurisprudence of this Court. For example, in *S v M (Centre for Child Law as Amicus Curiae)*<sup>20</sup> the majority of this Court endorsed the approach that children are individual rights-bearers rather than mere extensions of their parents. Sachs J described this understanding of children's rights in evocative terms:

“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. The unusually comprehensive and emancipatory character of section 28 presupposes that in our new dispensation the sins and traumas of fathers and mothers should not be visited on their children.

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 they should conduct themselves and make choices in the wide social and moral world of adulthood.”<sup>21</sup>

[41] Moreover, this approach is consistent with the principle that courts should first give a broad construction to rights, and then determine whether a particular limitation is reasonable and justifiable in accordance with the framework established by section 36 of the Constitution. This is preferable to construing rights narrowly and thereby depriving individuals of “the full measure of the fundamental rights and freedoms” conferred by our supreme law.<sup>22</sup>

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<sup>20</sup> [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) (*S v M*).

<sup>21</sup> *Id* at paras 18-9.

<sup>22</sup> Lord Wilberforce in *Minister of Home Affairs and Another v Fisher and Another* [1979] 3 All ER 21 (PC) at 25H, cited in *S v Zuma and Others* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC)

*Evidence submitted*

[42] Before evaluating the merits of the case presented by the applicants, I consider it appropriate to give an overview of the factual evidence they submitted in support of their challenge. It should be noted that the respondents did not seek to present independent evidence of their own. Rather, they contented themselves with proffering alternative interpretations of the applicants' evidence, and with basing their remaining contentions on legal and inferential arguments.<sup>23</sup>

[43] The applicants have placed reliance on a report (expert report) compiled by the late Professor Alan Flisher, a child psychiatrist at the University of Cape Town, and Ms Anik Gevers, a clinical psychologist specialising in child mental health at the same university.<sup>24</sup> The expert report was compiled to provide information about the sexual development of children and the potential impact of sections 15 and 16 of the Sexual Offences Act in this regard. Its focus is on the impact of those provisions on adolescents. The respondents have neither impugned the relevance and the reliability of the expert report, nor have they sought to challenge its findings. I summarise the relevant findings contained in the expert report below.

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(*S v Zuma*) at para 14. See also *S v Mhlungu and Others* [1995] ZACC 4; 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) at para 8.

<sup>23</sup> The respondents have sought to place reliance on a report by the South African Law Reform Commission. However, no such report was ever placed before us.

<sup>24</sup> The expert report was compiled on the basis of some 43 academic works on children's sexuality and development.

[44] South African children reach physiological sexual maturity during adolescence (between the ages of 12 and 16 years). They undergo various and significant changes in their transition to adulthood. Their experiences during this transformative period have long-lasting effects that shape their adult lives.

[45] During adolescence children ordinarily engage in some form of sexual activity, ranging from kissing to masturbation to intercourse. Exploration of at least some of these activities is “potentially healthy if conducted in ways for which the individual is emotionally and physically ready and willing.” What is of utmost importance is ensuring that children are appropriately supported by the adults in their lives, to enable them to make healthy choices. This is particularly so given the awkwardness and embarrassment children often feel when discussing sexual relations with adults. If children are not made to feel that there are safe environments within which they can discuss their sexual experiences, they will be stripped of the benefit of guidance at a sensitive and developmental stage of their lives. Such guidance is particularly important given the “high rates of negative experiences and consequences of sexual behaviour” unearthed by the expert report.

[46] The data reviewed by Flisher and Gevers “indicate that the majority of South African adolescents between the ages of 12 and 16 years are engaging in a variety of sexual behaviours as they begin to explore their sexuality.” Sexual experiences during

adolescence, in the context of some form of intimate relationship, are “[n]ot only . . . developmentally significant, they are also developmentally normative.”<sup>25</sup>

[47] Finally, Flisher and Gevers opine on the various social and psychological effects of the impugned provisions on children’s development. First, children charged under sections 15 or 16 will feel a “mixture of shame, embarrassment, anger, and regret” which will “have an adverse impact on the individual and his or her development”. These feelings may also lead to the development of a generally negative attitude to sexual relations. Second, these feelings are “likely to inhibit the individual from seeking help for issues about sex . . . in order to avoid the emotional distress and interpersonal or social problems, adolescents will avoid seeking help or being open about issues with their sexuality [such that] existing problems will grow and future problems are unlikely to be prevented.” Third, far from achieving the positive outcome of deterring the harmful effects associated with early sexual conduct, the impugned provisions are likely to “increase adolescents’ risk for negative experiences and outcomes. . . . Sections 15 and 16 of the Act contribute more to silencing and isolating adolescents, which makes unhealthy behaviour and poor developmental outcomes more likely.” Finally, children’s reticence in seeking assistance will have a corollary effect on the ability of adults to provide the necessary guidance and support. As Flisher and Gevers explain:

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<sup>25</sup> Flisher and Gevers explain the term “developmentally normative” as indicating that “given their developmental stage and their developmental tasks, it is not unusual or necessarily unhealthy and harmful for adolescents to engage in sexual behaviours as they begin to learn about their sexuality and become more mature in several life domains.”

“Caregivers . . . and institutions and organisations . . . are unable to help because they cannot promote behaviour that is illegal and they are legally obligated to report sexual offences involving children and young adolescents. . . . Therefore, they cannot legally offer the adequate and appropriate support and guidance to promote healthy sexual development, which leaves adolescents to navigate the complex issues with only the support of their equally immature peers. . . . When adolescents are left to sort through sexuality issues and choices among themselves, they tend to engage in more risky behaviours for a variety of reasons including poor decision-making skills and power imbalances in a relationship.”

[48] This is the uncontradicted expert evidence which must inform our evaluation of the challenges to sections 15 and 16 of the Sexual Offences Act.

*Are any rights limited by the impugned provisions?*

[49] For the reasons that follow I find that sections 15 and 16 of the Sexual Offences Act infringe adolescents’ rights in terms of sections 10, 14 and 28(2) of the Constitution. It is therefore unnecessary to consider the additional infringements alleged by the applicants and the second and third amici.

[50] At this stage it is worthwhile clarifying the nature of the challenge put forward by the applicants. The applicants have opted for a two-pronged approach. On the one hand, they contend that the impugned provisions cannot be saved insofar as they criminalise adolescents for engaging in consensual sexual conduct. This is the primary focus of their submissions. On the other hand, they contend that, while it is permissible to criminalise 16- and 17-year olds for engaging in consensual sexual conduct with adolescents, the former should have available to them a close-in-age

defence<sup>26</sup> in order to ameliorate some of the undesirable consequences of such criminalisation. I shall deal with the arguments regarding the close-in-age defence at a later point in this judgment.

[51] Parliament has clearly determined that a particular group of children – adolescents – are vulnerable and merit special protection from sexual predation, by both adults and other children. In these proceedings the applicants have not challenged the legislative decision to differentiate between different groups of children (adolescents on the one hand, and 16- and 17-year olds on the other). Furthermore, and as is apparent from the summary above, the expert evidence before us relates only to the effects of the impugned provisions on adolescents. We have not heard argument or been presented with further evidence as to why the conclusions contained in the expert report should extend to 16- and 17-year olds. Accordingly, the findings regarding the unjustifiable limitation of rights in paragraphs [52] to [100] below are limited to the constitutional rights of adolescents.

### *Human dignity*

[52] Section 10 of the Constitution provides that “[e]veryone has inherent dignity and the right to have their dignity respected and protected.” While dignity is a cornerstone of our Constitution, it is not easily defined, at least in legal terms.<sup>27</sup>

Suffice it to say that dignity recognises the inherent worth of all individuals (including

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<sup>26</sup> Both for statutory sexual assault, as is currently provided for in section 56(2)(b), and for statutory rape, for which the Sexual Offences Act does not provide a defence of that nature.

<sup>27</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) (*National Coalition*) at para 28.

children) as members of our society, as well as the value of the choices that they make. It comprises the deeply personal understanding we have of ourselves, our worth as individuals and our worth in our material and social context.<sup>28</sup> This Court has found that children's dignity rights are of special importance<sup>29</sup> and are not dependent on the rights of their parents.<sup>30</sup> Nor is the exercise by children of their dignity rights held in abeyance until they reach a certain age.

[53] The respondents submit that the statutory prohibitions are designed to protect and promote the quality of life of adolescents, a quality of life that in itself is consistent with the constitutional conception of human dignity. In addition, the respondents submit that any stigma attached to adolescent sexual conduct is the result of societal attitudes regarding the adolescent sexual acts, rather than a function of the impugned provisions.

[54] In countering those arguments, the applicants relied on *National Coalition*,<sup>31</sup> in which this Court declared that the criminalisation of sodomy was an unjustifiable limitation of, amongst others, the rights to dignity and privacy. I am persuaded that their reliance is appropriate.

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<sup>28</sup> See *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) (*Khumalo v Holomisa*) at para 27. See also Cameron "Dignity and Disgrace – Moral Citizenship and Constitutional Protection", lecture delivered at the University of Oxford's *Understanding Human Dignity* conference (26 – 29 June 2012) (as yet unpublished) at 10-2.

<sup>29</sup> *De Reuck* above n 1.

<sup>30</sup> *S v M* above n 20 at para 18.

<sup>31</sup> Above n 27.

[55] It cannot be doubted that the criminalisation of consensual sexual conduct is a form of stigmatisation which is degrading and invasive. In the circumstances of this case, the human dignity of the adolescents targeted by the impugned provisions is clearly infringed. If one's consensual sexual choices are not respected by society, but are criminalised, one's innate sense of self-worth will inevitably be diminished. Even when such criminal provisions are rarely enforced, their symbolic impact has a severe effect on the social lives and dignity of those targeted.<sup>32</sup> It must be borne in mind that sections 15 and 16 criminalise a wide range of consensual sexual conduct between children: the categories of prohibited activity are so broad that they include much of what constitutes activity undertaken in the course of adolescents' normal development.<sup>33</sup> There can also be no doubt that the existence of a statutory provision that punishes forms of sexual expression that are developmentally normal degrades and inflicts a state of disgrace on adolescents. To my mind, therefore, the stigma attached to adolescents by the impugned provisions is manifest. The limitation of section 10 of the Constitution is obvious and undeniable.

[56] I find untenable the respondents' contention that it is social mores, rather than the criminalisation imposed by the Sexual Offences Act, which stigmatise adolescents who are investigated and prosecuted under the impugned provisions. An individual's human dignity comprises not only how he or she values himself or herself, but also

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<sup>32</sup> Id at paras 23 and 28.

<sup>33</sup> The prohibitions cover conduct ranging from hugging and kissing to sexual intercourse. See the summary of the expert evidence in this regard at [45] – [46] above.

includes how others value him or her.<sup>34</sup> When that individual is publicly exposed to criminal investigation and prosecution, it is almost invariable that doubt will be thrown upon the good opinion his or her peers may have of him or her. In this regard, consideration of the “Jules High School case”<sup>35</sup> is instructive. Two boys had sexual intercourse with a girl. All three children were investigated and subsequently prosecuted under section 15 of the Sexual Offences Act. As the NDPP explained in the High Court, “[the two boys] were arrested outside school premises in the late morning during the week. Their peers were aware that they had been arrested. The media had dubbed them ‘gang rapists’. The boys and their family were deeply shamed and traumatised”. The NDPP decided to prosecute the girl because she had “willingly sneaked out of the school yard to engage in consensual sexual intercourse with two boys.” At the time the proceedings were initiated in the High Court the female learner had yet to return to school or write her end-of-year examinations. I fail to see how, having admitted that section 15 was implemented against the three learners in full view of the public, and having acknowledged the resultant exposure and trauma those learners suffered, the respondents can possibly claim that the impugned provisions do not lead to the shaming and stigmatisation of adolescents.

[57] The stigma of criminalisation is exacerbated by the provisions in section 41 of the Sexual Offences Act mandating that the name of any person who commits an offence in terms of sections 15 and 16 be placed on the Register. If a person’s

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<sup>34</sup> See *Khumalo v Holomisa* above n 28.

<sup>35</sup> The case is referred to thus because two of the three children involved were learners at Jules High School at the time that the incident occurred.

particulars are recorded in the Register in connection with a sexual offence against a child, a number of adverse consequences follow. The person may not be employed to work with a child; may not hold any position which places him or her in authority, supervision or care of a child; and may not become a foster parent or an adoptive parent.<sup>36</sup> The relevant provisions of section 41(1) are clearly and laudably aimed at protecting children from adult sexual predators. However, this goal will not be achieved by the inclusion in the Register of the details of adolescents who have engaged in consensual sexual penetration or sexual violation. Indeed, to prevent an adolescent from meaningfully interacting with children in the future purely because that adolescent engaged in what may be developmentally normal sexual conduct constitutes a significant limitation of his or her right to dignity.

[58] Accordingly, I find that sections 15 and 16 of the Sexual Offences Act limit adolescents' right to dignity and am constrained to dismiss the respondents' limited interpretation of section 10 of the Constitution.

### *Privacy*

[59] Section 14 of the Constitution provides that “[e]veryone has the right to privacy”. In *Bernstein and Others v Bester and Others NNO*<sup>37</sup> this Court identified the “inner sanctum” of personhood that is protected by the right to privacy. This inner sanctum includes his or her “family life, sexual preference and home environment,

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<sup>36</sup> Section 41(1) of the Sexual Offences Act.

<sup>37</sup> [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) (*Bernstein v Bester*) at para 67.

which is shielded from erosion by conflicting rights of the community.”<sup>38</sup> In *National Coalition* this Court held as follows:

“Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.”<sup>39</sup>

[60] The principled basis of this Court’s reasoning in *National Coalition* applies with equal force to the consensual sexual conduct of adolescents, because the criminal offences under sections 15 and 16 of the Sexual Offences Act apply to the most intimate sphere of personal relationships and therefore inevitably implicate the constitutional right to privacy. The offences allow police officers, prosecutors and judicial officers to scrutinise and assume control of the intimate relationships of adolescents, thereby intruding into a deeply personal realm of their lives. This intrusion is exacerbated by the reporting provisions: trusted third parties are obliged by section 54 of the Sexual Offences Act to disclose information which may have been shared with them in the strictest confidence, on pain of prosecution.

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<sup>38</sup> Id at paras 67 and 79. See also *Mistry v Interim Medical and Dental Council of South Africa and Others* [1998] ZACC 10; 1998 (4) SA 1127 (CC); 1998 (7) BCLR 880 (CC) at paras 23 and 27.

<sup>39</sup> Above n 27 at para 32.

[61] In *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)*<sup>40</sup> the minority judgment found that there are a range of factors relevant to distinguishing the core of privacy from its penumbra:

“One of the considerations is the nature of the relationship concerned: an invasion of the relationship between partners, or parent and child, or other intimate, meaningful and intensely personal relationships will be a strong indication of a violation close to the core of privacy.”<sup>41</sup>

Following this reasoning, the minority judgment concluded that the commercial nature of the conduct under consideration removed it from the inner sanctum of privacy.

[62] The majority judgment also found that the circumstances of that case were distinguishable from *National Coalition*:

“[E]ven if the right to privacy is implicated, it lies at the periphery and not at its inner core. What lies at the heart of the prostitutes’ complaint is that they are prohibited from selling their sexual services. After all, they are in this industry solely for money. The prohibition is directed solely at the sale of sexual activity. Otherwise the prostitutes are entitled to engage in sex, to use their bodies in any manner whatsoever and to engage in any trade as long as this does not involve the sale of sex and breaking a law validly made. What is limited is the commercial interests of the prostitute.”<sup>42</sup>

[63] In the present case there is nothing, such as the commercialisation of sexual relationships, which may be said to remove adolescents’ privacy interests from the

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<sup>40</sup> [2002] ZACC 22; 2002 (6) SA 642 (CC); 2002 (11) BCLR 1117 (CC) (*Jordan*).

<sup>41</sup> *Id* at para 80.

<sup>42</sup> *Id* at para 29.

inner sanctum of the right contained in section 14 of the Constitution. Sections 15 and 16 of the Sexual Offences Act prohibit consensual intimate relationships and, accordingly, intrude into the core of adolescents' privacy.

[64] Of course, as we have emphasised time and again, the rights in the Bill of Rights are not discrete silos, each protecting a set of interests that is neatly categorised and absolutely divided along sharp, bright lines. Rather, there are levels of interconnectedness that must be acknowledged in any constitutional analysis.<sup>43</sup> This is certainly the case in relation to human dignity and privacy. Privacy fosters human dignity insofar as it is premised on, and protects, an individual's entitlement to "a sphere of private intimacy and autonomy".<sup>44</sup> I am therefore of the view that, to the extent that they encroach on the right to privacy, sections 15 and 16 constitute a related limitation of adolescents' dignity rights.

*The best interests of children*

[65] Section 28(2) of the Constitution provides that "[a] child's best interests are of paramount importance in every matter concerning the child." It is trite that section 28(2) is both a self-standing right and a guiding principle in all matters affecting children.<sup>45</sup> What is in the best interests of a child is a balancing exercise and in each case various factors need to be considered.

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<sup>43</sup> See *Khumalo v Holomisa* above n 28 and *South African National Defence Union v Minister of Defence and Another* [1999] ZACC 7; 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC) (*SANDU*) at para 8.

<sup>44</sup> *National Coalition* above n 27 at para 32. See also *Khumalo v Holomisa* above n 28.

<sup>45</sup> *Minister of Welfare and Population Development v Fitzpatrick and Others* [2000] ZACC 6; 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC) at paras 17-8.

[66] The respondents suggest that a violation of section 28(2) of the Constitution cannot be determined without an investigation into the circumstances of a particular child in a particular case.<sup>46</sup> It follows, so they reason, that there is no basis to mount an attack in generalised terms on sections 15 and 16 by relying on the best-interests principle.

[67] During oral argument counsel for the respondent did not pursue this line of attack with any vigour, and rightly so, for it is at odds with the general principle that section 28(2) exists to protect the interests of children, with common sense and with the jurisprudence of this Court.

[68] In *Centre for Child Law v Minister of Justice and Constitutional Development and Others*<sup>47</sup> the applicants did not allege that the rights of any specific child were threatened, but contended that all 16- and 17-year old children were threatened by the minimum-sentencing legislation. The Court ultimately declared the legislative provisions under challenge invalid on the basis of their inconsistency with section 28. In *C and Others v Department of Health and Social Development, Gauteng, and Others*,<sup>48</sup> this Court declared provisions of the Children's Act to be inconsistent with

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<sup>46</sup> In this regard they seek to place reliance on *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others* [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (7) BCLR 637 (CC) at para 123.

<sup>47</sup> [2009] ZACC 18; 2009 (6) SA 632 (CC); 2009 (11) BCLR 1105 (CC).

<sup>48</sup> [2012] ZACC 1; 2012 (2) SA 208 (CC); 2012 (4) BCLR 329 (CC) (C).

section 28(2) of the Constitution and did so by examining the interests of children in general. The majority of this Court found as follows:

“It is in the *interests of children* that an incorrect decision by a court made without hearing the child or the parents, or by a designated social worker or police official, be susceptible to automatic review by a court, in the ordinary course, in the presence of the child and the parents. It follows from this that sections 151 and 152 do not provide for this and are therefore constitutionally wanting.”<sup>49</sup> (Emphasis added.)

[69] Section 28(2) thus fulfils at least two separate roles. The first is as a guiding principle in each case that deals with a particular child. The second is as a standard against which to test provisions or conduct which affect children in general.<sup>50</sup>

[70] It is true that in *C* and in *Centre for Child Law* the reason the provisions were deemed to be against the best interests of children in general was that they were inflexible and therefore did not allow the particular circumstances of each child to be taken into consideration when a decision affecting that child was made. But I do not read these cases to mean that the best-interests principle could only be employed in scenarios where legislation is inflexible.

[71] The best-interests principle also applies in circumstances where a statutory provision is shown to be against the best interests of children in general, for whatever reason. As a matter of logic what is bad for all children will be bad for one child in a particular case. Thus, if there is evidence that exposing children to the criminal justice

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<sup>49</sup> Id at para 77.

<sup>50</sup> In relation to the first role see, for example, *S v M* above n 20 at paras 24-6.

system for engaging in consensual sexual behaviour has a negative impact on them generally, then it seems to me that a court may declare the scheme to be contrary to the best interests of the child in terms of section 28(2), and therefore invalid. I now turn to consider the best-interests principle with regard to this particular matter.

[72] First, I am persuaded that the evidence tendered by the applicants demonstrates that the existence and enforcement of the offences created by sections 15 and 16 of the Sexual Offences Act exacerbate harm and risk to adolescents by undermining support structures, preventing adolescents from seeking help and potentially driving adolescent sexual behaviour underground.

[73] Second, as discussed above,<sup>51</sup> the expert report indicates that the reporting provisions are likely to create an atmosphere in which adolescents will not freely communicate about sexual relations with parents and counsellors. In *S v M* this Court held that—

“section 28 requires the law to make best efforts to avoid, where possible, any breakdown of family life or parental care that may threaten to put children at increased risk. Similarly, in situations where rupture of the family becomes inevitable, the State is obliged to minimise the consequent negative effect on children as far as it can.”<sup>52</sup>

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<sup>51</sup> See the discussion in [47] above.

<sup>52</sup> Above n 20 at para 20.

The effect of the reporting provisions, however, is the opposite. They create a rupture in family life and invite a breakdown of parental care by severing the lines of communication between parent or guardian and child.

[74] Third, the imposition of criminal liability under the impugned provisions may, at worst, lead to imprisonment, and, at best, lead to diversion procedures. It is salutary to have regard, once again, to this Court's exposition on the import of section 28(2) in *S v M*:

“[F]oundational 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*.”<sup>53</sup> (Emphasis added.)

With that injunction in mind, I find myself constrained to agree with the applicants that even the prospect of diversion cannot save the impugned provisions. If the adolescent charged under section 15 or section 16 is ultimately diverted from the formal criminal justice system, he or she may still be arrested and forced to interact with arresting and investigating police officials.<sup>54</sup> If the adolescent is to avoid a formal criminal trial, he or she must acknowledge “responsibility for the offence” to a magistrate.<sup>55</sup> The acknowledgement is made during inquiry or trial proceedings at which various people may be in attendance, including the adolescent's guardian,<sup>56</sup> the

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<sup>53</sup> Id at para 19.

<sup>54</sup> In terms of section 52(1) of the Child Justice Act, diversion may occur during a pre-trial preliminary inquiry or during a criminal trial. In both cases the child involved will already have had his or her presence before the presiding officer secured, which may have occurred by way of arrest.

<sup>55</sup> Sections 41(1)(a) and 52(1)(a) of the Child Justice Act.

<sup>56</sup> Id section 44(1)(b).

relevant probation officer<sup>57</sup> and the prosecutor.<sup>58</sup> The adolescent will not only experience these interactions with various institutions of state, but in the course thereof will be forced to disclose and have scrutinised details of his or her intimate affairs. And all because he or she engaged in developmentally normative conduct.

[75] Fourth, I find unsustainable the respondents' reliance on the argument that the statutory prohibitions do not mean that *all* instances of "consensual sexual penetration" and "consensual sexual violation" between children will be prosecuted. The respondents contend that because the NDPP or the relevant Director of Public Prosecutions, as the case may be, has a discretion whether or not to prosecute a particular case, charges will only be preferred against adolescents in *some* instances.

[76] In principle, and as this Court has made plain, the existence of prosecutorial discretion cannot save otherwise unconstitutional provisions.<sup>59</sup> If the discretion to prosecute exists, the prospect of an adolescent being arraigned under the impugned provisions is ever-present.<sup>60</sup> For the reasons set out above, any such prosecution will invariably infringe the best-interests principle, as well as the affected adolescent's rights to privacy and human dignity. In other words, the mere existence of a prosecutorial discretion creates the spectre of prosecution, which undermines

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<sup>57</sup> Id section 44(1)(c).

<sup>58</sup> Id section 44(1).

<sup>59</sup> See, for example, *S v Mbatha*; *S v Prinsloo* [1996] ZACC 1; 1996 (2) SA 464 (CC); 1996 (3) BCLR 293 (CC) at para 23.

<sup>60</sup> See *S v Zuma* above n 22 at para 28.

adolescents' rights.<sup>61</sup> Furthermore, the discretion cited by the respondents only occurs at the stage of deciding whether to prosecute, by which time the adolescent involved may already have been investigated, arrested and questioned by the police. In any event, while the arguments in relation to prosecutorial discretion may be relevant when considering the extent of the limitation of section 28(2) of the Constitution, they are irrelevant when considering whether the right has been limited at all.

[77] Lastly, the harm created by the impugned provisions is amplified by the irrationality of the mandatory prosecution of both adolescents.<sup>62</sup> The respondents argue that it is not irrational to prosecute both parties, but consistent with the principle of equal treatment before the law whenever an offence has been committed. I disagree.

[78] The younger child is thought to require protection from the older child. We know from the record that the Legislature's rationale for the close-in-age exemption in section 56(2)(b) being restricted to two years was that the greater the age gap between the participants in sexual conduct, the more likely it is that the older child may have unduly influenced the younger child. However, prosecuting the younger child in these circumstances along with the older child is irrational. It simply does not make sense to reason that the younger the child or the greater the age gap between the children

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<sup>61</sup> See the discussion based on *National Coalition* above n 27 in [54] and [55] above.

<sup>62</sup> As set out in [21] and [23] above, if charges are pursued in terms of sections 15 or 16 in circumstances where both or all parties are adolescents, both or all adolescents must be prosecuted.

involved, the stronger the requirement to prosecute the younger child, particularly when the purpose behind the statutory provision is the protection of the younger child.

[79] For these stated reasons I find that sections 15 and 16 of the Sexual Offences Act are contrary to the best-interests principle and have the effect of harming the adolescents they are intended to protect. Indeed, it strikes me as fundamentally irrational to state that adolescents do not have the capacity to make choices about their sexual activity, yet in the same breath to contend that they have the capacity to be held criminally liable for such choices. Importantly, the right in terms of section 28(2), like the rights to human dignity and privacy, is not inviolable and is subject to justifiable limitation to the extent that section 36 of the Constitution permits. It is that justification inquiry to which I now turn.

#### *Limitation analysis*

##### *The importance of the purpose of the limitation*

[80] When making submissions on the underlying purpose of the prohibitions, counsel for the respondents equivocated between stating that the provisions were intended to target the risks associated with particular sexual conduct, and stating that they were intended to prohibit any act which may give children sexual gratification, regardless of the negative consequences that may flow from it. In my view the second purported objective could not have been intended by the Legislature. Such a purpose could find no place in an open and democratic society founded on human dignity, equality and freedom.

[81] I accept that the purposes of discouraging adolescents from prematurely engaging in consensual sexual conduct which may harm their development, and from engaging in sexual conduct in a manner that increases the likelihood of the risks associated with sexual conduct materialising, are legitimate and important.

*Nature and extent of the limitation*

[82] I have already found that the impugned provisions constitute a deep encroachment on the rights to human dignity and privacy, as well as the best-interests principle.

[83] The respondents rely extensively on the prosecutorial discretion and diversion measures in other relevant legislation to justify the limitation of the aforementioned rights. However, as already explained, these temper only some of the harm.<sup>63</sup> Adolescents would still be exposed to earlier processes in the criminal justice system such as being arrested and questioned by police and other authorities about their intimate sexual behaviour. A prosecutor choosing to act with circumspection does not do enough to alleviate the invasion of children's rights occasioned by those earlier processes.

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<sup>63</sup> See the discussion in [74] – [76] above.

*The relation between the limitation and the statutory purpose*

[84] As a starting point, it is important to note that where a justification analysis rests on factual or policy considerations, the party seeking to justify the impugned law – usually the organ of state responsible for its administration – must put material regarding such considerations before the court.<sup>64</sup> Furthermore, “[w]here the state fails to produce data and there are cogent objective factors pointing in the opposite direction the state will have failed to establish that the limitation is reasonable and justifiable.”<sup>65</sup>

[85] The respondents submit that there is a clear relationship between the prohibitions and the purpose sought to be achieved by the Act – the purpose of protecting adolescents from risks associated with sexual acts. According to the respondents, the connection is twofold. First, adolescents will not easily and knowingly engage in the proscribed acts in view of the prohibitions. Second, parents and guardians will be empowered by the provisions to drive home the risks of early sexual intimacy to their children.

[86] In relation to the respondents’ first proposition, there is evidence before this Court demonstrating that some sexual behaviour carries risks and that it may be undesirable for adolescents to engage in some kinds of sexual conduct on the basis that it may harm them psychologically. When questioned by the Bench during oral

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<sup>64</sup> *Moise v Greater Germiston Transitional Local Council* [2001] ZACC 21; 2001 (4) SA 491 (CC); 2001 (8) BCLR 765 (CC) at para 19.

<sup>65</sup> *S v Steyn* [2000] ZACC 24; 2001 (1) SA 1146 (CC); 2001 (1) BCLR 52 (CC) at paras 31-7.

argument, counsel reiterated that sexual penetration, even when consensual, leads to such “devastating effects” as unwanted pregnancies and the contraction of sexually transmitted diseases. It is these “material risks” which the Legislature has sought to discourage by promulgating sections 15 and 16 of the Sexual Offences Act, and it is therefore the case, so the respondents contend, that both non-consensual and consensual sexual conduct must be prohibited by criminal sanction.

[87] However, this is insufficient to justify sections 15 and 16 of the Sexual Offences Act as constitutionally valid. What the respondents need to demonstrate is that the existence and enforcement of the impugned provisions can reasonably be expected to control the aforementioned risks. The Minister, however, has not tendered any evidence, expert or otherwise, to corroborate these claims. Thus, we have before us no evidence at all to demonstrate that adolescents may be deterred by sections 15 and 16 from engaging in sexual conduct and thus avoid the risks associated with engaging in sexual activity at a young age. Rather, the evidence we do have before us is to the contrary. It shows that the impugned provisions increase the likelihood of adolescents participating in unsafe sexual behaviour and therefore actually increase the materialisation of the associated risks.<sup>66</sup>

[88] In the ordinary case it may well be that the state may, without more, rely on the nominal deterrent effect that the criminalisation of particular conduct may have. But where there is expert evidence indicating that the statute under challenge will not have

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<sup>66</sup> See [47] above.

the desired deterrent effect, more is required from the state if the relevant criminal prohibitions are to survive.<sup>67</sup>

[89] The expert report clearly demonstrates that the impugned provisions cultivate a society in which adolescents are precluded from having open and frank discussions about sexual conduct with their parents and caregivers.<sup>68</sup> Rather than deterring early sexual intimacy, the provisions merely drive it underground, far from the guidance that might otherwise be provided by parents, guardians and other members of society.

As Flisher and Gevers opine:

“Sections 15 and 16 of the [Sexual Offences] Act contribute to social taboos and silences around adolescent sexuality particularly by discouraging adolescents to seek help and disabling adults from providing appropriate and helpful guidance and support that will promote adolescents’ growth and development.”

[90] Significantly, the respondents did not dispute the veracity of the evidence given by Flisher and Gevers. Quite the reverse. They attempted to rely on it and to argue that the evidence was open to a different interpretation. However, this is not so. The report compiled by Flisher and Gevers comes to the unequivocal conclusion that “[i]n essence, sections 15 and 16 of the Act currently increase adolescents’ risk of being involved in unhealthy, risky sexual behaviour.”

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<sup>67</sup> On the importance of submitting sufficient evidence to defend a challenge to the constitutionality of a statutory provision see, for example, *Centre for Child Law* above n 47 at paras 54-60.

<sup>68</sup> See the discussion of the expert evidence in [47] above.

[91] In relation to the respondents' second proposition, that the impugned provisions empower parents and caregivers to emphasise the risks of early sexual intimacy, I note that there is also no evidence to suggest that this is the case. On the contrary, the evidence of Flisher and Gevers indicates that caregivers and institutions are disempowered in dealing with adolescents because they cannot promote behaviour that the provisions have deemed illegal and further because, in the course of attempting to provide guidance and assistance, they may well be told intimate information which they will be obliged to report to the authorities.<sup>69</sup>

[92] Thus, the impugned provisions have the opposite of their intended effect. In addition, sections 15 and 16 of the Sexual Offences Act also give rise to unintended and irrational consequences that are patently at odds with the purposes of the provisions. An example will suffice.

[93] As the second and third amici submitted, some instances of rape stem from scenarios in which there was consent for the initial, consensual sexual conduct. For instance, if a child of 12 consented to kissing another child of 15, but was subsequently raped by the 15-year old, then, if the 12-year old reported the instance of rape to the police, he or she could be prosecuted for the initial consensual kiss (in terms of section 16 of the Act). In these instances, victims may be discouraged from reporting crimes such as the rape for fear of being investigated and prosecuted for

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<sup>69</sup> Id.

consensual sexual violations they have committed, which is at odds with the statutory purpose of protecting children.<sup>70</sup>

[94] Because of the lack of a rational link between the impugned provisions and their stated purpose, sections 15 and 16 of the Sexual Offences Act do not pass constitutional muster. The provisions are all the more indefensible when one considers the availability of less restrictive means, to which I now turn.

*Less restrictive means*

[95] A limitation will not be proportional if other, less restrictive means could have been used to achieve the same ends. And if it is disproportionate, it is unlikely that the limitation will meet the standard set by the Constitution, for section 36 “does not permit a sledgehammer to be used to crack a nut.”<sup>71</sup> A provision which limits fundamental rights must, if it is to withstand constitutional scrutiny, be appropriately tailored and narrowly focused.<sup>72</sup> However, this Court has held that the state ought to be given a margin of appreciation in relation to whether there are less restrictive means available to achieve the stated purpose.<sup>73</sup>

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<sup>70</sup> For another instance of the irrational consequences that flow from the impugned provisions, see the discussion in [77] and [78] above.

<sup>71</sup> *S v Manamela and Another (Director-General of Justice Intervening)* [2000] ZACC 5; 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at para 34.

<sup>72</sup> *Islamic Unity Convention v Independent Broadcasting Authority and Others* [2002] ZACC 3; 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) at para 49. See also *SANDU* above n 43 at para 18.

<sup>73</sup> See *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 104.

[96] During oral argument counsel for the respondents made several submissions to the effect that the persistence of sexual conduct amongst adolescents indicates that less restrictive means, such as education programmes and guidance from parents, have failed to curb adolescents' sexual behaviour. We were not directed to a single fact in the record to support these submissions. I pause to emphasise two points. First, where one party has put forward cogent expert documentary evidence indicating that the impugned provisions do not pass constitutional muster, the party seeking to uphold the validity of those provisions must advance evidence of a similar nature if he or she is to have any hope of success. Mere statements from the bar will not suffice.<sup>74</sup> Second, in matters concerning children, it is particularly important that courts be furnished with information of the best quality that can reasonably be obtained.<sup>75</sup>

[97] In my view, there are clearly less restrictive means available for achieving the stated purposes of the impugned provisions. First, assuming criminalisation could be shown to be an appropriate response to deter consensual sexual acts which carry the risks of psychological harm, pregnancy or the contraction of sexually transmitted diseases, a narrowly focussed provision would target only those acts where these are potential risks. I have already noted that sexual penetration as defined goes well beyond sexual intercourse. Similarly, most of the acts falling within the ambit of sexual violation are not carriers of the recited risks. Thus, in relation to the purposes of preventing adolescents from suffering psychological harm, contracting sexually transmitted diseases and becoming pregnant, the impugned provisions are clearly and

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<sup>74</sup> *S v Steyn* above n 65 at para 37.

<sup>75</sup> *S v M* above n 20 at para 9.

impermissibly over-inclusive. In any event, I am highly doubtful that the introduction of criminal prohibitions could ever be shown to be a constitutionally sound means of preventing the occurrence of such risks as teenage pregnancy. Certainly the respondents have put forward neither argument nor evidence to convince me otherwise.

[98] Moreover, on the basis of the expert report, I am persuaded that there are various methods the state could use that do not involve criminalisation of consensual sexual conduct between adolescents in order to encourage them to lead healthy and responsible sexual lives.<sup>76</sup> For instance, Flisher and Gevers find that—

“adolescents who discuss sex and sexual health with their parents openly are less likely to engage in sexual risk behaviour. Parent-child sexual communication that is open and includes specific information and discussion about risk and risk reduction strategies has been shown to have a positive influence on adolescent sexual behaviour.” (Endnotes omitted.)

[99] Thus, according to the experts, efforts are needed “to make adolescents feel more comfortable in confronting sexuality issues in safe environments with guidance from more mature individuals.” Furthermore—

“[c]omprehensive sex education has been found to be more effective than abstinence-only or no sex education in reducing [risky sexual behaviour by young people,] including delays in sexual debut, reductions in [the] number of sexual partners, and reductions in pregnancy and diagnosed STIs among youth. Abstinence-only

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<sup>76</sup> The applicants submit that these are the kinds of measures that the Ministers of Health and Basic Education were attempting to implement in schools until they were made aware that the existence of the impugned provisions would make it impossible to do so.

education programmes have been found to have no significant impact on adolescents' values or attitudes toward sexual activity." (Endnotes omitted.)

[100] This judgment should not be seen as prescribing to Parliament which of a range of policy choices it ought to make in order to achieve its stated purpose of protecting adolescents from the risks attendant on early sexual conduct. However, in terms of section 36(1)(e), we have an obligation to consider the alternative means by which the Legislature could have achieved its stated purpose and it is pursuant to that analysis, amongst others, that I conclude that the impugned provisions do not pass constitutional muster.

[101] Accordingly, the limitations cannot be justified in terms of section 36 of the Constitution and sections 15 and 16 are unconstitutional insofar as they impose criminal liability on adolescents for engaging in consensual sexual conduct. It follows that the High Court's declarations of constitutional invalidity should be confirmed. What remains to be determined is the remedy to be granted to address this invalidity.

### *Remedy*

[102] In terms of section 172(1)(a) of the Constitution we are obliged to declare the impugned provisions invalid to the extent of their inconsistency with the Constitution. For the reasons set out above,<sup>77</sup> sections 15 and 16 of the Sexual Offences Act are inconsistent with the Constitution to the extent that they criminalise the consensual sexual conduct of adolescents and must accordingly be declared invalid.

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<sup>77</sup> See the discussion at [52] – [100] above.

[103] However, we must also determine whether it would be just and equitable to grant further relief and, if so, what form that relief should take.<sup>78</sup> In *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa intervening)*,<sup>79</sup> this Court set out the manner in which appropriate relief should be determined when dealing with possibly unconstitutional legislation:

“[L]egislation must be construed consistently with the Constitution and thus, where possible, interpreted so as to exclude a construction that would be inconsistent with judicial independence. If held to be unconstitutional, the appropriate remedy ought, if possible, to be in the form of a notional or actual severance, or reading in, so as to bring the law within acceptable constitutional standards. Only if this is not possible, must a declaration of complete invalidity of the section or subsection be made.”<sup>80</sup>  
(Footnotes omitted.)

[104] In the circumstances of this case an interpretation of sections 15 and 16 so as to ensure consistency with the Constitution is not possible. There is no reading of those sections that would meet the requirements of section 36 of the Constitution without doing violence to the clear meaning of the impugned provisions. Indeed, none of the

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<sup>78</sup> Section 172(1) of the Constitution reads:

- “(1) When deciding a constitutional matter within its power, a court—
- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
  - (b) may make any order that is just and equitable, including—
    - (i) an order limiting the retrospective effect of the declaration of invalidity; and
    - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”

<sup>79</sup> [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC).

<sup>80</sup> *Id* at para 88.

parties has sought to remedy the problems with the Act by proposing an innovative interpretation thereof.

[105] The applicants contend for a combination of severance and reading-in. They argue that section 15(2)(a) and (b) and section 16(2)(a) and (b) should be severed from the statute. I assume that this severance is argued for on the basis that it would remove the irrational obligation on the prosecuting authorities to choose between instituting proceedings against both (or all) children involved, or none at all. They further argue that words should be read in to the Sexual Offences Act such that (a) a child may not be charged with the commission of statutory rape or statutory sexual assault and (b) a close-in-age defence will apply with regard to a charge of statutory rape (at present it only applies with regard to a charge of statutory sexual assault). This relief was granted by the High Court.

[106] An order of severance should only be granted if (a) it is possible to sever the valid provisions from the invalid provisions (that is, to separate the good from the bad and remove the latter) and (b) if, after severance, the statutory provision still achieves the relevant object.<sup>81</sup> Furthermore, granting an application for severance, as with the award of any other form of relief, “should not infringe upon the doctrine of separation of powers, or usurp the power of the legislature to legislate.”<sup>82</sup> Similar considerations

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<sup>81</sup> *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer Port Elizabeth Prison and Others* [1995] ZACC 7; 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC) at para 16.

<sup>82</sup> *Premier, Limpopo Province v Speaker of the Limpopo Provincial Legislature and Others* [2012] ZACC 3; 2012 (4) SA 58 (CC); 2012 (6) BCLR 583 (CC) at para 27.

regarding severance apply in relation to reading in.<sup>83</sup> The reading-in must remedy the defect, must interfere as little as possible with the legislation and must still give effect to the purpose of the legislation.<sup>84</sup>

[107] For the reasons that follow I am of the opinion that the severance and reading-in proposed by the applicants and accepted by the High Court are inappropriate in the circumstances of this case. First, it cannot be denied that, notwithstanding their flaws, the impugned provisions serve an important function insofar as they impose criminal liability on an adult for engaging in sexual conduct with a consenting adolescent. No other provisions in the Sexual Offences Act serve this essential function. Any relief granted must preserve the criminalisation of such conduct by an adult.

[108] Second, sections 15 and 16 clearly form part of a more general scheme regarding sexual offences, and are interlinked with various other provisions in the Sexual Offences Act. Severing portions from, and reading words into, those sections might therefore have unintended consequences in relation to the operation of the Act as a whole, such that holistic legislative revision by Parliament would be more appropriate to address the concerns set out in this judgment. Indeed, courts should guard against patchwork judicial intervention in legislation.<sup>85</sup>

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<sup>83</sup> *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at paras 67-8.

<sup>84</sup> Bishop “Remedies” in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed RS 1 at 9-105.

<sup>85</sup> See, for example, *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others as Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* [2005] ZACC 20; 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC) at paras 58 and 116. See also *Ngewu and Another v Post Office Retirement Fund and Others* [2013] ZACC 4; 2013 (4) BCLR 421 (CC) at para 18, where this Court emphasised the importance of Parliament taking steps to consider how the

[109] Third, the regulation and legislation of sexual conduct in the public interest fall squarely within the Legislature's domain, subject, as always, to the prescripts of the Constitution. The force of those prescripts was shown in *National Coalition*,<sup>86</sup> as were their limits in *Jordan*.<sup>87</sup> While the current statutory regime is patently unconstitutional, it is quite conceivable that Parliament may wish to reconsider the close-in-age defence in the light of the finding set out above, or that it may wish to regulate "sexual penetration" between an adolescent and a minor aged 16 or 17 in a manner different to that proposed by the applicants. There is a significant difference between declaring the current Act to be unconstitutional, and instructing Parliament which of a range of constitutional policy choices it should make in addressing that unconstitutionality. The subject matter of the impugned provisions, in addition to being policy-laden, is sensitive and has attracted a high degree of public scrutiny. In our participatory democracy Parliament is institutionally best-suited to ensure that the ultimate statutory regime is decided upon in an open, inclusive and transparent manner, with all relevant parties who so desire being given the opportunity to shape the debate and the eventual outcome.<sup>88</sup>

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consequences of a declaration of invalidity would "affect the structure and application of the relevant legislation."

<sup>86</sup> Above n 27.

<sup>87</sup> Above n 40.

<sup>88</sup> See *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 (CC); 2000 (8) BCLR 837 (CC) at para 64, where O'Regan J held as follows for a unanimous Court:

"Where, as in the present case, a range of possibilities exists, and the Court is able to afford appropriate interim relief to affected persons, it will ordinarily be appropriate to leave the legislature to determine in the first instance how the unconstitutionality should be cured. This Court should be slow to make those choices which are primarily choices suitable for the legislature."

[110] I am therefore of the opinion that, while sections 15 and 16 should be declared invalid, justice and equity warrant that their invalidity should be suspended for a period of 18 months in order to allow Parliament to remedy the defects in the statute.

[111] The applicants strongly opposed any suspension of the declaration of invalidity, on the basis that it would allow investigations and prosecutions pursuant to sections 15 and 16 to continue until Parliament has enacted the necessary amending legislation. While I do not agree with the applicants' proposed solution of severance and reading-in (for the reasons set out above), their concerns have merit. It is for that reason that I order a moratorium on all investigations into, arrests of, and criminal and ancillary proceedings against adolescents in relation to sections 15 and 16 of the Sexual Offences Act, pending Parliament's remedying of the defects in the statute. This moratorium will put in abeyance any related reporting obligations which may otherwise have arisen from the operation of section 54 of the Act.

[112] I consider it necessary to order the Minister, as the responsible authority in terms of section 87(3) of the Child Justice Act,<sup>89</sup> to take the appropriate steps to

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<sup>89</sup> Section 87 reads in relevant part as follows:

- “(1) (a) Where a court has convicted a child of an offence referred to in Schedule 1 or 2, the conviction and sentence in question fall away as a previous conviction and the criminal record of that child must, subject to subsections (2), (3) and (5), on the written application of the child, his or her parent, appropriate adult or guardian (hereafter referred to as the applicant), in the prescribed form, be expunged after a period of—
- (i) five years has elapsed after the date of conviction in the case of an offence referred to in Schedule 1; or
  - (ii) 10 years has elapsed after the date of conviction in the case of an offence referred to in Schedule 2,

ensure that the conviction and sentence of any adolescent pursuant to sections 15 or 16 of the Sexual Offences Act be expunged. I also consider it necessary to order the Minister, as the member of the Executive with ultimate responsibility for the administration of the Sexual Offences Act, to take whatever steps are required to have the particulars of any adolescent convicted under the impugned provisions removed from the Register. Expungement and removal from the Register will, to some extent, ensure that adolescents who were convicted and sentenced under the Sexual Offences Act do not continue to suffer the unconstitutional consequences of sections 15 and 16 in the future.

[113] Before concluding, I pause to clarify the scope of the findings in this judgment. The applicants' challenge was only against the criminalisation of consensual sexual conduct between children. This judgment therefore does not implicate the

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unless during that period the child is convicted of a similar or more serious offence.

- (b) In the case of a dispute or uncertainty as to whether another offence of which a child is convicted during the period is similar to or more serious than the offence in respect of which a record exists, the opinion of the Cabinet member responsible for the administration of justice prevails.
- (2) The Director-General: Justice and Constitutional Development must, on receipt of the written application of an applicant referred to in subsection (1), issue a prescribed certificate of expungement, directing that the conviction and sentence of the child be expunged, if the Director-General is satisfied that the child complies with the criteria set out in subsection (1).
- (3) Notwithstanding the provisions of subsection (1), the Cabinet member responsible for the administration of justice may, on receipt of an applicant's written application in the prescribed form, issue a prescribed certificate of expungement, directing that the conviction and sentence of the child be expunged, if he or she is satisfied that exceptional circumstances exist which justify expungement, where, in the case of the child—
  - (a) the period of five years, referred to in subsection (1)(a)(i); or
  - (b) the period of 10 years, referred to in subsection (1)(a)(ii),
 has not yet elapsed, if the Cabinet member responsible for the administration of justice is satisfied that the child otherwise complies with the criteria set out in subsection (1).”

criminalisation of non-consensual sexual conduct (including cases of undue influence or other instances where consent has not properly been given) or the criminalisation of sexual conduct between adults and children.

[114] Furthermore, the findings of invalidity have been limited to the extent to which sections 15 and 16 of the Sexual Offences Act criminalise the conduct of adolescents – children between the ages of 12 and 16 years. This is due to the reasons set out in paragraph [51] above. The applicants also sought to impugn the constitutionality of section 15 insofar as it imposes criminal liability on 16- and 17-year olds. However, the challenge was more limited than the challenge regarding adolescents in that the applicants accept as a point of departure that 16- and 17-year olds may be criminalised for engaging in consensual sexual conduct with adolescents. The applicants would, nevertheless, have us read in a close-in-age defence for such children similar to the defence contained in section 56(2)(b). This must fail, for two reasons.

[115] First, as I have already explained, the expert evidence does not relate to children other than adolescents, and the applicants have not sought to challenge Parliament's decision to differentiate between categories of children and to grant only one such category – adolescents – protection. We therefore have little basis for concluding that the impugned provisions have the same constitutional implications for 16- and 17-year olds as they do for adolescents, or that the differentiation between the two groups of children is somehow impermissible. Second, for the reasons set out

above,<sup>90</sup> I do not consider it appropriate for this Court to address the problems raised by the applicants by reading provisions into the Sexual Offences Act.

### *Costs*

[116] The applicants have been substantially successful in defending the constitutional rights infringed by the Sexual Offences Act. There is therefore no reason why costs should not follow the cause, such costs to include the costs of two counsel.

### *Order*

[117] The following order is made:

The order of the North Gauteng High Court, Pretoria is set aside and replaced by the following:

1. Sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Act) are declared inconsistent with the Constitution and invalid to the extent that they impose criminal liability on children under the age of 16 years.
2. The declaration of invalidity is suspended for a period of 18 months from the date of this judgment in order to allow Parliament to correct the defects in the light of this judgment.
3. From the date of this judgment, a moratorium is placed on all investigations into, arrests of, prosecutions of, and criminal and ancillary

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<sup>90</sup> [107] – [109].

proceedings against children under the age of 16 years in relation to sections 15 and 16 of the Act, pending Parliament's correction of the defects in the Act.

4. The Minister of Justice and Constitutional Development is required to take all steps necessary to ensure that, when a court has convicted a child under the age of 16 years of an offence referred to in sections 15 or 16 of the Act or issued a diversion order following a charge under those provisions, the details of the child will not appear in the National Register for Sex Offenders and a certificate of expungement is issued directing that the conviction and sentence or diversion order of such child be expunged.
5. The respondents are ordered to pay the applicants' costs, including the costs of two counsel, in the High Court and in this Court.

For the Applicants:

Advocate S Budlender, Advocate A Skelton and Advocate N Ferreira instructed by the Centre For Child Law.

For the First and Second Respondents:

Advocate V Maleka SC and Advocate F Karachi instructed by the State Attorney.

For the First Amicus Curiae:

Advocate DJ Cook instructed by Norman, Wink and Stephens Attorneys.

For the Second and Third Amici Curiae:

Advocate M O'Sullivan and Advocate C De Villiers instructed by the Women's Legal Centre Trust.