IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 73300/10

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	
THE TRUSTEES FOR THE TIME BEING OF THE WOMEN'S LEGAL CENTRE TRUST	First Amicus Curiae
TSHWARANANG LEGAL ADVOCACY CENTRE	Second Amicus Curiae
JUSTICE ALLIANCE OF SOUTH AFRICA	Third Amicus Curiae

(a) REPORTABLE: ~~YES~~/NO.
(b) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(c) REVISED. OK
14/1/2013
DATE

JUDGMENT

Coram: RABIE J

1. This application seeks to challenge the constitutional validity of certain sections of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of

2007 ("the Act"). More particularly it concerns the constitutional validity of aspects of the following sections:

1.1. section 15 of the Act – titled "Acts of consensual sexual penetration with certain children (statutory rape)";

1.2. section 16 of the Act – titled "Acts of consensual sexual violation with certain children (statutory sexual assault)"; and

1.3. section 56(2) of the Act – dealing with defences in respect of sections 15 and 16 of the Act.

2. These provisions criminalise a wide range of consensual sexual activities between children of a certain age. Only to the extent that these sections are not found to be unconstitutional, do the applicants also challenge the constitutional validity of:

2.1. section 54(1)(a) of the Act – which requires a person who has knowledge that the impugned offences have been committed by a child under 18 years of age to report such knowledge to a police official; and

2.2. sections 50(1)(a)(i) and 50(2)(a)(i) of the Act – which require children convicted of the impugned offences to be included in the National Register for Sex Offenders;

insofar as they apply to children engaging in consensual sexual activities.

3. The First Applicant is **THE TEDDY BEAR CLINIC FOR ABUSED CHILDREN**, a not-for-profit company duly registered and incorporated in accordance with section 21 of the Companies Act, Act 61 of 1973.

3.1. The First Applicant had its origins more than 24 years ago in the outpatient facilities of the Johannesburg General Hospital and the Department of Paediatrics of the Medical School of the University of the Witwatersrand in response to an urgent need for medical examinations for abused children.

3.2. Currently, the First Applicant offers a full range of services for abused children and other children in need of care, including forensic medical examinations, forensic psychological counselling, other counselling (including HIV test counselling), psychological assessments, play therapy, preparation for court appearances for children and their families, social awareness and training programmes and programmes designed to divert young sex offenders away from the criminal justice system to a therapeutic environment.

4. The Second Applicant is **RAPCAN**, the name of which is an acronym for "Resources Aimed at the Prevention of Child Abuse and Neglect", a not-for-profit company duly registered and incorporated in accordance with section 21 of the Companies Act, 61 of 1973, with its head office in Cape Town.

4.1. The Second Applicant was established in 1989 by the University of Cape Town's Department of Paediatrics and Child Health in response to the need for education and training in the field of child abuse prevention. Initially it was set

up as a research programme and was later attached to the Child Health Unit at the University. It is now an independent organisation dedicated to the prevention of child victimisation and offending and the promotion of children's rights. It operates locally in Cape Town, at provincial and national levels in South Africa, as well as in the Southern African region and internationally. The Second Applicant's work includes primary, secondary and tertiary prevention approaches with respect to child sexual abuse, corporal and humiliating punishment and child offending, especially sexual and violent offending.

4.2. These approaches include direct support services to child victims of sexual offences at six Sexual Offences Courts in urban and peri-urban settings around Cape Town, the development of resources and best practices aimed at the extension and improvement of quality services to child victims and witnesses in the criminal justice system and the advocacy of appropriate reform of law and policy to protect children from abuse, exploitation and neglect.

5. The First Respondent is the **MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT**, cited as the Minister responsible for the administration of the Act.

6. The Second Respondent is the **NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**, cited by virtue of the powers and obligations conferred on him by the Act.

7. The first *Amicus Curiae* is the **WOMEN'S LEGAL CENTRE TRUST**. According to its constitution the core objective of the first *amicus curiae* is to advance and protect the human rights of all women and girls in South Africa, particularly women who suffer many intersecting forms of disadvantage. In so doing it seeks to contribute to replacing the systematic discrimination and disadvantage that women face. In fulfilling its main objective it assists women litigants free of charge and make submissions to assist courts in constitutional and public interest matters that concern women's rights and gender equality. Over the years it has participated in numerous cases concerning these issues in the form of litigating on behalf of parties or in the form of making relevant submissions.

8. The second *Amicus Curiae* is the **TSHWARANANG LEGAL ADVOCACY CENTRE**, a non-profit independently funded centre. It was established to advance the human rights of women in South Africa and does so through conducting research and engaging in advocacy, training and capacity building aimed at the promotion and protection of women's rights. The activities of the second *amicus curiae* are extensive and it was allowed to participate in these proceedings for the obvious interest it has in the subject matter of the application.

9. The third *Amicus Curiae* is the **JUSTICE ALLIANCE OF SOUTH AFRICA** which is a non-profit voluntary association whose objectives are detailed in clause 4 of its constitution. The key objective is to "take all lawful and proper steps to uphold and develop Judaeo-Christian values, and the Constitution and laws of the Republic of South Africa, by means of litigation in the courts, submissions to Parliament and

assistance to members of Parliament, involvement in the media, and in any other appropriate way". The third *amicus curiae* has in the past often participated in litigation relating to a wide variety of issues and was again allowed to do so in the present application.

10. The applicants brought the present application:

10.1. in their own interests, as organisations dedicated to upholding and protecting children's rights, pursuant to section 38(a) of the Constitution;

10.2. on behalf of all children at risk of being criminalised under sections 15 and 16 of the Act and processed by the criminal justice system, pursuant to section 38(c) of the Constitution and section 15(2)(c) of the Children's Act, 38 of 2005 (the "Children's Act"); and

10.3. in the public interest, pursuant to section 38(d) of the Constitution and section 15(2)(d) of the Children's Act.

11. Before I proceed with a discussion of the merits of the application I wish to express my appreciation and gratitude for the assistance rendered to this court by all the parties and the *amici curiae* both in the form of heads of argument and oral argument in court. The heads of argument filed on behalf of the parties and the *amici* were particularly helpful and I have made extensive use thereof in this judgement. I must also add that the parties and the *amici* presented a vast number of arguments and submissions and referred extensively to authorities. I have considered all that

was said and referred to, but in this judgment I have merely referred to the more salient aspects thereof.

12. Broadly speaking the Act aims to codify the law regarding sexual offences in a single statute. It criminalised all forms of sexual abuse and exploitation. It further repealed certain common law sexual offences and replaced them with new and, in some instances, expanded or extended statutory sexual offences, irrespective of gender. It also established a National Register for Sex Offenders in order to establish a record of persons who are or have been convicted of sexual offences against children and persons who are mentally disabled so as to prohibit such persons from being employed in a manner that places them in a position to work with or have access to or authority or supervision over or care of children or persons who are mentally disabled. In the process it repealed most of the Sexual Offences Act, Act 23 of 1957, as well as various common law crimes, including rape and indecent assault.

13. The sexual offences created by the Act are those offences mentioned in Chapters 2, 3 and 4 and sections 55 and 71(1), (2) and (6) of the Act. What concerns us in the present application are certain of the offences created in Part 1 of Chapter 3, being sexual offences against certain children, and more particularly the offences created in section 15(1) and section 16(1).

14. Chapter 2 of the Act criminalises non-consensual acts of sexual penetration and sexual violation with any person, including both adults and children of any age, as well as other types of sexual acts. Part 2 and Part 3 of Chapter 3 relate to other offences against children which are not relevant for purposes of the present

application. Chapter 4 of the Act relates to sexual offences against persons who are mentally disabled. The Applicants do not seek to impugn the constitutional validity of any of the sections in chapters 2, Part 2 and Part 3 of Chapter 3, and Chapter 4 of the Act.

15. Part 1 of Chapter 3 consists of sections 15 and 16. The offence created in section 15 relates to the consensual sexual penetration with certain children which, in terms of section 15, is also referred to as statutory rape. The offence created in section 16 relates to the consensual sexual violation with certain children which, in terms of section 16, is also referred to as statutory sexual assault.

16. Section 15 and 16 provide as follows:

"15 Acts of consensual sexual penetration with certain children (statutory rape)

(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.

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

(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."

17. In order to appreciate the contents of these sections it is necessary to refer to certain definitions as contained in the Act. "Child" is defined in section 1(1) as follows: " 'child' means- (a) a person under the age of 18 years; or (b) with reference to sections 15 and 16, a person 12 years or older but under the age of 16 years, and 'children' has a corresponding meaning."

For purposes of the present application a child is therefore a person of the age of 12, 13, 14 or 15 years. I shall also refer hereinafter to children in this age group as "adolescents".

18. Section 15 and 16 thus concerns the consensual "sexual penetration" and the consensual "sexual violation" of a child in the age group 12 to 15 years.

19. "Sexual penetration" is defined as follows:

'sexual penetration' includes 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, and 'sexually penetrates' has a corresponding meaning."

20. "Sexual violation" is defined as follows:

'sexual violation' includes 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, and 'sexually violates' has a corresponding meaning."

21. The provisions of sections 15 and 16 must also be read together with section 57(1) of the Act, which provides that any child under the age of twelve is incapable of consenting to a sexual act. A "sexual act" is defined in the Act as "an act of sexual penetration or an act of sexual violation". The provisions thus also criminalise all acts of sexual penetration and sexual violation committed by any person with a child

under the age of twelve. Again, the applicants do not seek to impugn the constitutional validity of these sections.

22. Where an adult, being a person of 18 years and older, engages in consensual acts of sexual penetration and sexual violation with children aged 12 to 15 years of age, this is dealt with by sections 15 and 16 of the Act. This emerges from section 1 of the Act, which, as stated above, defines "child", for purposes of these two sections, as being from 12 to 15 years of age. Sections 1, 15 and 16, in other words, provide that the age of consent is sixteen. The effect of these provisions is that whenever an adult engages in act of consensual sexual penetration or consensual sexual violation with an adolescent (that is a child between from 12 to 15 years), this will amount to an offence under section 15 or section 16. This is the equivalent of, for example, the previous offences of statutory rape and statutory sexual assault. The applicants do not seek to impugn the constitutional validity of these sections insofar as they criminalise adults engaging in consensual acts of sexual penetration or sexual violation with children in the age group 12 to 15 years.

23. However, sections 15 and 16 go much further and criminalise a wide range of consensual sexual activities between children of a certain age. It is against these provisions which the present application is aimed. Subject to certain narrow defences in section 56(2) of the Act, these sections also criminalise consensual acts of sexual penetration and sexual violation between:

    23.1. a child aged between sixteen and eighteen years of age (that is a child of the age of 16 or 17 years) and a child aged 12 to 15 years; or

23.2. two children aged 12 to 15 years.

24. The Applicants were at pains to express that they recognise that adolescents are in a special position. Physiologically, they are rapidly developing and maturing, but psychologically they are not yet fully developed and are still vulnerable to the influence of adults. For that reason the Applicants accepted that sections 15 and 16 are constitutionally permissible insofar as they criminalise the sexual conduct of adults. However, to the extent that the sections criminalise the sexual conduct of children, they are unconstitutional. The impugned provisions which are consequently challenged in the present application are those that criminalise consensual sexual activity between children, and the consequential reporting and registration as sex offender requirements.

25. In order to understand the reach of sections 15 and 16, the wide range of conduct that falls within the scope of the definitions of "sexual penetration" and "sexual violation" needs to be understood. Sexual violation is defined to include, amongst others:

25.1. Direct or indirect contact between the mouth of one person and the mouth of another person. Thus, all forms of kissing on the mouth are included.

25.2. Direct or indirect contact between the mouth of one person and "any other part of the body of another person" which "could cause sexual arousal or stimulation" or "be sexually aroused or stimulated thereby". Thus most forms of petting are included.

25.3. Direct or indirect contact between the genital organs or anus (or breasts in the case of a female) and "any part of the body of another person". Thus most forms of bodily contact, including cuddling and hugging while fully clothed, are included.

26. It is clear that "sexual violation" is defined so broadly that it includes conduct (such as kissing and light petting) that virtually every normal adolescent participates in at some stage or another. It is for this reason that the applicants submitted that the term "sexual violation", is a misnomer, as the definition includes virtually every conceivable form of physical contact, even where it is only tangentially of a sexual nature. It was further submitted that much of the behaviour which is included in the aforesaid definition is developmentally normative and can contribute to positive and healthy development if it is conducted in ways that are consensual and respectful. I shall refer to this aspect again below.

27. Sexual penetration is defined to include "any act which causes penetration to any extent whatsoever" by any part of the body or any object, into the genital organs or anus of another person. Thus, many forms of consensual sexual play and exploration which cannot cause pregnancy or the transmission of sexual disease are included.

28. The evidence before this court was undisputed that large numbers of adolescents engage in the kinds of behaviour that fall within the definitions of "sexual penetration" and "sexual violation". The studies cited in the Flisher and Gevers

expert opinion, and to which I refer below, returned the following results for the cohort of adolescents surveyed in Cape Town and Polokwane:

28.1. Between 39% and 80% had engaged in kissing.

28.2. Between 25.8% and 33.8% had engaged in heavy petting.

28.3. Between 15% and 26.8% had engaged in vaginal sex.

29. The offences created by the impugned provisions thus apply to huge numbers of children across our country. In this regard the applicants submitted that any enforcement of the criminal prohibitions will necessarily be selective and arbitrary and that because so many children engage in the conduct which the provisions criminalise, there is an intrinsic unfairness in the selection of which children are to be charged. This inherent arbitrariness is exacerbated, so it was submitted, by the existence of a wide and unguided prosecutorial discretion about which cases to prosecute. I shall refer to this issue again below.

30. Apart from the wide range of conduct that falls within the scope of the definitions of "sexual penetration" and "sexual violation" as mentioned above, both section 15 and section 16 accomplish a number of qualitatively different results. I shall deal with section 15 first and then with section 16.

31. An analysis of section 15 shows, *inter alia*, the following:

31.1. Where A is an adult (18 years and above) and B is 12 to 15 years of age, and A and B engage in an act of consensual sexual penetration, A is guilty

of the offence created in section 15(1) despite B having consented to the act. Only A has committed an offence, not B.

31.2. Where A is a child of 16 to 17 years of age and B is 12 to 15 years of age, and A and B engage in an act of consensual sexual penetration, A is guilty of the offence created in section 15(1) despite B having consented to the act. Only A has committed an offence, not B.

31.3. Where both A and B are 12 to 15 years of age, and A and B engage in an act of consensual sexual penetration, both A and B are guilty of the offence created in section 15(1) despite the fact that they have consented to the act. If a prosecution is authorised in terms of section 15(2), A and B must both be prosecuted.

32. As mentioned above, and for reasons of the vulnerability of adolescents to the psychological influence of adults, who are generally more experienced and mature than adolescents are, the applicants did not seek to impugn the Act's criminalisation of A where A is an adult and B is an adolescent. (*i.e.*, the result set out in the first subparagraph of the previous paragraph). However, the applicants contended that the criminalisation of consensual sexual acts between adolescents (i.e. the result described in the third subparagraph of the previous paragraph) violates their constitutional rights. The applicants further submitted that the criminalisation of consensual sexual acts between an adolescent on the one hand and another child who is 16 or 17 years of age (i.e. the result described in the second subparagraph of

the previous paragraph) violates the same rights in cases where the adolescent is two years or less younger than the older child.

33. Section 16 which deals with acts of "consensual sexual violation" with certain children, *i.e.*, statutory sexual assault, has to be read with the defence created in section 56(2)(b) of the Act, which provides:

> "56. (2) Whenever an accused person is charged with an offence under —
>
> ....
>
> (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."

34. When read with this defence and the definition of "child" in section 1 of the Act, section 16 also accomplishes a number of qualitatively different results, which differ from the outcomes under section 15 because of the defence in section 56(2)(b). An analysis shows, *inter alia*, the following:

34.1. Where A is an adult and B is 12 to 15 years of age, and A and B engage in an act of consensual "sexual violation", A is guilty of the offence created in section 16(1) despite B having consented to the act. Only A has committed an offence, not B.

34.2. Where A is a child between of 16 or 17 years of age and B is 12 to 15 years of age, and A and B engage in an act of consensual "sexual violation", whether A is guilty of the offence created in section 16(1)

depends on whether A is more than two years older than B. If so, only A may be prosecuted, not B.

34.3. Where both A and B are 12 to 15 years of age, and A and B engage in an act of consensual "sexual violation", the question of whether a criminal offence has been committed depends on whether A is more than two years older than B. If there is more than a two year age gap, an offence has been committed and both A and B have committed an offence. It is important to emphasise in this regard that the younger adolescent is thus also rendered guilty of the offence where he or she is more than two years younger than the older adolescent. This outcome is thus different from the previously mentioned event where A and B are more than two years apart but A is of an older age of 16 or 17 years. In such a case B would not have committed an offence and could not be prosecuted.

35. As stated before, because of the vulnerability of adolescents to the psychological influence of adults, the applicants do not seek to impugn the criminalisation of A in a situation of consensual "sexual violation" where A is an adult and B is an adolescent (*i.e.*, the result set out in the first subparagraph of the previous paragraph). The Applicants further submitted that the criminalisation of A in a situation of consensual "sexual violation" where A is 16 or 17 years of age and B is more than two years younger than A (*i.e.*, some of the results set out in the second subparagraph of the previous paragraph), would be justifiable in light of the age disparity between the participants.

36. However, the applicants contended that the criminalisation of acts of consensual "sexual violation" between adolescents where there is an age disparity of less than two years (i.e. the result described in the third subparagraph above) violates their constitutional rights as set out below.

37. The applicants furthermore contended that the different outcomes referred to above, *i.e.*, when comparing the position of the younger adolescent when the older person was 12 to 15 years, on the one hand, with the position of the younger adolescent when the older person was 16 and 17 years, on the other hand, constitute a result which is irrational, anomalous and absurd insofar as the position of the younger adolescent is concerned. For example, when A is seventeen years old and B is fourteen years old (i.e. a difference of more than two years) and they engage in an act of consensual "sexual violation", only A may be prosecuted and not B. However, when A is fifteen years old and B is twelve years old (also a difference of more than two years) and they engage in an act of consensual "sexual violation", both must be prosecuted. In other words, the younger child is protected (and not criminalised) in cases where the older child is older than sixteen. But in cases where the older child is younger than sixteen, the younger child is criminalised along with the older child even if the age difference between them is the same.

38. The applicants further submitted that the offences created by sections 15 and 16 are also irrational in some respects when read with the defence created by section 56(2)(a) of the Act. Section 56(2)(a) provides that:

"(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;...."

39. The applicants referred to the following example to highlight the irrationality of the operation of the section 56(2)(a) defence in some circumstances: B (a girl, for the sake of example) is in grade 10 at school. She is fifteen years old. She is in class with a boy A, who is sixteen years old and another boy, C, who is also fifteen years old. She tells both boys that she is sixteen and they reasonably believe her, after which they proposition her for sex. If she engages in consensual sexual penetration with A, he may raise the defence set out in section 56(2)(a) of the Act, and neither of them could be convicted of an offence.

40. If, however, the girl engages in consensual sexual penetration with C, if either is prosecuted, they must both be prosecuted, even though C may raise the defence set out in section 56(2)(a) of the Act, and only B (the girl) may be convicted. This would be so because the defence created by section 56 (2) (a) is not available to the person who caused the deception, *i.e.,* B (the girl).

41. It is clear from this that the Act renders a wide range of behaviours on the part of adolescents and children criminal and the examples referred to above, are, according to the applicants, serious anomalies and show that none of the behaviours on the part of adolescents and children which are criminalised by the impugned provisions and which are relevant to this application, fall within the purpose of the

provisions as stated by the Minister (the first respondent), namely to protect children from predatory adults.

42. The impact of the provisions in sections 15 and 16 of the Act on adolescents must also be considered in the light of the provisions of Chapter 6 of the Act which relate to the creation of a National Register For Sex Offenders. In terms of section 43 this Register contains particulars of persons convicted of any sexual offence against a child or a person who is mentally disabled or are alleged to have committed a sexual offence against a child or a person who is mentally disabled. A sexual offence means any offence in terms of Chapters 2, 3 and 4 of the Act and thus includes the offences created by the impugned provisions which are relevant to the present application.

43. Entry on the Register is an extremely serious matter with long term effects. A person whose particulars have been included in the Register, may not be employed to work with a child in any circumstances; or hold any position, related to his or her employment, or for any commercial benefit which in any manner places him or her in any position of authority, supervision or care of a child, or which, in any other manner, places him or her in a position of authority, supervision or care of a child or where he or she gains access to a child or places where children are present or congregate; or be granted a license or be given approval to manage or operate any entity, business concern or trade in relation to the supervision over or care of a child or where children are present or congregate; or become the foster parent, kinship care-giver, temporary safe care-giver or adoptive parent of a child.

44. Sections 15 and 16 must furthermore be considered in conjunction with the provisions of section 54 (1) of the Act. According to section 54(1) a person who has knowledge that a sexual offence has been committed against a child must report such knowledge immediately to a police official and failure to do so constitutes an offence for which the person 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 provisions of this section clearly also apply to the consensual offences created by sections 15 and 16, even if both offending parties are adolescents.

45. Section 54 (2) (a) provides that a person who has knowledge, reasonable belief or suspicion that a sexual offence has been committed against a person who is mentally disabled must report such knowledge, reasonable belief or suspicion immediately to a police official. Failure to do so constitutes 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. This section obviously relates to children as well.

46. Although the provisions of section 54 are not directly the subject of the present application, and may possibly in future become the subject of a separate constitutional challenge, the effects thereof do play a role in the consideration of the constitutionality of the impugned provisions.

47. Regarding the purpose of the impugned legislation and its impact on children the applicants referred extensively to the parliamentary deliberations on the Act, the briefing by the then Deputy Minister of Justice and Constitutional Development to the

Portfolio Committee on Justice and Constitutional Development during 2006, the discussions in the portfolio committee and the ultimate report on the bill by the portfolio committee. I do not deem it necessary to refer to that evidence herein.

48. The applicants also presented expert evidence in the form of an expert opinion prepared by the late Professor Alan Flisher and Me Aník Gevers. The expert opinion was annexed to the founding affidavit is annexure "LS8". Prior to his passing, Prof. Flisher was a child and adolescent psychiatrist teaching at the University of Cape Town and Me Gevers is a clinical psychologist and researcher specialising in child and adolescent mental health and well-being at the same institution.

49. In their founding affidavit the applicants made extensive reference to this expert opinion of Flisher and Gevers and I regard the summary and the references as set out in the founding affidavit to be a fair reflection and a fair summary of the expert evidence. I shall consequently refer to paragraphs 51 to 63 of the founding affidavit despite the fact that it contains additional submissions by the applicants. These paragraphs read as follows:

> "51. The Applicants do not quarrel with the general scheme of the Act with respect to the age of consent. Most jurisdictions in the world specify one or more ages of consent, and draw "bright line" rules with respect to age, as it is not seen as viable or practical under most circumstances to differentiate between individual children on the basis of their particular levels of physical, cognitive and emotional development. In this respect, the Applicants consider it within the legitimate berth of the legislature's discretion to specify twelve as the age under

which consent would be legally irrelevant and sixteen as the general age of consent.

52. Indeed, the legislature's determination in this regard is backed by the Flisher and Gevers Opinion. Based on various studies, they show that the onset of puberty generally occurs before or around the age of twelve, with most other physical indications of sexual maturity manifesting between the ages of twelve and sixteen. (See "LS 8" at pp. 4 – 5)

53. Further, and partly due to their physical development, adolescents "begin to understand and experience their bodies in different ways" and "to experience sexual pleasure and integrate a sexual identity into their self-concept and conceptualisations of their bodies." ("LS 8" at p. 4) Their sexual development "may affect their cognitive processing as they learn a new schema to interpret information and make sexual decisions." ("LS 8" at p. 5) This affects their social relationships, where the roles of their peers proportionally increase vis-à-vis that of their caregivers. Significantly, "[w]hen adolescents are in intimate relationships, the intimate partner becomes more influential than platonic friends and parents. .... The intimate or dating relationship provides a new context for experiential learning about emotional and physical intimacies." ("LS 8" at p. 5)

54. These intimate relationships are "*developmentally normative*" – i.e. normal – with up to 87% of a cross-section of Grade 8 to Grade 11 pupils in one study indicating that they are or were in an intimate relationship. "*It is usually within these intimate relationships that adolescents begin to explore a range of sexual behaviours including kissing, petting, oral sex, vaginal intercourse, and anal intercourse.*" ("LS 8" at p. 6).

55. These factors lead Flisher and Gevers to conclude that "on a psychological level, adolescents begin to develop the cognitive and emotional aspects of sexuality, which together with physiological feedback, motivates them to explore their sexuality to satisfy their curiosity and desire to share affection and connection with a partner". ("LS 8" at pp. 6 – 7) Adolescence is a time during

which children need particular guidance with respect to their developing sexuality "*as adolescents have underdeveloped abstract reasoning and decision-making skills. Individuals develop these cognitive skills during adolescence in addition to developing cognitive schemas related to sex and sexuality.*" ("LS 8" at pp. 6 – 7).

56. This makes it clear that adolescents are in a particularly vulnerable position. They often have the physiological ability and psychological disposition to engage in various sexual activities, but not yet the fully developed cognitive and emotional apparatus to deal with such experiences in a constructive fashion. It follows that the Applicants do not quarrel with a number of the propositions underlying the impugned provisions which are stated above.

57. However, the impugned provisions unfortunately go much further than to give effect to these propositions. Instead of only protecting adolescents from sexual advances from adults, they also criminalise adolescents engaging in sexual acts with other adolescents, no matter how harmless or, indeed, developmentally healthy such acts may be. Many instances of such criminalisation are set out in this affidavit.

58. The Flisher and Gevers Opinion canvasses the harmful impacts of such criminalisation, both on children charged with section 15 and 16 offences and on children and society generally, in detail. In order not to burden this application unduly, I will summarise the aspects identified by Flisher and Gevers only briefly. I pray that the whole report by read as incorporated herein.

59. The point of departure for Flisher and Gevers is 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.*" ("LS 8" at p. 7) In this regard, it must be appreciated that "*sexual behaviours*" include a wide range of acts, including kissing, petting, oral sex, vaginal intercourse and anal intercourse, not all of which may be suitable for a specific child at a specific stage of development. On the other

hand, for most adolescents, some forms of sexual behaviour may be healthy. "*Healthy*" sexual behaviour is "*behaviour that is mutually consensual, wanted / desired, non-violent, safe (in terms of using methods to minimise risks of STI transmission and pregnancy), and for which the individual feels emotionally and physically ready.*" ("LS 8" at p. 8) It is in the best interests of children that attitudes promoting healthy sexual behaviours are fostered and that attitudes promoting "*unhealthy*" sexual behaviour (being the opposite of "*healthy*" sexual behaviour) are discouraged during the formative period of adolescence.

60. The impugned provisions do not only criminalise potentially "*healthy*" sexual behaviour among adolescents, but their (unintended) effect is to promote "*unhealthy*" sexual behaviour. The impugned provisions harm children and society and promote "unhealthy" sexual behaviour in the following ways:

60.1 Children who are accused of or charged with offences under sections 15 and 16 are likely to experience emotional distress in the form of shame, embarrassment, anger and regret. This will have a lifelong negative influence on these children's views on sexuality. ("LS 8" at p. 12) In this regard, "*healthy development during the adolescent developmental period is likely to have a long-lasting impact on the individual and thus on the various systems within which that individual is embedded.*" ("LS 8" at p. 8)

60.2 Criminalisation of consensual sexual acts will discourage adolescents from seeking help with respect to their sexuality, because they may then be prosecuted for such behaviour and because it reinforces the social stigmas and taboos around sexuality. This is likely to drive adolescent's sexuality and sexual talk "*underground.*" Research has shown that "*adolescents' discussions with their peers about sex seemed to largely reinforce risky sexual behaviour including having multiple partners and not using a condom (among boys) and feeling unable to negotiate sexual behaviour with partners (among girls)*". ("LS 8" at p. 6) This unhelpful mode of sexual communication is the only available one when the behaviour in question is unlawful. Indeed,

"[s]ections 15 and 16 of the Act contribute more to silencing and isolating adolescents, which makes unhealthy behaviour and poor developmental outcomes more likely." ("LS 8" at p. 13)

60.3 Criminalisation of consensual sexual acts (especially coupled with the duty to report created by section 54(1)(a) of the Act) limits the ability of support organisations to educate, empower, guide and support adolescents in their sexual development. This they cannot do, because they cannot be seen to promote behaviour that is illegal. The implication of the impugned provisions is that abstinence-only sex education should be the only available form of guidance to adolescents. In this regard, Flisher and Gevers opine, on the basis of research conducted especially in the United States of America that *"[s]uch an education programme is unrealistic, disempowering, and potentially harmful."* ("LS 8" at p. 14)

60.4 The social impact of the criminalisation of consensual sexual behaviour is to contribute to the taboos and silence around sexuality in society generally, and more specifically with respect to children who are accused of or charged with the offences. They are *"likely to experience negative social consequences including stereotyping, gossip and rumours, teasing, and estranged peer relationships."*("LS 8" at p. 15) This social stigmatisation will be more keenly felt by girls than boys, due to the gendered construction of sexual relations in our society.

60.5 The impugned provisions are likely to promote inappropriate use of the law. Adults (especially caregivers) or other children may report offences in order to make the children examples of moral turpitude or for reasons of vengeance or social rivalry. It may also encourage children charged with these offences wrongly to plead that they did not consent in order to escape liability.

60.6 The impugned provisions fail to distinguish between healthy and unhealthy sexual behaviours. In this way, they skew adolescents' moral

compass. *"It is likely to be a confusing event for the adolescent who is being punished for engaging in consensual (and potentially healthy and safe), developmentally normative behaviour."* ("LS 8" at p. 15) They contribute to adolescents' risk of experiencing unhealthy sexual conduct, because they blend the lines between right and wrong.

61. The criminalisation of consensual sexual acts between adolescents is particularly inapposite in the South African context, where research indicates that (i) statistically, South Africans tend to have their first sexual experiences during adolescence ("LS 8"at p. 9 - 10) and (ii) many adolescents already experience sex in violent, coercive or unsafe circumstances. ("LS 8"at p. 11) These experiences lead to negative physical consequences (such as unwanted pregnancies and increased levels of infection by HIV and other STDs) as well as psychological harm. The failure of the impugned provisions to distinguish between healthy and unhealthy sexual behaviours will exacerbate the tendency for first sexual experiences to occur under negative circumstances.

62. Flisher and Gevers' observations regarding the tendency of sections 15 and 16 to diminish help-seeking among teenagers are thrown into stark relief if the Act's prohibition on consensual sexual activities is contrasted with the measures taken by the legislature to promote the access of teenagers to reproductive and sexual health services. So, for instance:

62.1 Section 134 of the Children's Act provides that:

62.1.1 No person may refuse to sell condoms to a child over the age of 12 years or to provide a child over the age of 12 years with condoms on request where such condoms are provided or distributed free of charge.

62.1.2 Contraceptives other than condoms may be provided to a child on request by the child and without the consent of the parent or care-giver of the child if the child is at least 12 years of age, proper medical advice is

given to the child and a medical examination is carried out on the child to determine whether there are any medical reasons why a specific contraceptive should not be provided to the child.

62.1.3 A child who obtains condoms, contraceptives or contraceptive advice in terms of the Children's Act is entitled to confidentiality in this respect, subject to section 110 of the Children's Act, which provides for reporting duties for persons "*who on reasonable grounds conclude[ ] that a child has been abused in a manner causing physical injury, sexually abused or deliberately neglected.*"

62.2 The Choice on Termination of Pregnancy Act, 92 of 1996 provides in its section 5(2) that "no *consent other than that of the pregnant woman shall be required for the termination of a pregnancy*".

63. These provisions, which aim to make reproductive and sexual health services freely available to children in need thereof, are in direct contrast to, and will be severely compromised by, the impugned provisions – in particular the reporting duties created by section 54(1)(a) of the Act."

50. The applicants submitted further evidence of incidents which they experienced in practice as service organisations intimately engaged in the criminal justice system with respect to both child victims and child offenders. It is not necessary to refer to the physical examples but it is necessary to note some of the conclusions which, according to the applicants, can be drawn. Firstly, despite many reforms to make the child justice system more child-friendly and to minimise the secondary victimisation experienced in many instances of the prosecution of sexual offences, exposure to the criminal justice system is still a dramatic and harrowing experience for children, be they victims or offenders. Despite the ameliorating factors of a

discretion of the National Director of Public Prosecutions, or in some instances the relevant Director of Public Prosecutions, whether to prosecute or not, and the possibility of diversion for child offenders in certain circumstances, the fact remains that even if they are not ultimately prosecuted for the section 15 or 16 offences, the children will be subjected to earlier processes of the criminal justice system which can include arrest, providing detailed statements, questioning by the police and other authorities, appearance at the preliminary enquiry and, possibly, even detention. Even if the child is diverted, he or she would be regarded as a sex offender and would have to admit responsibility for the section 15 or 16 offence. Children would in most cases also be exposed to public humiliation and stigma when it becomes known in the community that they were accused of these offences. The mere fact of being charged with an offence under the impugned provisions will cause emotional stress in the form of shame, embarrassment, anger, regret and estranged peer relationships. These feelings will contribute to a negative attitude to sexual matters and decrease self esteem. Female children are especially likely to suffer this kind of harm.

51. Based on the above and on their own practical experiences, the applicants submitted that the suppositions and factual conclusions on which the impugned provisions are based, are flawed in many respects which include the following: It is entirely unnecessary to achieve the goal of protecting adolescents against adult sexual interference, to criminalise sexual experimentation between adolescents to the extent that the impugned provisions do. In this regard, the conclusion with respect to seventeen and eighteen year olds that they should not be drawn into the

criminal justice system "in their thousands" equally applies to adolescents. The negative impact of such criminalisation entirely outweighs any positive effects that it may have. Secondly, the protective measures inserted by the legislature in sections 15 and 16 address the severity of the impact on adolescents to some extent, but not sufficiently, in light of the harm that the sections still may cause in individual cases and the systemic effects of the sections. In some cases, these protective measures introduce additional irrationality into the legislative scheme – for instance where it compels both children to be charged with the section 16 offence where the older child is more than two years older than the younger child.

52. According to the applicants the practical outcomes of matters dealt with in terms of the impugned provisions have demonstrated that the impugned provisions are highly counter-productive and unconstitutional. Furthermore, that the children involved suffered severe trauma and were subjected to secondary victimisation. Judging from the evidence presented it in fact appears that the impugned provisions demonstrated serious difficulties with its implementation as well as real damage to the children which these sections were supposed to protect.

53. The impugned provisions will furthermore in all probability prevent the vast majority of adolescents from seeking help because they would fear that they would be charged with a crime. After all, any councillor or other person in authority would be placed in an invidious position for the simple reason that in order to properly conduct his or her duties, or assist the adolescent and to build a trust relationship with the adolescent, they have to solicit the required information in order to do so. However, once they have received this information they would be required to report the child

for the behaviour which has been elicited. This will isolate adolescents from potentially supportive resources and systems. This would also increase the likelihood that adolescents will engage in risky behaviour by making it impossible for caregivers to provide advice, counselling and support on issues regarding the child's sexuality. Such caregivers would obviously also, from their side, be reluctant to enquire too much and would thus be inhibited in their actions, and actually be prevented from performing their duties as they are supposed to do. The existence of the offences also increases the risk that children will experience unhealthy sexual contact, by teaching them that consensual, developmentally normative sexual behaviour is wrong and deserves to be punished.

54. The applicants submitted that the negative consequences of the impugned provisions run even deeper than would appear at first blush. So, for example, the applicants submitted, the impugned provisions might actually in certain cases discourage the pursuit of rape charges by victims and the National Prosecuting Authority ('the NPA"). It was submitted that it would be far easier for the NPA to prove a contravention of section 15 (consensual sex with a minor) than a contravention of section 3 (rape). The NPA will inevitably tend toward pursuing a case in terms of section 15. The difficulty is further that where the alleged rapist is under 16 years old, the victim of the possible rape must herself also be charged with contravening section 15. It would then be for her to prove that the sex was non-consensual and thus avoid conviction under section 15. Failing this, she would be convicted. The applicants also submitted that quite apart from the manifest injustice

this may cause in a given case, this approach is certain to further discourage the reporting of rape.

55. The applicants, the respondents and the *amici curiae* placed a bulk of evidence before this court, some of which had already been referred to. As stated before it is not necessary to refer to all the evidence and I shall merely refer to certain additional features thereof. The first and second *amici* supported the submissions made on behalf of the applicants but sought to emphasise the right to equality and the right to access healthcare services, in particular reproductive health care, which they submitted are infringed by the impugned provisions for the reason that these provisions will be felt disproportionately by adolescent girls. Apart from their own factual observations, to which they alluded, the first and second *amici* relied on and supported the evidence presented by the applicants.

56. The third *amicus* submitted a number of affidavits including that of a gynaecologist, a sexologist, a social worker, a principal of a High School, a paediatrician and a psychologist. They all underlined the health and psychological risks for sexually active adolescents and all were anxious that adolescents should be protected not only against adults, but also against themselves, because of their immaturity, irresponsibility, susceptibility to peer pressure and generally their poor decision-making ability. Many of the deponents supported legislative prohibitions with regard to adolescents, even in respect of consensual sexual activity. All differed, however, as to the nature and extent of such prohibitions.

57. One deponent, the principal of a High School in the Western Cape, took a much more stringent view and stated that he had the support of quite a number of principals of schools. He was, *inter alia,* of the view that it is essential to have the deterrent of the criminal law to protect children from psychologically harming themselves, and from the risk of pregnancy, HIV and STD's. He stated that it would make their already difficult task of dissuading children from early sex much more difficult if the law were to be ameliorated and that the proposals by the applicants would send out a message that sex is acceptable for children and that there are no consequences. On the other hand, the psychologist referred to, stated that although he believes that legal regulation of sexual behaviour could be a means of setting a standard of behaviour and also of creating a means of encouraging healthy sexual behaviour, abstinence programs have been less successful than informative programs such as programs of information and support wherein delayed sexual involvement could be advocated.

58. In response to the aforesaid affidavits filed by the third *amicus*, the applicant filed a number of affidavits in reply. Again, the deponents are all involved with young people and the difficulties they experience, especially those of a sexual nature, and have vast experience. It becomes clear from a study of this evidence that everyone seems to accept the need to be open and honest about teenage sexuality and to allow young people to make truly informed choices as to when they will start exploring and eventually having sex. Reference was made to the many tools available to delay sexual debut and to channel same in a safe and balanced route to the advantage of those concerned. There are many reasons for early sexual debut.

those factors are being addressed and much more can and should be done. However, the majority of deponents seem to be unanimous that using the weapon of the criminal justice system to deal with adolescent sexuality would further marginalise young people and will have long-term harmful consequences not only in respect of their own sexuality but also in respect of their own personal psychological well-being.

59. Of particular interest is the affidavit by a principal of a High School in rural Mpumalanga who was joined in his affidavit by the Chief Executive Officer of Penreach, a non-profit Whole School Development Programme working with stakeholders at every level in schools in disadvantaged rural communities. Between them they have 61 years experience in education of children and have devoted their professional careers to the education and pastoral care of children. These deponents expressed their surprise and dismay at the statements of the principal of the school in the Western Cape referred to above, and after referring to the harmful and devastating effects of the impugned provisions, not only on children but also on caregivers and teachers, they submitted that the threat of prosecution and criminal conviction would not serve as an effective deterrent to sexual behaviour amongst children, and would in fact be counter-productive and would damage children's attitudes to sex by creating and reinforcing unhealthy attitudes of stigma and shame around the idea of sex. For teachers, principals and parents to use the threat of criminal sanction would be an abdication of their responsibility to educate children about sexual matters and would damage the relationships of trust in our schools and our homes.

60. It is not necessary to refer to the other affidavits and the evidence contained therein. The golden thread through all the evidence is the extreme difficulty experienced by all those who have children's best interests at heart, to inform them of all that is necessary and to try and persuade them to take the best decisions possible. At the heart of this quest lies the relationship of trust between that person and the child concerned. Without that relationship of trust the battle is lost and trying to force or threaten in a child in regard to sexual matters and sexual conduct, has seldom proved to be successful. In fact, the evidence seems to be overwhelming that such would exacerbate the problem and be highly damaging and harmful to those who are most at risk. With younger children the sexual activity in question is often initiated innocently and possibly even unknowingly, and, according to some, certainly without a full understanding or realisation of what they are doing. For that reason children need to discuss openly such activity so that they can be carefully lead and guided on the right path, not frightened or intimidated into avoiding the topic.

61. The respondents opposed the present application and initially did so in every respect. The first, and main basis of the respondent's case was that the impugned provisions do not violate any constitutional rights of the children concerned. The starting point of this submission is that it is crucial to consider the provisions of the Act and more particularly the impugned provisions in conjunction with the other statutes designed for the protection and promotion of the rights and interests of children. It is consequently wrong, according to the respondents, to isolate and

challenge individual provisions of the Act whilst ignoring the provisions of other statutes.

62. In this regard the respondents referred to the Children's Act , Act 38 of 2005, and the Child Justice Act, Act 75 of 2008. It was submitted that the Children's Act is the principal legislation in all matters affecting children and that all legislation applicable to children is subject to the general principles laid down by that Act. Consequently, the provisions of sections 15 and 16 of the Act cannot be properly analysed without due regard to the general principles of the Children's Act and the regulations promulgated thereunder. It was further submitted that the Children's Act proscribes implementation of any other legislative provision that deviates from its own provisions in matters affecting children. Consequently, so it was submitted, the impugned provisions cannot be considered without at the same time considering the manner in which they should be implemented if regard is head to the general principles of the Children's Act. It was thus further submitted that this court ought not to question the content of the impugned provisions themselves but should rather have regard to the manner of their implementation in order to establish their impact on the constitutional rights of children.

63. According to the respondent the general principles under the Children's Act, and which govern the implementation of the impugned provisions, include the following:

    63.1. All proceedings, actions or decisions in a matter concerning a child must respect, protect, promote and fulfill the child's fundamental rights (including those that the applicants assert) and the best interests of the child, subject to any lawful limitation.

63.2. Such proceedings, actions or decisions must promote respect for the child's inherent dignity and a fair and equitable treatment of the child, and protect the child from unfair discrimination on any ground.

63.3. The approach that is adopted in any matter concerning a child must be conducive to conciliation. Problem-solving should be followed and a confrontational approach should be avoided.

63.4. Delay in making a decision or taking action on any matter concerning a child must be avoided as far as possible.

64. According to the respondents the aforesaid can be regarded as constitutional safeguards and that it is therefore incorrect to merely refer to the fact that certain provisions of the Act criminalise the sexual conduct of children without considering the aforesaid constitutional safeguards in the implementation of the impugned provisions.

65. The second Act referred to, the Child Justice Act, also provides, according to the respondents, constitutional safeguards which prevent the violation of children's constitutional rights. One of the aims of the Child Justice Act is to prevent children from being exposed to the adverse effects of the formal criminal justice system by using, where appropriate, processes, procedures, mechanisms, services or options more suitable to the needs of children and in accordance with the Constitution, including the use of diversion. The main object of diversion is to deal with a child

who has committed an offence, outside the formal criminal justice system in appropriate cases. According to the respondents such a diversion process would prevent stigmatisation of the child and from acquiring a criminal record. It was submitted that other adverse effects which may be avoided are those of arrest, prosecution in a criminal court open to the public, custodial sentence in a prison cell and featuring in the National Register for Sex Offenders.

66. Apart from the aforesaid statutory safeguards the respondents also referred to National Instructions issued pursuant to the Child Justice Act to police officials which would have the effect that arrests would rarely be justified.

67. Regarding the impugned provisions the main submission on behalf of the respondents was that these provisions do not create offences and that all they do is to confer upon the NDPP or the DPP the sole discretion as to whether or not to institute a prosecution where adolescents engage in the described actions. Such discretion would then be exercised within the strictures of the general principles set out in the Children's Act and the objectives and principles of the diversion program provided for in the Child Justice Act.

68. All the submissions made by the applicants relating to the offences created by the impugned provisions were thus basically met by a denial on the part of the respondents for the aforesaid reason namely that the discretion conferred would determine whether a prosecution ensues and that the exercise of that prosecutorial discretion would be done with reference to the provisions of the Constitution, the Children's Act and the Child Justice Act. As such it was submitted by the

respondents that the best interests of children would weigh heavily in the exercise of the prosecutorial discretion not to prosecute and that diversion would often be the result.

69. As a result of this approach by the respondent all the negative results and consequences submitted by the applicants and most of the *amici* in the evidence before this court, were described by the respondents as speculative in the extreme and therefore denied.

70. In the alternative it was submitted by the respondents that if the applicants were correct in their constitutional criticism of the impugned provisions, this court should still not grant the relief prayed for. It was submitted that in the absence of consideration of the objectives and general principles of the Children's Act and the Child Justice Act, the applicants' construction of the impugned sections is unreasonable and strained whilst, considering the aforesaid objectives and principles, a constitutionally valid interpretation of sections 15 and 16 is possible.

71. There can be no doubt that the impugned provisions as they stand, infringe a range of constitutional rights of children. In fact, this much was eventually conceded during argument on behalf of the respondents. The third *amicus curiae* also conceded that the impugned provisions violate certain constitutional rights of children. As a result I shall only briefly refer to the relevant rights in issue.

72. Section 28(2) of the Constitution provides that "a child's best interests are of paramount importance in every matter concerning the child." This section has a wide ambit and must be considered in all matters affecting children. In **S v M (Centre for**

Child Law as Amicus Curiae) 2008 (3) SA 232 (CC) at paragraph 15 the following was stated:

"The comprehensive and emphatic language of s 28 indicates that just as law enforcement must always be gender-sensitive, so must it always be child-sensitive; that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children; and that courts must function in a manner which at all times shows due respect for children's rights."

73. Section 28(2) is both a self-standing right and a guiding principle in all matters affecting children. See **Minister of Welfare and Population Development v Fitzpatrick and Others 2000 (3) SA 422 (CC)** at paragraph 17. Furthermore, and more importantly, the Constitutional Court has held that section 28 of the Constitution "protects children against the undue exercise of authority." See **Centre for Child Law v Minister of Justice and Constitutional Development and Others 2009 (6) SA 632 (CC)** at paragraph 25.

74. The evidence presented in this application clearly indicates that the impugned provisions may cause harm to children. They also constitute an unjustified intrusion of control into the intimate and private sphere of children's personal relationships, in a manner that will cause severe harm to them. As such these provisions constitute a violation of section 28(2) of the Constitution.

75. Section 10 of the Constitution provides that "(e)veryone has inherent dignity and the right to have their dignity respected and protected." The Constitutional Court has found that children's dignity is not dependent on that of their parents. Neither is the full and proper exercise of dignity by children held in abeyance until they reach a

certain age. See **S v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC)** at paragraph 18.

76. Criminal offences which apply to consensual sexual conduct have also previously been found to be inconsistent with the dignity of those targeted. In ***National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*** **2000 (2) SA 1 (CC)**, the Constitutional Court considered the validity of the criminalisation of sodomy and struck down the criminal prohibition as an unjustifiable limitation of the rights of equality, dignity and privacy. The Constitutional Court made the following findings which are directly applicable to this matter:

    76.1. The criminal punishment of consensual sexual conduct is a form of stigmatisation which infringes the dignity of those targeted (paragraph 28).

    76.2. Even when such provisions are rarely enforced, the symbolic impact of such criminalisation has a severe effect on the social lives and dignity of those targeted (paragraphs 23 and 28).

    76.3. The criminalisation of consensual sexual conduct "builds insecurity and vulnerability into the daily lives" of those targeted (paragraph 28).

    76.4. As such, the criminalisation is degrading and invasive and palpably breaches the right of dignity (paragraph 28).

76.5. The harm caused by such criminalisation "can, and often does" affect the targeted person's "ability to achieve self-identification and self-fulfilment" (paragraph 36).

77. These findings by the Constitutional Court are in my view equally true of the criminalisation of consensual sexual conduct between children. The impugned provisions also stigmatise and degrade children on the basis of their consensual sexual conduct.

78. The impugned provisions also, in my view, violate the right of children to control over their body, and to make their own decisions concerning reproduction. Section 12(2) of the Constitution provides as follows:

"Everyone has the right to bodily and psychological integrity, which includes the right-

(a) to make decisions concerning reproduction;

(b) to security in and control over their body".

79. They also violate children's right to private and intimate personal relationships as protected by section 14 of the Constitution.

80. Our Constitution recognises that children are the bearers of the aforementioned rights in the same manner than adults are, and that children are entitled to a realm of personal space and freedom in which to live their own lives. In **S v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC)** at paragraph 19 the following was found:

"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."

The most intimate spheres of life are protected, even from "erosion by conflicting rights of the community". These are "the inner sanctum of a person, such as his/her family life, sexual preference and home environment."

See also **Bernstein and Others v Bester and Others NNO 1996 (2) SA 751 (CC)** at paragraphs 65 and 67.

81. Regarding the right of privacy in respect of intimate personal relationships the following was stated in paragraph [32] of the **National Coalition** case (supra): "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."

82. Adolescents are bearers of all of these rights no less than adults. In **Christian Lawyers South Africa v Minister of Health and Others (Reproductive Health Alliance as Amicus Curiae) 2005 (1) SA 509 (T)** the court found that the rights in section 12(2)(a) and (b) (bodily and psychological integrity, including the right to make a decision concerning reproduction), section 27(1)(a) (health care services, including reproductive health services), section 10 (dignity) and section 14 (privacy) apply to 'everyone' including girls under the age of 18 years. Our courts have also recognised children's right to autonomy, particularly in the case of adolescents. See

MEC for Education, Kwa-Zulu Natal v Pillay 2008 (1) SA 474 (CC); MEC for Education, Kwa-Zulu Natal v Pillay 2008 (1) SA 474 (CC), at paragraph 56 and **Antonie v Governing Body, Settlers High School and Others 2002 4 SA 738 (C).**

83. The impugned provisions thus trespass into the constitutionally protected realm of children's personal relationships. To subject intimate personal relationships to the coercive force of the criminal law is to insert state control into the most intimate area of adolescents' lives, namely, their personal relationships. Any legislation which does so must be carefully and narrowly crafted to infringe on these vital constitutional rights as little as possible. An analysis of section 15 and 16 shows that these provisions do not properly balance children's rights to autonomy, dignity, and privacy with the state's interest in encouraging responsible sexual behaviour by children. In this regard I again refer to what can only be described as the irrational, overbroad and harmful consequences of these provisions.

84. Instead of creating provisions to decriminalise experimental non-coercive sexual activity between children, which the South African Law Reform Commission proposed in its 2002 report on sexual offences, the impugned provisions of the Act do not achieve this. Instead, they criminalise significant numbers of children for engaging in consensual sexual activities. These consensual sexual activities are of a wide range of acts that would commonly be performed by children engaging in ordinary sexual exploration. Sexual penetration would include, for example, what can be regarded as petting or "french kissing". The wide definition of sexual violation criminalises an extraordinarily wide range of acts commonly performed by

children and which involve only moderate sexual exploration. Criminalising these activities undermines the best interests and rights of the children concerned and of children generally.

85. Even if children are ultimately not prosecuted for the crimes under sections 15 and 16 or are diverted in terms of the Child Justice Act following such a decision to prosecute, this would not avoid the substantial trauma and harm that the children would endure. The children would still have been exposed to the earlier processes in the criminal justice system such as arrest, being required to provide detailed statements about their sexual conduct, being questioned by police and other authorities about the sexual conduct, and detention in police cells. There can be no doubt that such exposure to reporting and early investigation processes would have negative consequences on the dignity of the children as a result of being questioned on and having to describe the sexual activity to police officials. Arrest and detention will obviously exacerbate these negative consequences. The infringement on the child's privacy will extend beyond the immediate family to members of the criminal justice system. Public exposure and humiliation is a real risk, as was shown by the evidence before this court. Negative labelling and social stigma would result and add to the victimisation of the children involved.

86. I have already referred to the fact that the respondents submitted that the impugned provisions, if properly interpreted, do not have these harsh and rights-invading consequences for the reason that very few prosecutions would occur as a result of the discretion conferred on the NDPP and the DPP and furthermore because of the

protective mechanisms of other legislation, more particularly the possibility of diversion.

87. It is, firstly, necessary to say a bit more about the issue of diversion. Although this alternative process does have salutary consequences, especially if compared with the normal criminal procedures to which accused persons are subjected, there can be no doubt that this process does not completely protect the individual. Some of the consequences of this process, some of which I have referred to above, include the following: The child may be arrested; the child is brought to the police station (in some instances), and to the Magistrates Court (in all instances); the child will have come into contact with an investigating officer and could be asked to sign a "warning statement"; even if the child is not arrested, he or she will be issued with a written notice to appear at a preliminary inquiry held at the Magistrates Court; before meeting the prosecutor, the child will be assessed by a probation officer; at this interview the parents are present; the probation officer must discuss the consensual sexual conduct, as the officer must assess whether the child "acknowledges responsibility" for the offence. Diversion cannot take place where there has not been an acknowledgement of responsibility; the child must therefore make an election: either he or she can acknowledge responsibility, and potentially be diverted or he or she must face a trial; if the prosecutor is satisfied that the child has acknowledged responsibility, the matter may be diverted (though it need not be); the decision to divert must be made an order of court in terms of section 42 of the Child Justice Act, in the Magistrate's chambers, with the child present.

88. As stated before, diversion would therefore entail bringing the child into contact with the criminal justice system to a significant degree. He or she must be taken to the police station, wait in corridors at the Magistrates Court, discuss his or her consenting sexual activity several times with criminal justice officials in the presence of his or her parents. This process certainly constitutes an invasion of children's rights. At its best the process would be highly traumatic to any child and should not be one that a child should be put through without sufficient reason. The inappropriateness of the process is further demonstrated by the fact that in cases of consensual sexual conduct, there really is no "victim" and thus there should in reality be no "offender". The diversion process does not recognise this phenomenon and is mainly directed at the usual victim/offender scenario.

89. It is also necessary to say a bit more about the prosecutorial discretion which was heavily relied upon by the respondents. The applicants have set out their practical experiences relating to the exercise of this discretion. As could be expected, these experiences were not positive. The respondents' response thereto was that bad prosecutorial decisions should be subjected to judicial review rather than that the constitutionality of the provisions be attacked. For obvious reasons this submission cannot be accepted. One cannot ignore the fact that in practice, although available, judicial review would seldom protect children from the aforesaid invasion of their constitutional rights.

90. But, apart from the above, prosecutorial discretion could never cure the existence of constitutionally invalid criminal offences. Dealing with the argument that judicial discretion to acquit was a sufficient protection against a statutory reverse onus, the

Constitutional Court found in **S v Zuma and Others 1995 (2) SA 642 (CC)** at paragraph 28 as follows:

"Even if there is such a discretion and even if it could be exercised so as to overcome a statutory presumption (surely a doubtful proposition) that gives rise to no more than a possibility of an acquittal; the possibility of a conviction remains. The presumption of innocence cannot depend on the exercise of discretion."

91. *In casu*, prosecutorial discretion similarly only creates the possibility of non-prosecution or diversion. The possibility of prosecution and conviction remains.

92. I furthermore agree with the submission on behalf of the applicants that the Act, the Regulations under the Act, and the prosecutorial guidelines put up by the NDPP do not contain any real guidance as to how the discretion, whether or not to prosecute a section 15 or section 16 offence, should be exercised. In particular, there is no guidance on what constitutes permissible acceptable adolescent sexual development and what does not. Since there is no legislative or other guidelines to assist the relevant official to decide which cases to prosecute, the discretion conferred cannot save the constitutionality of the provisions.

93. In ***Dawood & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC)** at paragraphs 52 to 57, the Constitutional Court dealt with the effect of discretionary powers on constitutional rights. It held that where Parliament conferred a discretionary power on an official which could limit fundamental rights, it was necessary for Parliament to provide guidance as to how such constitutional rights were to be protected. At paragraph [54] the following was stated:

"We must not lose sight of the fact that rights enshrined in the Bill of Rights must be protected and may not be unjustifiably infringed. It is for the Legislature to ensure that, when necessary, guidance is provided as to when limitation of rights will be justifiable. It is therefore not ordinarily sufficient for the Legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of the constitutional obligations placed on such officials to respect the Constitution. Such an approach would often not promote the spirit, purport and objects of the Bill of Rights. Guidance will often be required to ensure that the Constitution takes root in the daily practice of governance. Where necessary, such guidance must be given. Guidance could be provided either in the legislation itself or, where appropriate, by a legislative requirement that delegated legislation be properly enacted by a competent authority."

94. The policy directives referred to by the respondents do not seem to be of the calibre referred to. The directives are rather vague and lack guidance as to how the prosecutorial discretion is to be exercised.

95. The Constitutional Court has found in a number of other matters that, as a matter of principle, where a criminal offence infringes a constitutionally protectable interest, the existence of prosecutorial discretion is no defence. In **Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others 1996 (3) SA 617 (CC)** the Constitutional Court struck down offences relating to the possession of pornographic material. In a footnote to her separate concurring judgment (*cf* footnote 96 paragraph 59), Mokgoro J found that:

"[I]t is no answer to assert that prosecutorial discretion would never be exercised so as to hit forms of expression which, it is common cause, deserve constitutional protection. This Court held in S v Zuma ... that even if there existed a judicial discretion to reject a confession because of doubts as to the voluntariness thereof, 'that gives rise to no more than a possibility of an acquittal; the possibility of a conviction remains'. See also Attorney-General v British Broadcasting Corporation [1980] AC 303 (HL) ([1980] 3 All ER 161) at 346 (AC)

and 174 (All ER) ('insofar as the Attorney-General invites the Courts to rely on his ipse dixit in the confidence that all holders of that office will always be both wise and just about instituting proceedings . . . acceptance of his invitation would involve a denial of justice to those who are bold enough to challenge that a particular holder has been either wise or just'."

96. In ***Mbatha* S v Mbatha; S v Prinsloo1996 (2) SA 464 (CC)** the Constitutional Court struck down the presumption that any person in charge of premises at which certain articles were present, was in possession of the article. In defence of the provision, counsel for the State claimed that the presumption did not lead to absurd results "because it is applied with circumspection by prosecutors." The Constitutional Court rejected this argument as follows at paragraphs 22-23:

"First, there is nothing to suggest that prosecutors in general and around the country agree with the view or, if they do, that it is invariably implemented. If a general directive to that effect has been issued, it has not been mentioned in argument. In the second instance, even if one were to accept that prosecutors adhere to such a policy there is no evidence that the police do so."

97. *In casu* there is also no evidence of any guidance or directive issued to prosecutors to ensure that the impugned provisions are implemented with circumspection. According to the evidence there is no legislative or policy guidance provided to the officials tasked with exercising this specific prosecutorial discretion. Furthermore, the police are tasked with deciding whether a matter merits investigation or arrest, and they are not provided with any guidance whatsoever in the exercise of this general discretion when it comes to the particular offences created by the impugned provisions. In my view the existence of prosecutorial discretion does not save the impugned provisions from unconstitutionality.

98. Having come to the conclusion that sections 15 and 16 do indeed limit a number of constitutional rights of children, the question to be answered is whether the limitations are reasonable and justifiable in terms of section 36 of the Constitution. In this regard there was a burden on the first respondent to establish that the limitations are lawful. See **Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre As Amicus Curiae) 2001 (4) SA 491 (CC)** at paragraph 31; **Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others 2005 (3) SA 280 (CC)** at paragraphs 33-37; **Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division, and Others 2003 (3) SA 345 (CC)** at paragraph 20.

99. Section 36(1) of the Constitution provides as follows:

> "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."

100. The respondents submitted that the rights impacted upon by the impugned provisions are capable of limitation, given the immaturity and vulnerability of adolescents as bearers of sexual and personal autonomy rights. It was submitted that when weighing the limitation of the child's sexual autonomy rights as against the

governmental objective sought to be achieved by the impugned provisions, it becomes plain that such limitation is reasonable and justifiable. The respondents accepted that it is a common and normal part of sexual development for children to explore and experiment in sexual behaviours with their peers. However, so it was submitted, sexual experimentation must be appropriate to the child's age. That means, according to the respondents, that apart from mutual agreement and actions being non-coercive, the participants must have the requisite maturity to participate in the act and to appreciate fully the consequences of their actions. It was submitted that a 15-year-old cannot appreciate fully the consequences of sexual penetration and that, accordingly, scrutiny is justifiable in such circumstances. For that reason the legislator took a policy decision to effect same by way of a prosecutorial discretion.

101. The respondents further submitted that the impugned provisions do not seek to completely take away the personal and sexual autonomy rights of adolescents. They seek merely to delay, and in some instances provide scrutiny to, sexual behaviours among adolescents with a view to protecting them due to their immaturity and vulnerability. It was further submitted that the limitation is not serious but merely a minor infringement of the rights concerned and that it does not have grave and irreparable effects on the rights concerned.

102. The respondents consequently submitted that the law that infringes the rights in the present matter, are reasonable and justifiable in an open and democratic society based on freedom and equality. They aim to protect the child by deterrence and prevention but at the same time recognise adolescent sexual experimentation.

There is consequently a rational connection between the means and the objective sought to be achieved.

103. From the evidence submitted to this court and the submissions on behalf of the parties and the *amici curiae* it is abundantly clear that these submissions cannot be accepted. The evidence showed that the impugned provisions constitute a severe limitation of important constitutional rights. Furthermore, that they are not rationally related to the purpose they seek to achieve and that they are overbroad and that there are less restrictive means available to achieve the purpose. I do not deem it necessary to refer to the other factors mentioned in section 36 of the constitution.

104. Regarding the relationship between the limitation and the purpose of the impugned provisions, the following appears to be the purpose of the criminal offences according to the respondents: to protect children from predatory adults, sexual predators, persons who sexually abuse children, and perpetrators of sexual abuse; to recognise that adolescent sexual experimentation between peers is a reality; to protect children from the criminal justice system; to provide certainty as regards the age of engaging in sexual behaviour; to regulate and correct the sexual behaviour of children; and to promote "healthy sexual behaviour within healthy developmental norms".

105. I agree with the submission on behalf of the applicants that the impugned provisions are not rationally connected to any of these purposes. The criminalisation of consensual sexual conduct between adolescents bears no relationship to the purpose of protecting children from predatory adults and abusers. This purpose is

comprehensively served by provisions of the Act which are not under attack. Very little, if anything, is added to the protection of children by criminalising consensual sexual conduct between children. On the contrary, as has been demonstrated by the evidence, children charged under the impugned provisions will be severely harmed.

106. The provisions also bear no rational relationship to the stated purpose of protecting children from the criminal justice system. They will result in children being needlessly exposed to a system which would cause trauma and harm. Consequently, far from recognising that sexual experimentation between adolescents is a reality and not necessarily harmful, the provisions render all such experimentation a criminal offence, and make adolescents who engage in it subject to police investigation, official scrutiny, diversion, and the whims of prosecutorial discretion.

107. The impugned provisions are also not needed to provide certainty as regards the age of consent. The age of 16 will remain the age of consent, and all that will change if the relief were to be granted, is that adolescents will not be able to be prosecuted for engaging in consensual sexual conduct with one another. In this regard it is important to note that the respondents eventually conceded that the State has no legitimate interest in preventing the "healthy sexual behaviour" referred to by the applicant's experts but that it is only unsafe sexual conduct that is sought to be targeted. "Healthy sexual behaviour" was described as "behaviour that is mutually consensual, wanted/desired, non-violent, safe (in terms of using methods to minimise the risks of STI transmission and pregnancy), and for which the individual

feels emotionally and physically ready for the particular behaviour and its potential consequences."

108. However, such "healthy sexual behaviour" is criminalized by sections 15(1) and 16(1) of the Act. I agree with the submission on behalf of the applicants that this is not only one of the anomalies that the Act creates but that it lies at the heart of the conduct that the sections criminalise. If the State has no legitimate interest in preventing this type of conduct and yet the sections render it a criminal offence, then it is manifest that the impugned provisions are overbroad. For these reasons the impugned provisions cannot satisfy the "less restrictive means" requirement of section 36(1)(e) and can therefore not be permissible limitations of the rights concerned.

109. It needs to be mentioned that the purpose of the impugned provisions which was mentioned in passing, namely that of regulation and correction of children's behaviour, has for all practical purposes fallen by the wayside. The bulk of the evidence did not support this proposition and it was eventually accepted on behalf of the respondents that there is no evidence that the present provisions would in fact deter, regulate or correct the adolescent sexual conduct concerned. There was no evidence to show that the existence of the impugned provisions will be effective in protecting children or deterring them from engaging in consensual sexual conduct. Clearly, any form of sexual conduct, even consensual conduct, will hold certain risks. What has not been shown, however, is that the existence of the impugned provisions will in any way ameliorate these risks. In fact, the bulk of the evidence indicates that the impugned provisions, and more particularly the offences that had

been created, will exacerbate the harm and risk to adolescents as discussed above, will undermine support structures and prevent children from seeking help and will put them further at the risk. For these reasons also there is thus no relation between the limitation and its purpose as envisaged by section 36(1)(d) of the Constitution and consequently the provisions fall to be struck down.

110. In regard to the factor mentioned in section 36(1)(e) of the Constitution namely that of less restrictive means to achieve the purpose, the following may be briefly referred to. A provision which infringes constitutional rights must be "appropriately tailored" and "narrowly focused". See **Islamic Unity Convention v Independent Broadcasting Authority and Others 2002 (4) SA 294 (CC)** at paragraphs 51; **South African National Defence Union v Minister Of Defence And Another 1999 (4) SA 469 (CC)** at paragraph 18.

111. As had been mentioned above, the impugned offences are extraordinarily broad. They apply to a wide range of consensual sexual conduct between children, ranging from kissing on the mouth to penetration. The criminalisation of this conduct goes beyond what is necessary to achieve the primary purpose of the provisions, as mentioned above. Moreover, much of the conduct which is criminalised is committed by huge numbers of normal adolescents, does not harm anyone, and according to the undisputed evidence before this Court, is developmentally normative and healthy.

112. The use of damaging and draconian criminal law offences to attempt to persuade adolescents to behave responsibly is a disproportionate and ineffective method

which is not suited to its purpose. There are plainly less restrictive means available for achieving the purposes sought to be pursued. Other offences which are not under challenge in this matter serve the purpose of protecting children from predatory adults, and the salutary aim to encourage adolescents to lead healthy and responsible sexual lives can be addressed by the other methods mentioned in the evidence that do not involve criminalisation of consensual sexual conduct between adolescents.

113. Having come to the conclusion that the impugned provisions are invalid, the next question to be answered is what the remedy should be. There are generally three possible remedies for the breach of a constitutional right namely, severing words from a provision, reading words into a provision, and striking down the provision. In deciding whether words should be read into a provision or severed from it, the two considerations to be kept in mind are the need to afford appropriate relief to litigants and the need to respect the separation of powers. In ***National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*** **2000 (2) SA 1 (CC)** the court said the following at paragraph 74:

"In deciding whether words should be severed from a provision or whether words should be read into one, a Court pays careful attention first, to the need to ensure that the provision which results from severance or reading words into a statute is consistent with the Constitution and its fundamental values and, secondly, that the result achieved would interfere with the laws adopted by the Legislature as little as possible."

See also **Zondi v MEC for Traditional and Local Government Affairs and Others 2005 (3) SA 589 (CC)** at paragraph 122.

114. In prayer 1 of the notice of motion, the Applicants sought an order declaring that section 15(1) and 56(2)(b) and the definition of "sexual penetration" in section 1 of the Act are unconstitutional to the extent that they:

114.1. Criminalise a child (A) who is between twelve and sixteen years old (12 to 15 years of age) for engaging in an act of consensual sexual penetration with another child (B) who is between twelve and sixteen years old (12 to 15 years of age); and

114.2. Criminalise a child (A) who is between sixteen and eighteen years old (16 and 17 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.

115. To remedy the defect, the applicants sought in prayer 2 of the notice of motion an order of reading in that would ensure that the offence created by section 15 does not apply to such children. This can be achieved by reading the following words into the end of section 15(1):

> *", 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."*

116. In prayer 3 of the notice of motion, the Applicants sought an order declaring that sections 16 and 56(2)(b) of the Act and the definition of "sexual violation" in section 1 of the Act are unconstitutional to the extent that they criminalise a child (A) who is between twelve and sixteen years old (12 to 15 years of age) for engaging in an act

of consensual sexual violation with another child (B) who is between twelve and sixteen years of age (12 to 15 years of age), where there is more than a two year age difference between A and B.

117. To remedy the defect, the applicants in prayer 4 of the notice of motion sought an order of reading in that would ensure that the offence created by section 16 does not apply to such children. This can be achieved by reading the following words into the end of section 16(1):

", unless at the time of the sexual violation A is a child."

118. I agree with the applicants' submission that the reading in of this form is a competent remedy to cure the defects in the provisions. Such a reading in retains the offences created by sections 15 and 16 to the extent that they criminalise adults. They therefore allow the provisions to serve their primary purpose, namely, to protect children from predatory adults. Any lesser form of remedy would fail to ensure that the provisions are consistent with the Constitution and its fundamental values. To allow Parliament to consider and amend the provisions, as was submitted by the respondents, would also not be in the interest of justice and more particularly not in the interest of the thousands of adolescents across the country who are subjected to the aforesaid unconstitutional and invalid criminal prohibitions on a daily basis.

119. I also agree with the submission that this remedy complies with the two requirements for reading in laid down in the **National Coalition** and **Zondi** cases referred to above. First, it ensures that the impugned provisions are consistent with

the Constitution and its fundamental values. It does so in this case by exempting children who engage in consensual sexual conduct with other children from the offences. Secondly, it interferes with the laws adopted by the legislature as little as possible. It does so by leaving the core of the offences created intact, in that the provisions of sections 15 and 16 criminalising adults for engaging in consensual sexual conduct with children, remain unaltered.

120. In paragraph 5 of the Notice of Motion the applicants challenged the constitutional validity of three further provisions of the Act which were intended to be protective of child victims, but which, in conjunction with the over breadth of the impugned provisions, serve to exacerbate and intensify the negative effects of the section 15(1) and section 16(1) offences upon adolescents. They are sections 50(1)(a)(i), 50(2)(a)(i) and section 54(1)(a) of the Act.

121. The relief claimed in paragraph 5 of the Notice of Motion, however, only becomes relevant as a lesser or alternative form of relief in the event of the main attack on sections 15 and 16 failing. Having come to the conclusions that I have regarding the invalidity of the impugned provisions, the constitutional validity of these three sections need not be dealt with and decided individually.

122. Regarding costs there is no reason why the usual principles applicable in constitutional matters of this sort, if the applicants succeed, should not be applied *in casu.* Having regard to all the relevant considerations, the costs should also include the costs of two counsel.

123. In the result the following order is made:

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:

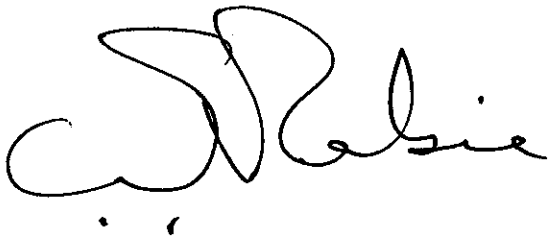
"A person ('A') who commits an act of sexual violation with a child ('B') is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual violation with a child, unless at the time of the sexual violation A is a child.

5. The applicants' costs of the application shall be paid by the first respondent and the second respondent jointly and severally, which costs shall include the costs of two counsel.

6. The orders in paragraphs 1, 2, 3 and 4 above are hereby referred to the Constitutional Court in terms of section 172(2) of the Constitution.

7. The Registrar of this Court is requested and directed to comply with the Registrar's obligation in terms of Rule 16 of the Rules of the Constitutional

Court to lodge with the Registrar of the Constitutional Court a copy of this order within 15 days of date hereof.



C.P. RABIE
JUDGE OF THE HIGH COURT

4 January 2013