Sweet sixteen and never been kissed? Statutory discrepancies with respect to the age of consent to sexual acts

by

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Sweet sixteen and never been kissed? Statutory discrepancies with respect to the age of consent to sexual acts

The phrase "sweet sixteen and never been kissed" refers to the innocence of childhood and the coming of age of children. It also relates to the increased need for autonomy by adolescents. However, it is highly improbable that the average child in South Africa, when reaching the age of sixteen years, has never been kissed.

Children's rights are categorised as rights of protection (the state and parents have a duty to protect children from sexual abuse and exploitation) and rights of autonomy.

The Choice on Termination of Pregnancy Act 92 of 1996 provides for the right of female children of any age to consent to the termination of a pregnancy if all the requirements are met. In terms of the Children's Act 38 of 2005, persons who are responsible for the care of a child must guide, advise and assist such child. A child must have access to information regarding sexuality and reproduction, and has clear rights from a young age with regard to consenting to medical treatment and HIV testing, as well as to access to contraceptives.

Sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 deal with consensual sexual acts with adolescents - a person who commits a sexual act with an adolescent is, despite the consent of such adolescent, guilty of an offence. Adolescents and children between the ages of sixteen and eighteen years can also be offenders. There is an obligation on a person with knowledge of a sexual offence that has been committed to report same to the South African Police Service. The particulars of a convicted person must be inserted in the National Register for Sex Offenders. These reporting obligations limit the child's rights to consent to the termination of a pregnancy, to access contraceptives and confidential contraceptive advice and to consent to HIV testing. It also limits the ability of adults to provide children with sex education, advice and guidance.

The court in the *The Teddy Bear Clinic for Abused Children and RAPCAN v Minister of Justice and Constitutional Development and National Director of Public Prosecutions* (73300/2010) [2013] ZAGPPHC 1 (4 January 2013) found that certain sections of the Sexual Offences Act are unconstitutional. However, three main issues remain unaddressed. Firstly, the above-mentioned provisions in the Choice on Termination of Pregnancy Act and the Children's Act still send out contradictory messages, leading to legal uncertainty. Secondly, the diversion provisions of the Child Justice Act 75 of 2008 are not, in totality, relevant to consensual sexual acts between children, and expose children to the criminal justice system. Thirdly, the reporting provisions of the Sexual Offences Act pose serious challenges.

To address the above, it is recommended that the state should embark on a nation-wide information campaign, the national statutory and institutional framework should be reviewed, rationalised and

aligned, information relating to the appropriate education of children should be disseminated, and the reporting requirement in the Sexual Offences Act be amended.

Declaration of originality

Full names of student: Clara Williams

Student number: 04342976

Declaration

1. I understand what plagiarism is and am aware of the University's policy in this regard.

2. I declare that this mini-dissertation is my own original work. Where other people's work has been used (either from a printed source, Internet or any other source), this has been properly acknowledged and referenced in accordance with departmental requirements.

3. I have not used work previously produced by another student or any other person to hand in as my own.

4. I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work.

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Acknowledgements

To me, the following Latin proverb is a true description of this journey: *auribus teneo lupum*.

I would like to thank God for helping me to see this through, my husband for his unwavering love and support, my father and brother for being my academic mentors, my mother for helping me to find balance, and the rest of my family and friends for their understanding.

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Contents

1 Introduction

The well-known phrase "sweet sixteen and never been kissed" refers to the innocence of childhood and the coming of age of children (the all-important transition from childhood to adulthood). It also relates to the increased need for autonomy by adolescents.[1] In "You're Sixteen", Ringo Starr sang:[2]

> you come on like a dream, peaches and cream,
> lips like strawberry wine.
> you're sixteen, you're beautiful and
> you're mine. (mine, all mine)
>
> you're all ribbons and curls, ooh, what a girl,
> eyes that sparkle and shine.
> you're sixteen, you're beautiful and you're mine.
> (mine, all mine, mine, mine)
>
> you're my baby, you're my pet,
> we fell in love on the night we met.
> you touched my hand, my heart went pop,
> ooh, when we kissed, I could not stop.

The relevance of the above phrase in South Africa, specifically regarding the innocence of children when they turn sixteen, can be debated.[3]

This dissertation will describe the aim and methodology of the study, followed by the background and the hypothesis, after which a brief overview of the historical national statutory framework, the international children's rights framework, as well as the current national statutory framework relating to the age of consent to sexual acts[4] are provided. *The Teddy Bear Clinic for Abused Children and RAPCAN v Minister of Justice and Constitutional Development and National Director of Public Prosecutions*[5] (hereinafter "*TBC* case"), where a number of statutory provisions relating to the age of consent to sexual acts were declared to be unconstitutional, is then discussed in detail. This is followed by a critical analysis of the current statutory framework, the *TBC* case and the *status quo*, as well as recommendations and concluding remarks.

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1 The term "adolescents" refers to children between the ages of twelve and sixteen years.

2 Sherman and Sherman *You're Sixteen* (n.d.). Originally performed by Johnny Burnette. Cover by Ringo Starr (1973).

3 See 3 below. No moral opinion is provided in this dissertation. South Africa is a country of moral diversity. Individuals' autonomy and moral integrity are important and must be respected. See Ngwena "Conscientious objection and legal abortion in South Africa: delineating the parameters" June 2003 *Journal for Juridical Science* 7.

4 The terms "sexual acts" and "sexual activities" are used to refer to both acts of sexual violation and sexual penetration, as defined in s 1 Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

5 (73300/2010) [2013] ZAGPPHC 1 (4 January 2013).

2 Aim and methodology

This dissertation aims to:

a Examine the relationship between the provisions of:

i Section 5 of the Choice on Termination of Pregnancy Act 92 of 1996 (hereinafter "Choice on Termination of Pregnancy Act") relating to the child's right to consent to the termination of a pregnancy;

ii Section 134 of the Children's Act 38 of 2005 (hereinafter "Children's Act") relating to the child's right to access to contraceptives; and

iii Sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereinafter "Sexual Offences Act") relating to the inability of adolescents to legally consent to certain sexual acts.

b Determine whether the above provisions are in actual fact contradicting one another in certain respect.

c Examine what the *TBC* case entails.

d Make suitable recommendations.

A critical analysis of the literature available on the topic was undertaken in order to collect, analyse and evaluate the relevant material and to test the hypothesis.[6] A descriptive and analytical approach was followed in order to analyse the relevant provisions of the:

a United Nations Convention on the Rights of the Child (1989) (hereinafter "UNCRC");

b African Charter on the Rights and Welfare of the Child (1990) (hereinafter "ACRWC");

c Constitution of the Republic of South Africa, 1996 (hereinafter "Constitution");

d Choice on Termination of Pregnancy Act;

e Children's Act;

f Sexual Offences Act; and

g Child Justice Act 75 of 2008 (hereinafter "Child Justice Act"),

as well as other related legislation, relevant secondary sources and case law relating to the topic.

[6] See 4 below.

3 Background

The Choice on Termination of Pregnancy Act provides for consent to the termination of pregnancies and the Children's Act for access to contraceptives to children above the age of twelve years, while the Sexual Offences Act prohibits children from engaging in certain consensual sexual acts with other children. As is clear from the discussion below on the findings of a number of surveys, children are not deterred by the provisions of the Sexual Offences Act, and do participate in sexual acts with each other. The reality is that young children engage in sexual experimentation, notwithstanding criminal prohibitions against such sexual acts. With regard to the relevance of the phrase "sweet sixteen and never been kissed" in South Africa, it is highly improbable that the average child, when reaching the age of sixteen years, has never been kissed.

In a 2008 survey of Grade 8 to 11 learners from public schools in all nine provinces, in which 10 270 learners participated,[7] 37.5% of learners reported having had sex, of which 12.6% had their first sexual encounter before they turned fourteen. Of sexually active learners, 41.1% reported having had two or more sexual partners in their lifetime, 52.3% had one or more sexual partners in the past three months, 19.0% had been pregnant or made someone pregnant, 17.7% reported having had a child(ren), 4.4% had a sexually transmitted infection with 55.0% of them reporting having received treatment for their infections, 8.2% had (or their partner had) an abortion, and 17.9% reported not having used any form of contraception. Of those using contraceptives, 45.1% mostly used condoms, and 30.7% used condoms consistently. Only 11.7% of all learners reported they thought they could get the Human Immunodeficiency Virus (hereinafter "HIV") in their lifetime. 21.5% reported having had an HIV test and 65.4% reported receiving HIV and/or Acquired Immunodeficiency Syndrome (hereinafter "AIDS") education in school.[8]

In 2008, 4 391 youths between the ages of twelve and 22 were surveyed by the Centre for Justice and Crime Prevention.[9] A total of 38.6% of these youths reported having had sexual intercourse (4.6% of twelve to fourteen year olds, 25.3% of fifteen to seventeen year olds and 64.9% of eighteen to 20 year olds). The majority of youths (81.7%) who had ever been sexually active had first initiated sex at the age of fifteen years or older, but almost a fifth (18.3%) reported they had been fourteen years of age or younger when they first engaged in sexual activity.[10] 40.4% of twelve to fourteen year olds and 48.0% of fifteen to seventeen year olds reported consistent condom use.[11]

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7 Reddy, James, Sewpaul, Koopman, Funani, Sifunda, Josie, Masuka, Kambaran, and Omardien *Umthente Uhlaba Usamila – The South African Youth Risk Behaviour Survey 2008* (2010) 10.
8 Reddy *et al* 34-35.
9 Leoschut *Running Nowhere Fast: Results of the 2008 National Youth Lifestyle Study* (2009) 99.
10 Leoschut 100.
11 Leoschut 107.

Another recent study (2009), conducted amongst Grade 8 learners in three Cape Town schools, revealed that 81.9% engaged in kissing, 28.2% in light petting, 9.5% in heavy petting, 26.8% in vaginal sex, 6.8% in oral sex and 3.3% in anal sex.[12]

At the outset, it is important to note that children's rights are categorised as "rights of protection and rights of autonomy".[13] On the one hand, children need protection, and, in the context of the matter at hand, the state and parents have a duty to protect children[14] from sexual abuse and, more specifically, sexual exploitation. On the other hand, children's increased autonomy needs to be respected. The older and more mature a child becomes, the more important his/her rights of autonomy become – this is referred to as the evolving capacities of the child.[15] Autonomy, in a legal sense, is defined as "the right to assert one's own personal and physical integrity, to express one's views freely, to take responsibility for one's life and to have decisions regarding one's own choices respected".[16] Karp states that the interest of personal autonomy and empowerment is one of the five basic components of human dignity.[17] The fact that adolescence is the stage of life during which children reach sexual maturity[18] must be taken into account by the state and parents, guardians and caregivers. Adolescents' increased sexual autonomy and the realities concerning adolescent sexual experimentation must be recognised.

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[12] Flisher and Gevers "Expert Opinion" annexed to the Applicants' Founding Affidavit in *The Teddy Bear Clinic for Abused Children and RAPCAN v Minister of Justice and Constitutional Development and National Director of Public Prosecutions* (73300/2010) [2013] ZAGPPHC 1 (4 January 2013) 9. See also 7 6 1 and 7 6 4 below.

[13] Friedman, Pantazis and Skelton "Children's rights" in *Constitutional Law of South Africa* (eds Woolman, Bishop and Brickhill) (2012) 47-2. Schäfer describes the three pillars of child law as the (a) "rights, status, capacities and incapacities of children as individuals", (b) "inter-relationships between children and their parents, guardians and other caregivers", and (c) "role of the State in protecting children from harm, supporting their families and discharging its own parenting responsibilities under section 28(1)(b) of the Bill of Rights as role model '*par excellence*'" (Schäfer *Child Law in South Africa: Domestic and International Perspectives* (2011) 6 (footnote omitted)). See Woodhouse "The changing status of the child" in *The U.N. Convention on the Rights of the Child: An Analysis of Treaty Provisions and Implications of U.S. Ratification* (eds Todres, Wojcik and Revaz) (2006) 60 where she states that there are tensions between the rights of parents (in controlling the upbringing of the child), the interests of the State (in protecting and promoting the child's welfare) and the emerging rights of the child. See also Human "The theory of children's rights" in *Child Law in South Africa* (ed Boezaart) (2009) 243-262.

[14] See Woodhouse 53.

[15] See Woodhouse 51-63 where she states that there is a gradual move from the "helpless state of infancy to the maturity of late adolescence and young adulthood" (51-52). Schäfer states that childhood is "a continuous process of physical, emotional and intellectual development which starts with complete dependence on others and ends with physical maturity and a substantial measure of factual autonomy". The gradual empowerment of the child goes hand in hand with the diminishing power of the parent. He views the fact that South African law does not have clear principles on how to regard the increasing independent child, as a weakness (5).

[16] Couzens "Autonomy rights versus parental rights" in *The UN Children's Rights Convention: Theory Meets Practice* (eds Alen *et al*) (2007) 420, footnote omitted.

[17] Karp "Matching human dignity with the UN Convention on the Rights of the Child" in *The Case for the Child: Towards a New Agenda* (eds Ronen and Greenbaum) (2008) 95 and 113. On 95-96, she states that the other components are the interest of life, physical and mental integrity; development; identity; and dialogue.

[18] Eriksson *Reproductive Freedom in the Context of International Human Rights and Humanitarian Law* (2000) 295.

Nevertheless, adolescent sexual experimentation has the potential to result in serious consequences, including the transmission of Sexually Transmitted Diseases (hereinafter "STDs"), HIV infection and pregnancy.

The legislature acknowledged that children become sexually active at a young age by enabling female children of any age to consent to the termination of a pregnancy in terms of the Choice on Termination of Pregnancy Act (administered by the Department of Health) and by granting access to contraceptives to children who are twelve years or older through the Children's Act (administered by the Department of Social Development) (provided the other prerequisites as stated in these two Acts are also met). However, the Sexual Offences Act (administered by the Department of Justice and Constitutional Development (hereinafter "DoJCD")), aims to protect children, but provides that a child over the age of twelve but under the age of sixteen years (adolescents) cannot legally consent to certain sexual acts with another child. It is noteworthy that the term "consent" is not defined in the Choice on Termination of Pregnancy Act or the Children's Act. The definition in section 1 of the Sexual Offences Act is quite vague as it states "'consent' means voluntary or uncoerced agreement".

The relevant provisions of the Sexual Offences Act deprive children of their sexual autonomy. In addition, by criminalising certain consensual sexual acts between children and placing an obligation on all persons to report knowledge of a sexual offence having been committed against a child, the Sexual Offences Act, in fact, discourages children to seek advice and guidance on sexual matters. It also impacts negatively on a child's rights to privacy, to receive information relating to sexual matters and to access health services. In addition, it limits adults' ability to educate children and provide advice and assistance. It can thus be said that the legislature decided to take a paternalistic approach in the Sexual Offences Act by attempting to deter children from engaging in certain consensual sexual acts by criminalising such acts (focusing on the child's right to protection). By placing a reporting obligation on all persons, the legislature did not take into account that access to sex education, guidance and assistance by adults[19] might prove a more viable option in order to address the consequences of adolescent sexual activity (by respecting the child's autonomy and evolving capacities). Such access would enable children to appreciate the sexual act and its consequences and to increase their knowledge of the risks involved.

[19] See 8 2 below regarding state programmes aimed at providing sex education to children.

The applicants and the court in the *TBC* case[20] referred to the importance of sex education and access to health services. With reference to the Alan Flisher and Anik Gevers Expert Opinion, the following was stated in the first applicant's Founding Affidavit in the *TBC* case:[21]

> These provisions [section 5(2) of the Choice on Termination of Pregnancy Act[22] and 134 of the Children's Act[23]], 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 [the relevant sections of the Sexual Offences Act] – in particular the reporting duties created by section 54(1)(a) of the Act.

It is submitted that the discrepancies between the relevant provisions of the Choice on Termination of Pregnancy Act, Children's Act and Sexual Offences Act relating to the age of consent to sexual acts send out a confusing message to children and may lead to incorrect assumptions regarding the ability of adolescents[24] to legally consent to sexual acts. Adolescents may assume that they may consent to sexual acts as they may access contraceptives and may consent to the termination of a pregnancy. The *status quo* is therefore that the law allows adolescents to buy condoms, but prohibits them to use them until they are sixteen years of age or older.

4 Hypothesis

The provisions of section 5 of the Choice on Termination of Pregnancy Act and section 134 of the Children's Act have an indirect relationship with the legal ability of children to consent to sexual acts as they provide for consent to the termination of pregnancies and access to contraceptives, while sections 15 and 16 of the Sexual Offences Act deal directly with the legal ability of children to consent to sexual acts. However, it is the hypothesis of this dissertation that these provisions are *prima facie* in contradiction with one another as different ages of consent are provided for in the various Acts.

Even though the DoJCD argues that the protective measures in the Sexual Offences Act will "ensure that such children who explore their sexuality are not likely to come into conflict with the criminal justice system"[25] through the application of the diversion provisions of the Child Justice Act, it is submitted that these measures are not sufficient and do not justify and address the contradictions between the three Acts. The court in the *TBC* case concluded that certain sections of the Sexual

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20 See 7 6 below.
21 Founding Affidavit of the first applicant in the *TBC* case 36-37. See fn 12 above, as well as 7 6 1 and 7 6 4 below.
22 Right to consent to the termination of a pregnancy. See 7 2 below.
23 Right to access to contraceptives and contraceptive advice. See 7 3 below.
24 Persons under the age of eighteen years are referred to as "children", unless the context dictates otherwise.
25 Minnie "Sexual offences against children" in *Child Law in South Africa* (ed Boezaart) (2009) 551.

Offences Act are unconstitutional. However, even if the Constitutional Court confirms the High Court order, certain discrepancies will remain.

5 Historical national statutory framework

In order to understand the context relating to the age of consent to sexual acts, it is necessary to examine the relevant provisions of legislation which dealt with the issues at hand in the past. The relevant Acts are the Abortion and Sterilization Act 2 of 1975 (hereinafter "Abortion and Sterilization Act", the provisions dealing with abortion were repealed by the Choice on Termination of Pregnancy Act), the Child Care Act 74 of 1983 (hereinafter "Child Care Act", repealed by the Children's Act) and the Sexual Offences Act 23 of 1957 (hereinafter "old Sexual Offences Act", later amended by the Sexual Offences Act). In addition, the common law is also of importance.

The historical national statutory framework dealing with the termination of pregnancies and contraceptives were strict and provided rights in limited circumstances. No female could consent to the termination of a pregnancy in circumstances other than those listed in section 3 of the Abortion and Sterilization Act, i.e. for non-medical reasons or for a reason other than the fact that the mother fell pregnant as a result of rape and incest.[26] There was neither any direct provision for children's access to contraceptives, nor any provision enabling children to consent to the use thereof. Section 39 of the Child Care Act provided that a child over the age of fourteen could consent to medical treatment which, according to Kassan and Mahery, included the use of contraceptives.[27]

In terms of the common law, there was an irrebuttable presumption that a female child under the age of twelve years could not consent to sexual intercourse. The common law provided that the consent of a female adolescent to sexual intercourse was regarded as a valid defence against the charge of rape.[28] The terms "rape" and "indecent assault" were also limited. With regard to acts that fell within the ambit of "sexual assault", if the consenting party was a female child between the ages of twelve and eighteen years, or a male child between the ages of seven and eighteen years, it had to be determined whether the child was capable of understanding the nature of the act concerned.[29]

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[26] See also Boezaart "Child law, the child and South African private law" in *Child Law in South Africa* (ed Boezaart) (2009) 13; Kassan and Mahery "Special child protective measures in the Children's Act" in *Child Law in South Africa* (ed Boezaart) (2009) 208. For a comparison between the Abortion and Sterilization Act and the Choice on Termination of Pregnancy Act (and a discussion of the possible unconstitutionality of certain limitations in the Choice on Termination of Pregnancy Act), see McQuoid-Mason "Are the restrictive provisions of sections 2(1)(c) and 5(5)(b) of the Choice on Termination of Pregnancy Act 92 of 1996 unconstitutional?" 2006 *Journal for Juridical Science* 121-133. See also Lategan "Kommentaar op die verskuiwing in moraal in die hersiene wetsontwerpe oor die vrywillige beëindiging van swangerskap" 2006 *Journal for Christian Scholarship* 144.

[27] Kassan and Mahery 221.

[28] Amongst others, only a female could be raped (Minnie 525-527).

[29] Minnie 528-529.

The old Sexual Offences Act introduced the offence of statutory rape. Sections 14(2) and 14(4) of the old Sexual Offences Act provided for a range of defences.[30] The legal age of consent for homosexual activities was nineteen years, but only sixteen years for heterosexual activities. In this regard, the relevant provisions were declared unconstitutional in *Geldenhuys v National Director of Public Prosecutions*[31] where they were found to discriminate based on the sexual orientation of homosexual people.[32] In *Masiya v Director of Public Prosecutions, Pretoria (Centre for Applied Legal Studies and Another,* amici curiae*)*[33] the Constitutional Court found that the common law definition of rape needed to be adapted and extended to include acts of non-consensual, intentional penetration of a penis into a female's anus.[34]

By the end of the 1970s, in other parts of the world, the courts started to view sexual experimentation by adolescents in a more liberal light. In 1977, the United States Supreme Court found in *Carey v Population Services International*[35] that a New York statute which prohibited the sale or distribution of contraceptives to minors was invalid. In the 1985 English case of *Gillick v West Norfolk and Wisbech Area Health Authority*,[36] a mother challenged a government directive providing access to contraceptives and contraceptive advice without parental approval to children under the age of sixteen years. The court had to decide whether a child below the age of sixteen years could ever provide valid consent and found that a child does not lack capacity by virtue of age alone. Capacity is reached when such child has sufficient understanding and intelligence (intellectual ability and maturity) to make up his or her own mind. The court also found that parental rights terminate when a child acquires the capacity to make his or her own independent decisions.

The South African Law Commission[37] in 1996 embarked on a review of the Child Care Act (Project 110), as well as sexual offences against children (Project 108).[38] As a result of South Africa's

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30 Minnie 533-544, also with reference to Milton, Cowling and Hoctor *South African Criminal Law and Procedure Vol III: Statutory Offences* (1998) E3-12; Gallinetti and Combrink "Section 56 subsections (2)-(6) and subsection (8): Defences relating to children and mentally disabled persons" in *Sexual Offences Commentary* (eds Smythe and Pithey) (2011) 21-2.

31 2009 (1) SACR 231 (CC).

32 See also Minnie 534-535.

33 2007 (5) SA 30 (CC).

34 Minnie 542.

35 431 U.S. 678 (1977). See Todres and Howe "What the U.N. Convention on the Rights of the Child says (and doesn't say) about abortion and family planning" in *The U.N. Convention on the Rights of the Child: An Analysis of Treaty Provisions and Implications of U.S. Ratification* (eds Todres, Wojcik and Revaz) (2006) 163-176; Couzens 426-427.

36 [1985] 3 All ER 402. See also Freeman "Removing rights from adolescents" in *The Case for the Child: Towards a New Agenda* (eds Ronen and Greenbaum) (2008) 309-325; Schäfer 186.

37 Currently referred to as the South African Law Reform Commission.

38 South African Law Commission *Issue Paper 10, Project 108: Sexual Offences against Children* (1997); South African Law Commission *Issue Paper 13, Project 110: The Review of the Child Care Act First Issue Paper* (1998); South African Law Commission *Discussion Paper 103, Project 110: Review of the Child Care Act* (2002); South African Law Commission *Report, Project 110: Review of the Child Care Act* (2002). Project 79 (Juvenile Justice) is also relevant.

obligations in terms of international law[39] and these reviews, the current legislation applicable to the matter at hand[40] was developed.

6 International children's rights framework

South Africa has ratified and assented to various international law instruments that are relevant to the rights of the child. The most important international children's rights instruments are the UNCRC and ACRWC.

Regarding the relationship between the Constitution and international law, section 39(1) of the Constitution makes it clear that international law must be considered when rights in the Bill of Rights are interpreted.[41] When interpreting domestic law, an interpretation consistent with international law must be preferred.[42] Treaties must be domesticated[43] before citizens may take the state to court for non-realisation of a treaty.[44] Certain elements of the UNCRC[45] and the ACRWC have been domesticated and included in the Constitution, Choice on Termination of Pregnancy Act, Children's Act and Child Justice Act. An analysis of these Acts indicates that the above-mentioned international children's rights instruments played a significant role in the development of current legislation relating to children in South Africa.

The UNCRC was ratified by South Africa on 16 July 1995.[46] The four general principles of the UNCRC are non-discrimination,[47] the best interests of the child,[48] the right to life, survival and development, and respect for the child's views.[49]

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39 See 6 below.
40 See 7 below.
41 See also Dugard 347-351.
42 S 233 of the Constitution. Mahery (2009) 323.
43 I.e. enacted into law by national legislation (s 231(4) of the Constitution).
44 Mahery (2009) 324.
45 Mahery (2009) 324. Schäfer states that a conventional dualistic approach towards international human rights law is not possible as it is so closely integrated into the fabric of child law in South Africa (Schäfer 60).
46 United Nations *Convention on the Rights of the Child* (1989) http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx. See Sloth-Nielsen "Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law" 1995 *South African Journal on Human Rights* 401-420; Van Bueren *The International Law on the Rights of the Child* (1998); Hodgkin and Newell *Implementation Handbook for the Convention on the Rights of the Child* (2007); Schäfer 90-97; Dugard *International Law: A South African Perspective* (2012) 335. For a discussion on the impact of the UNCRC and the Constitution on judicial decision-making, see Sloth-Nielsen "Children's rights in the South African Courts: An overview since ratification of the UN Convention on the Rights of the Child" 2002 *The International Journal of Children's Rights* 137-156.
47 See Besson "The principle of non-discrimination in the Convention on the Rights of the Child" in *Children's Rights: Progress and Perspectives* (ed Freeman) (2011) 85-117.
48 See Mason "The best interests of the child" in *The U.N. Convention on the Rights of the Child: An Analysis of Treaty Provisions and Implications of U.S. Ratification* (eds Todres, Wojcik and Revaz) (2006) 121-126.
49 Mahery "The United Nations Convention on the Rights of the Child: Maintaining its value in international and South African child law" in *Child Law in South Africa* (ed Boezaart) (2009) 315-323.

Article 19 of the UNCRC aims to protect children from, amongst others, exploitation, including sexual abuse, by providing that states parties must take legislative, administrative, social and educational measures in this regard. Article 34 of the UNCRC focuses specifically on the obligation on states parties to protect children from sexual exploitation and abuse. Measures must be taken to, *inter alia*, prevent "[t]he inducement or coercion of a child to engage in any unlawful sexual activity".[50]

Article 24 of the UNCRC deals with the health rights of children and provides that states parties must take appropriate measures to, amongst others, "develop preventative care, guidance for parents and family planning[51] education[52] and services".[53]

Article 5 of the UNCRC determines that states parties must respect the responsibilities, rights and duties of parents or guardians "to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention". [54] Article 14 of the UNCRC reiterates this right and adds that a child should have the freedom of thought and conscience,[55] whilst article 12 of the UNCRC provides for the right of children to express their views.[56] Article 13 of the UNCRC provides that a child has the right to seek, receive and impart information whereas article 16 of the UNCRC protects the child's right to privacy.

General Comment No 3 of the Committee on the Rights of the Child[57] determines, amongst others, that states parties should implement programmes focusing on HIV/Aids prevention, care, treatment and support. With regard to prevention, children should have access to sex education and information, even though this might not be the cultural norm in a specific country.[58] It also recommends that health

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50 Art 34(a) of the UNCRC.

51 See Eriksson 188 where it is submitted that the right to family planning "consists of two main elements: the right to procreate and the right not to reproduce" (footnote omitted).

52 Karp 105 states that this includes information and counselling regarding sex and reproductive health, contraceptives, pregnancy and the prevention of STDs.

53 See Büchner-Eveleigh and Nienaber "Gesondheidsorg vir kinders: Voldoen Suid-Afrikaanse wetgewing aan die land se verpligtinge ingevolge die Konvensie oor die Regte van die Kind en die Grondwet?" 2012 *Potchefstroom Electronic Law Journal* 103-146. See also Todres and Howe (2006) 163-176.

54 Freeman states that the UNCRC hereby "establishes a new code of ethics for adults that commit them to regard children as active subjects of self-development with relative autonomy that should be acknowledged" (113). See also Himonga and Cooke "A child's autonomy with special reference to reproductive medical decision-making in South African law: Mere illusion or real autonomy?" 2007 *International Journal of Children's Rights* 360; Landsdown "'Evolving capacities' explained" October 2009 *CRIN Review* 7-9.

55 Lantier "Freedom of thought, conscience, and religion" in *The U.N. Convention on the Rights of the Child: An Analysis of Treaty Provisions and Implications of U.S. Ratification* (eds Todres, Wojcik and Revaz) (2006) 151-162.

56 Matthews "Freedom of expression" in *The U.N. Convention on the Rights of the Child: An Analysis of Treaty Provisions and Implications of U.S. Ratification* (eds Todres, Wojcik and Revaz) (2006) 143-150.

57 Committee on the Rights of the Child *General Comments: HIV/AIDS and the rights of the child – General Comment 3 CRC/GS/2003/3* 2003.

58 Sloth-Nielsen's discussion of, *inter alia*, pars 15 and 20 of the General Comment in Sloth-Nielsen "Protection of children" in *Commentary on the Children's Act* (eds Davel and Skelton) (2007) 7-32. The

services should not require parental consent and should be accessible, also to children under the age of eighteen years.[59] General Comment No 4[60] reiterates the need to provide access to sexual and reproductive information relating to, amongst others, contraception, without requiring parental consent.[61]

The ACRWC came into force on 29 November 1999 and was ratified by South Africa on 7 January 2000.[62] It was drafted to deal with issues that are specifically relevant to children in Africa, and its three main principles are the best interests of the child, non-discrimination and the superiority of the ACRWC over cultural practices and customs that are harmful.[63] Article 4 of the ACRWC states, amongst others, that the best interests of the child must be the primary consideration in all actions concerning a child, that are undertaken by any person or authority.[64] Article 16 of the ACRWC provides for protection against child abuse, including sexual abuse. Article 27 of the ACRWC deals with sexual exploitation and sexual abuse and provides that states parties must take measures to, amongst others, prevent "the inducement, coercion or encouragement of a child to engage in any sexual activity".[65]

Article 14 of the ACRWC deals with health and health services and, in this regard, states parties must take measures to, *inter alia*, "develop preventative health care and family life education and provision of service".

General Comments are "guiding considerations" (7-32) and are the interpretation by the Committee on the Rights of the Child of human rights provisions.

59 See Sloth-Nielsen (2007) 7-32.

60 Committee on the Rights of the Child *General Comments: Adolescent Health and Development in the Context of the Convention on the Rights of the Child – General Comment 4 CRC/GS/2003/4* 2003 (hereinafter "General Comment No 4").

61 Sloth-Nielsen's discussion of par 23 of General Comment No 4 in Sloth-Nielsen (2007) 7-32. For more on the relevant articles of the UNCRC (and the ACRWC), see Gallinetti and Waterhouse "Sections 15-16: Consensual sexual acts with certain children" in *Sexual Offences Commentary* (eds Smythe and Pithey) (2011) 9-1 – 9-5. See also Hodgkin and Newell 6 and 205.

62 Organization of African Unity *African Charter on the Rights and Welfare of the Child* (1990) http://www.au.int/en/sites/default/files/Charter_En_African_Charter_on_the_Rights_and_Wlefare_of_the_Child_AddisAbaba_July1990.pdf. See Van Bueren "The African Charter on the Rights and Welfare of the Child: A new children's treaty" 1991 *International Children's Rights Monitor* 20-22; Thompson "Africa's Charter on Children's Rights: A normative break with cultural traditionalism" 1992 *International and Comparative Law Quarterly* 432-444; Arts "The international protection of children's rights in Africa: The 1990 OAU Charter on the Rights and Welfare of the Child" 1993 *African Journal of International and Comparative Law* 139-162; Madotyeni "The implications of South Africa's acceptance of the African Charter on the Rights and Welfare of the Child" 2000 *Children First* 31-33; Viljoen "The African Charter on the Rights and Welfare of the Child" in *Child Law in South Africa* (ed Boezaart) (2009) 331 and 348; Schäfer 94-97. In general, see Sloth-Nielsen *Children's Rights in Africa: A Legal Perspective* (2008) (specifically Part I); Kaime *The African Charter on the Rights and Welfare of the Child: A Socio-legal Perspective* (2009). For a critical discussion of the ACRWC, see Chirwa "The merits and demerits of the African Charter on the Rights and Welfare of the Child" 2002 *The International Journal of Children's Rights* 157-177; Olowu "Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child" in *Children's Rights: Progress and Perspectives* (ed Freeman) (2011) 395-405.

63 Viljoen 335-336.

64 Kaime discusses the changing nature of childhood with a specific focus on the African context ((2009) 70-92).

65 Art 27(1)(a) of the ACRWC.

Similar to article 14 of the UNCRC, article 9 of the ACRWC provides for the child's right to freedom of thought, conscience and religion, as well as for the duty of parents and guardians to provide guidance and direction to children, taking into account their best interests and evolving capacities. Article 10 of the ACRWC aims to protect the child's privacy.

It is clear from the above that, although great emphasis is placed in these two international treaties on the protection of children from sexual exploitation and abuse, children should also have the right to seek and receive information and should have the freedom of thought and conscience (and rights of autonomy).[66] In addition, children should receive sex education and information about sexuality in order to ensure protection against infection, even where this is not the cultural norm. Parents and guardians (when compared to the state) also have certain duties and responsibilities regarding providing direction and guidance to children.

These treaties do not stipulate a minimum age of consent to sexual acts and, it is submitted, takes the realities regarding adolescent sexual experimentation into account. The focus is primarily on the provision of health services, as well as guidance (amongst others, by parents) and education, and not on the criminalisation of consensual sexual acts between children.

7 Current national statutory framework

The current national statutory framework relevant to the matter at hand consists of the Constitution, Choice on Termination of Pregnancy Act, Children's Act and Child Justice Act.

7 1 Constitution of the Republic of South Africa, 1996

Sections 9(1) and (3) of the Constitution state that everyone, including children, are equal before the law, and that the state may not unfairly discriminate against anyone on the grounds listed in subsection (3), including sex, pregnancy, age, conscience and belief.[67]

Section 10 of the Constitution provides for the right to human dignity, [68] of which personal autonomy is an important part, and section 11 for the right to life.[69] Section 10 of the Constitution is

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66 It is submitted that this includes the right to have their own opinions regarding sexual matters.

67 Currie and De Waal *The Bill of Rights Handbook* (2006) 229-271; Albertyn "Equality" in *South African Constitutional Law: The Bill of Rights* (eds Cheadle, Davis and Haysom) (2011) 4-1 – 4-65, Albertyn "Equality" in *Constitutional Law of South Africa* (eds Woolman, Bishop and Brickhill) (2012) 35-i – 35-85.

68 Currie and De Waal 272-279; Karp 89-135; Haysom "Dignity" in *South African Constitutional Law: The Bill of Rights* (eds Cheadle, Davis and Haysom) (2011) 5-1 – 5-15; Woolman "Dignity" in *Constitutional Law of South Africa* (eds Woolman, Bishop and Brickhill) (2012) 36-1 – 36-75. See also fn 17 where a summary is given of the five components of human dignity with reference to Karp 95-96.

69 Currie and De Waal 280-290; Davis and Youens "Life" in *South African Constitutional Law: The Bill of Rights* (eds Cheadle, Davis and Haysom) (2011) 6-1 – 6-20; Pieterse "Life" in *Constitutional Law of South Africa* (eds Woolman, Bishop and Brickhill) (2012) 39-i – 39-21.

linked to section 12, which provides for freedom and security of the person.[70] Section 12(2)(a) of the Constitution states as follows:[71]

> (2) Everyone has the right to bodily and psychological integrity, which includes the right -
>
> (a) to make decisions concerning reproduction.

Section 14 of the Constitution provides for the right to privacy[72] and section 27 deals with health care, food, water and social security.[73] Section 27(1)(a) of the Constitution[74] states that:

> (1) Everyone has the right to have access to -
>
> (a) health care services, including reproductive health care.

Even though section 28 of the Constitution[75] deals specifically with the rights of children, children are also entitled to all the rights in the remainder of the Bill of Rights (Chapter 2 of the Constitution). It is submitted that the child's rights include the right to make decisions concerning reproduction and the right to have access to reproductive health care. Section 28(2) of the Constitution provides for the best interests of the child principle.[76] The rights to basic health care services and social service and to be protected from abuse, are also provided for in sections 28(1)(c) and (d) of the Constitution.[77]

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[70] Currie and De Waal 291-311; Davis "Freedom and security of the person" in *South African Constitutional Law: The Bill of Rights* (eds Cheadle, Davis and Haysom) (2011) 7-1 – 7-17; Bishop and Woolman "Freedom and security of the person" in *Constitutional Law of South Africa* (eds Woolman, Bishop and Brickhill) (2012) 40-i – 40-99.

[71] See also Bonthuys *et al* "Gender" in *The Law of South Africa* (eds Joubert and Faris) (2005) 457 where the definition of reproductive health in the Beijing Declaration and Platform for Action, 1995, is quoted as follows: "Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people are able to have a satisfying sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so … It also includes sexual health, the purpose of which is the enhancement of life and personal relations, and not merely counselling and care related to reproduction and sexually transmitted disease."

[72] Currie and De Waal 315-335; Davis and Steenkamp "Privacy" in *South African Constitutional Law: The Bill of Rights* (eds Cheadle, Davis and Haysom) (2011) 9-1 – 9-18; McQuoid-Mason "Privacy" in *Constitutional Law of South Africa* (eds Woolman, Bishop and Brickhill) (2012) 38-i – 38-43.

[73] Currie and De Waal 566-598.

[74] See Ngwena "Access to health care as a fundamental right: The scope and limits of section 27 of the Constitution" 2000 *Journal for Juridical Science* 1-32; Pieterse "Children's access to health care services within and outside of the parent-child relationship" 2010 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 230-247; Van Bueren "Health" in *South African Constitutional Law: The Bill of Rights* (eds Cheadle, Davis and Haysom) (2011) 22-1 – 22-18; Bilchitz "Health" in *Constitutional Law of South Africa* (eds Woolman, Bishop and Brickhill) (2012) 56A-1 – 56A-47; O'Sullivan "Reproductive rights" in *Constitutional Law of South Africa* (eds Woolman, Bishop and Brickhill) (2012) 37-i – 37-28, specifically 37-18 – 37-21.

[75] Currie and De Waal 599-620; Skelton "Constitutional protection of children's rights" in *Child Law in South Africa* (ed Boezaart) (2009) 265-290; Sloth-Nielsen "Children" in *South African Constitutional Law: The Bill of Rights* (eds Cheadle, Davis and Haysom) (2011) 23-1 – 23-33; Friedman, Pantazis and Skelton 47-i – 47-47.

[76] See also Carstens and Pearmain *Foundational Principles of South African Medical Law* (2007) 176-180; Kassan and Mahery 221; Schäfer 153-159; Founding Affidavit of the first applicant in the *TBC* case 49-51.

[77] See Schäfer 130-138.

In terms of section 36 of the Constitution, the rights in the Bill of Rights may be lawfully restricted and limited:[78]

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

A two-staged approach must be followed to identify an infringement and to determine whether it is justified. In this regard, two questions must be answered, namely whether a right in the Bill of Rights has been infringed by law or conduct[79] and whether such an infringement can be justified as a permissible limitation.[80]

The Constitution provides the basic framework for the rights of children.[81] The details of these rights are contained in, *inter alia*, the Choice on Termination of Pregnancy Act, Children's Act, Sexual Offences Act and Child Justice Act.

7 2 Choice on Termination of Pregnancy Act 92 of 1996

The Preamble to the Choice on Termination of Pregnancy Act refers to the constitutional protection of the right to make decisions regarding reproduction and the right to security in, and control over, a person's body. It also determines that the state must provide reproductive health to all and provide

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78 This is referred to as a "justifiable infringement" (Currie and De Waal 164). See Currie and De Waal 163-188; Rautenbach and Malherbe *Constitutional Law* (2009) 342-357; Cheadle "Limitation of rights" in *South African Constitutional Law: The Bill of Rights* (eds Cheadle, Davis and Haysom) (2011) 30-1 – 30-18.

79 Cheadle states that it must be determined what the right's boundary is and whether the law or action crosses such boundary (30-3 – 30-8). The court in the *TBC* judgement examined the provisions of section 36 of the Constitution as it relates to the limitation of the rights of children by sections 15 and 16 of the Sexual Offences Act (pars 98-112). The court referred to the following cases on section 36 of the Constitution (par 98): *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), *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others* 2005 (3) SA 280 (CC), and *Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2003 (3) SA 345 (CC).

80 Currie and De Waal 166; Cheadle 30-3 – 30-16. This approach was also followed in the judgement in the *TBC* case (par 98).

81 See also Gallinetti and Waterhouse 9-5 – 9-8.

conditions under which the right to choose to have a pregnancy terminated may be exercised without fear or harm. The Choice on Termination of Pregnancy Act (administered by the Department of Health) repealed the Abortion and Sterilization Act in so far as it related to the termination of pregnancies. Section 1 of the Choice on Termination of Pregnancy Act defines "woman" as "any female person of any age" and therefore includes a female child of any age. With regard to legal consent to the termination of a pregnancy,[82] section 2(1)(a) of the Choice on Termination of Pregnancy Act provides that a woman may request the termination of her pregnancy during the first twelve weeks of her pregnancy.

Section 5(2) of the Choice on Termination of Pregnancy Act determines that only the consent of the pregnant woman is required. In the event that the woman is a child, she must be advised to consult with her parents, guardian, family members or friends. However, she will not be denied the termination of her pregnancy if she chooses not to consult them (subsection (3)).[83]

In *Christian Lawyers Association v The Minister of Health (Reproductive Health Alliance as* amicus curiae*)*,[84] the court (per Mojapelo J) stated that sections 9, 10, 11, 12(2)(a) and (b), 14 and 27(1)(a) of the Constitution[85] recognise females' right to self-determination and grant a right to every woman to choose whether or not to terminate her pregnancy.[86] Any distinction between women on the ground of age would invade the rights provided for in sections 9(1) and 9(3) of the Constitution.[87] A limitation on the freedom of any woman to have her pregnancy terminated will be a limitation of

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82 Within the abortion debate, the safe termination of a pregnancy is a medical matter; whether an abortion may be carried out is an ethical and religious matter; and the right to decide on the perseverance of a pregnancy is a legal matter (Lategan 140). Mhlanga sees the Choice on Termination of Pregnancy Act as promoting women's health (Mhlanga "Maternal, new born and child health: 30 years on" 2008 *South African Health Review* 123-124). See also Meyerson "Abortion: The constitutional issues" 1999 *South African Law Journal* 50-59; Van Oosten "The Choice on Termination of Pregnancy Act: Some comments" 1999 *South African Law Journal* 60-76; Mahery "Consent laws influencing children's access to health care services: Child health" 2006 *South African Health Review* 167-180; Himonga and Cooke 323-363; Skelton "Girls' socio-economic rights in South Africa" 2010 *South African Journal on Human Rights* 141-163; Rohrs "Termination of pregnancy and children: correspondence" April 2011 *South African Medical Journal* 210-211.

83 Subs (4) and (5) deal with instances where the woman cannot legally consent to a termination of a pregnancy as a result of being severely mentally disabled or being in a state of continuous unconsciousness. See also McQuoid-Mason "Medical professions and practice" in *The Law of South Africa* (eds Joubert and Faris) (2008) par 61. For a discussion on reproductive rights, see Bonthuys *et al* 457 and 458. S 129(1) of the Children's Act deals with the age of consent to medical treatment and surgical operations, but specifically states that these provisions are subject to s 5 of the Choice on Termination of Pregnancy Act. See also Sloth-Nielsen (2007) 7-31 – 7-33.

84 2005 (1) SA 509 (T). See also Bonthuys *et al* par 458; Carstens and Pearmain 88-114; Boezaart 13-15; Schäfer 192-195.

85 S 9 deals with the right to equality and protection against discrimination on certain grounds, s 10 with a person's dignity, s 11 with the right to life, s 12(2) with the right to bodily and psychological integrity, s 14 with the right to privacy, and s 27(1)(a) with the right to access to reproductive health care. See also 7 1 above.

86 Page 39.

87 Everyone has the right to equal protection and benefit of the law. No discrimination on any of the listed grounds may take place.

her fundamental rights and will only be valid if justified in terms of section 36(1) of the Constitution.[88] The court found that the relevant provisions of the Choice on Termination of Pregnancy Act serve the best interests of a pregnant child as they recognise and accommodate her individual position based on her intellectual, psychological and emotional state. If a female child is capable of giving informed consent (i.e. if she is capable and mature enough to form a free will, and fulfils the requirements of knowledge, appreciation and consent), she may consent to the termination of her pregnancy.[89] A rigid age-based approach without taking into account the child's individual characteristics would not suffice. As a result, the court found the relevant provisions to be constitutional.[90]

The Choice on Termination of Pregnancy Act therefore provides reproductive health care to all female children by granting them the opportunity to terminate their pregnancies if they comply with the requirements regarding the gestation period and the ability to provide informed consent. It is submitted that the Choice on Termination of Pregnancy Act, on the one hand, protects female children by providing them with safe terminations of their pregnancies, without the consent of their parents (which would, in certain instances, expose them to parental abuse). On the other hand, the Choice on Termination of Pregnancy Act provides female children with rights of autonomy and to have their decisions regarding the termination of a pregnancy respected.[91]

7 3 Children's Act 38 of 2005

The Children's Act (administered by the Department of Social Development) gives effect to some of the rights of the child contained in section 28 of the Constitution[92] and makes specific reference to the UNCRC and ACRWC.[93] Section 1 of the Children's Act defines "care", which includes "guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development".[94] Section 7 of the Children's Act provides for the best interests of the child standard and provides a number of factors that must be taken into account

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88 Page 47. See 7 1 above.

89 Page 48. See Sloth-Nielsen (2007) 7-31, 7-33 and 7-39 (this is also referred to as "evolving maturity"). For a detailed discussion of consent, see McQuoid-Mason (2008) 33 and 35. The court stated as follows on 36: "No woman, regardless of her age, may have her pregnancy terminated unless she is capable of giving her informed consent to the termination and in fact does so". Informed consent requires knowledge (of the nature and extent of the harm or risk), appreciation and consent (meaning subjective and comprehensive consent to the harm or risk and consequences) (36-37). Only a person with the intellectual and emotional capacity for the required knowledge, appreciation and consent can give valid consent. According to Van Oosten 67, informed consent has personal autonomy and self-determination as its underlying principle.

90 Page 49.

91 See 3 above, as well as Couzens 420.

92 See 7 1 above.

93 Long title of, and Preamble to, the Children's Act. S 2(c) deals with the objects of the Children's Act and states that it aims to give effect to the obligations regarding children in terms of the binding international instruments. See 6 above in this regard. For a general discussion of the Children's Act, see Heaton "The law of persons and family law" 2007 *Annual Survey of South African Law* 885-960. For a detailed discussion of the Children's Act, see Schäfer 53-70.

94 Par (e) of the definition of "care" in s 1 of the Children's Act.

when applying same, including the child's age, maturity, stage of development and intellectual, emotional and social development. Another relevant factor is the need to protect children from harm that may be caused by subjecting or exposing the child to exploitation and abuse.[95] Section 9 of the Children's Act states that the best interests of the child is of paramount importance in all matters relating to the child's care, protection and well-being. In terms of section 13 of the Children's Act, every child has the right to, *inter alia*, "have access to information on health promotion and the prevention and treatment of ill-health and disease, sexuality and reproduction", and the right to confidentiality.[96]

Chapter 7 of the Children's Act provides for the protection of children. The National Child Protection Register (Part A) is a record of, amongst others, reports of abuse or deliberate neglect of a child. The information is used to protect the relevant children from further abuse.[97] Part B contains information of persons who are unsuitable to work with children.[98]

Section 129 of the Children's Act deals with consent to medical treatment and surgical operations.[99] Section 129(1) of the Children's Act states that the section is subject to section 5(2) of the Choice on Termination of Pregnancy Act (dealing with the age of consent to the termination of a pregnancy).[100] In terms of section 129 of the Children's Act, a child may consent to medical treatment (including treatment for STDs) if he/she is over the age of twelve years and "of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment".[101] Section 130 of the Children's Act enables a child who is twelve years or older, or under the age of twelve years but who has "sufficient maturity to understand the benefits, risks and social implications of such a test", to consent to an HIV test after proper counselling.[102]

Section 134 of the Children's Act grants access to contraceptives to children over the age of twelve years[103] and provides that no person may refuse to sell condoms to such child, or refuse to provide condoms to such child if they are provided free of charge. Other types of contraceptives may be provided to a child twelve years or older without parental consent if requested by such child and

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95 Ss 7(1)(g), (h) and (l) of the Children's Act.
96 Ss 13(1)(a) and (d) of the Children's Act.
97 Ss 113 and 114 of the Children's Act.
98 S 118 of the Children's Act. See Sloth-Nielsen (2007) 7-1 - 7-17. There seems to be an overlap of Part B of the Register with the Sexual Offences Register as provided for in the Child Justice Act with regard to the persons whose particulars must be entered and consequences for such persons. The Children's Act and Sexual Offences Act are administered by two different government departments. See 7 4 below. See also Schäfer 393-407.
99 See also Skeen "Criminal law" in *The Law of South Africa* (eds Joubert and Faris) (2010) 63.
100 See 7 2 above.
101 S 129(2) of the Children's Act.
102 Ss 130(2)(a) and 132 of the Children's Act. Post-test counselling must also be provided. S 133 of the Children's Act states that information on the HIV/Aids status of a child must be kept confidential. There are, however, certain exceptions hereto. See also Schäfer 188-192.
103 See also Mahery (2006) 167-180; Skelton 141-163. Schäfer states that the reality of sexual experimentation and the risks involved outweighs the rights of parents to raise their children according to their own religious and moral views (186-187).

proper advice is provided to the child and the child is medically examined. Subsection (3) protects the child's right to privacy by providing that he/she is entitled to confidentiality when obtaining condoms, contraceptives or contraceptive advice (subject to section 110).[104] Section 134 is in line with General Comment No 4 of the Committee of the Rights of the Child[105] and non-compliance constitutes a criminal offence in terms of section 305(1)(c) of the Children's Act.[106]

Even though the Children's Act aims at the protection of children against exploitation and abuse, it also determines that children have the right to have access to information on health promotion, sexuality and reproduction. The Children's Act refers to the provision of guidance, advice and assistance to children by parents, guardians and caregivers. The legislature's viewpoint was to protect children by providing them with access to (confidential) health care services, advice, guidance and assistance, as well as the right to consent to HIV testing and to access contraceptives (the two last-mentioned rights are limited to children over the age of twelve years), and thereby granting them rights of autonomy.[107]

7 4 Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

The Sexual Offences Act (administered by the DoJCD) aims to deal with all legal aspects of sexual offences in a single statute.

Section 1 of the Sexual Offences Act provides that a child, for purposes of sections 15 and 16 of the Sexual Offences Act, refers to a person who is twelve years or older and under the age of sixteen years.[108] A child under the age of twelve years is unable to consent to sexual acts.[109] The term "sexual act" is defined as "an act of sexual penetration or an act of sexual violation".

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[104] S 110 deals with the reporting of abused or neglected children and children in need of care and protection.

[105] See 6 above.

[106] See Sloth-Nielsen (2007) 7-40 – 7-41. According to McQuoid-Mason, the section implies that children under the age of twelve years may be provided with condoms, but that such requests may be refused. However, contraceptives other than condoms may only be provided to children under the age of twelve years with parental or caregiver consent (see also McQuoid-Mason (2008) 36)). It must, however, be noted that children under the age of twelve years cannot consent to any sexual activities (s 57 of the Sexual Offences Act).

[107] See also Schäfer 54, and for the meaning of autonomy, 3 above.

[108] Therefore, adolescents. With regard to all other sections of the Sexual Offences Act, a child refers to a person under the age of eighteen years. According to Gallinetti and Waterhouse, there was a Portfolio Committee on Justice and Constitutional Development debate on the possibility of raising the age of consent from sixteen to eighteen years. It was agreed that the age of sixteen should be retained for both heterosexual and homosexual activities. Reasons included the relative maturity and responsibilities of children sixteen years and older, and the fact that the raising of the age could "jeopardise the entire category of statutory rape, which is primarily intended for the protection of vulnerable children from adults" (footnote omitted) (Gallinetti and Waterhouse 9-13 – 9-14).

[109] S 57 of the Sexual Offences Act.

"Sexual penetration" and "sexual violation" are defined as follows in section 1 of the Sexual Offences Act:

'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;

'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.

It is clear that these definitions are very wide. "Sexual violation" includes, amongst others, hugging, "simulating sex while fully clothed, touching or fondling the genitals or anus of another person, and using an object such as a feather, to touch the genitals or anus of another person", and "sucking the skin on the neck or stomach of a person in a sexual manner".[110]

Chapter 3 of the Sexual Offences Act deals specifically with sexual offences against children, and sections 15 and 16 of the Sexual Offences Act deal with consensual sexual acts with certain children between the ages of twelve and sixteen.[111] Sections 15 and 16 of the Sexual Offences Act deal directly with the age of consent to sexual acts and state as follows:[112]

> **15 Acts of consensual sexual penetration with certain children (statutory rape)[113]**
>
> (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.

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[110] Gallinetti and Waterhouse 9-17 – 9-18 (footnote omitted). See also 7 6 below for the applicants' and the court's view in the *TBC* case with regard to these definitions.
[111] Therefore, adolescents. See also Gallinetti and Waterhouse 9-8 – 9-21.
[112] See also Snyman 392-398; Skeen pars 61 and 412.
[113] It is submitted that the statement by Gallinetti and Waterhouse (9-11) that the term "statutory rape" is a misnomer as the acts do not resemble rape as consent is present, is correct.

Section 56 of the Sexual Offences Act contains a number of defences.[114] Subsection (2)(a) applies to both section 15 and 16 (Sexual Offences Act) offences and states that it is a valid defence if the child deceived the accused person into believing that such child was sixteen years or older at the time of the commission of the offence and the accused person reasonably believed this to be true.[115] A second defence applies only to section 16 of the Sexual Offences Act and provides that it is a valid defence if both accused persons were children and the age difference between them was two years or less at the time of the commission of the offence (section 56(2)(b) of the Sexual Offences Act).[116]

Section 54(1)(a) of the Sexual Offences Act provides for an obligation to report knowledge of the commission of sexual offences against children as it states "A person who has knowledge that a sexual offence has been committed against a child **must** report such knowledge immediately to a police official."[117] The penalty for non-compliance is very harsh, namely a fine or imprisonment for a period not exceeding five years, or both a fine and imprisonment.[118]

Chapter 6 of the Sexual Offences Act provides for the National Register for Sex Offenders.[119] In terms of section 41 of the Sexual Offences Act, the details of certain persons who have committed sexual offences against children and mentally disabled persons must be entered into the National Register for Sex Offenders. Such persons are prohibited from certain types of employment in order to protect children and mentally disabled persons against sexual offenders.[120] Section 50 of the Sexual

[114] See De Souza and Smythe "Section 56: Defences and sentencing" in *Sexual Offences Commentary* (eds Smythe and Pithey) (2011) 20-1 – 20-2; Gallinetti and Combrink 21-2 – 21-3. See also 7 6 below for the applicants' and the court's view in the *TBC* case with regard to the "irrationality" of the defences.

[115] This is called the "deception defence" (see 7 6 1 below).

[116] This is called the "close in age exemption" (see 7 6 1 below). According to Gallinetti and Waterhouse, this defence is available to children up to the age of eighteen years, as it refers to the general definition of "child" and not the limited definition applicable to s 15 and 16 of the Sexual Offences Act (9-19). It is submitted that their viewpoint is correct as a "child" is defined in section 1 of the Children's Act as "a person under the age of 18 years", except with regard to sections 15 and 16 where it refers to "a person 12 years or older but under the age of 16 years".

[117] Own emphasis added.

[118] S 54(1)(b) of the Sexual Offences Act. This is in line with article 19 UNCRC – see 6 above, as well as Sloth-Nielsen "Section 54: Obligation to report commission of sexual offences against children or people who are mentally disabled" in *Sexual Offences Commentary* (eds Smythe and Pithey) (2011) 18-1 (and 18-5 regarding the need for child/parent privilege, and the burden placed on health care providers). Subs (2), which deals with mentally disabled persons instead of children, has a further paragraph, which states that "(c) A person who in good faith reports such reasonable belief or suspicion shall not be liable to any civil or criminal proceedings by reason of making such report". See also Strode and Slack "Sex, lies and disclosures: Researchers and the reporting of under-age sex" July 2009 *Southern African Journal of HIV Medicine* 8-10; McQuoid-Mason "Mandatory reporting of sexual abuse under the Sexual Offences Act and the 'best interests of the child'" 2011 *South African Journal of Bioethics and Law* 74-78.

[119] See also Le Roux and Williams "Sections 40-53: National Register for Sex Offenders" in *Sexual Offences Commentary* (eds Smythe and Pithey) (2011) 17-1 – 17-44; Schäfer 407-415. There are numerous overlaps with information in the Child Protection Register – see 7 3 above.

[120] See also s 43 of the Sexual Offences Act.

Offences Act details the persons whose particulars must be included in the National Register for Sex Offenders.[121]

The Sexual Offences Act takes a protective approach and criminalises a wide variety of consensual sexual acts between children, some of which could be regarded as normal adolescent development. It states that if both parties are between the ages of twelve and sixteen years (i.e. adolescents) and the National Director of Public Prosecutions (hereinafter "NDPP") (in respect of section 15 of the Sexual Offences Act) or the Director of Public Prosecutions (hereinafter "DPP") (in respect of section 16 of the Sexual Offences Act) exercises his/her prosecutorial discretion and decides to prosecute, both children must be prosecuted.[122] If found guilty, the child's particulars must be entered into the National Register for Sex Offenders, which will seriously limit the child's future employment opportunities. In addition, the Sexual Offences Act obliges all persons with knowledge of the commission of a sexual offence against a child (even if both parties involved in the offence are children or under the age of eighteen years) to report such knowledge, failing which such person may be fined and imprisoned for a period up to five years. This obligation severely impacts on a child's ability to seek advice and guidance regarding sexual matters, as well as to access health care services, contraceptives and HIV testing services. It also hampers the ability of parents, guardians, caregivers, teachers, medical personnel, social workers and state officials (to name but a few) to openly and confidentially, discuss sexual matters with children and provide education, advice and guidance in this regard.

7 5 Child Justice Act 75 of 2008

The drafting of the Child Justice Act (administered by the DoJCD) is another direct consequence of South Africa's international obligations.[123] The Child Justice Act aims to protect children who come into contact with the criminal justice system. Section 3 of the Child Justice Act sets out the guiding principles of the Child Justice Act, including that "[a]ll consequences arising from the commission of an offence by a child should be proportionate to the circumstances of the child, the nature of the

[121] See *S v RB; S v DK* 2010 (1) SACR 447 (NCK), where the court found that the names of minor sexual offenders must also be recorded. See also *Director of Public Prosecutions, Western Cape v Prins and Others* 2012 (2) SACR 183 (SCA), where the Supreme Court of Appeal found that, in the event that an Act fails to provide for a specific sentence, section 271(6) of the Criminal Procedure Act 51 of 1977 empowers the courts to impose sentences. This case dealt specifically with s 5(1) of the Sexual Offences Act (sexual assault). It is submitted that the same principle applies to offences in terms of ss 15 and 16 of the Sexual Offences Act, as the Sexual Offences Act does not specifically provide for a penalty. See also the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act 6 of 2012 (which was assented to on 23 June 2012) which aims to, amongst others, address the issues relating to sentencing (section 5).

[122] As a s 15 (Sexual Offences Act) offence is more serious than a s 16 (Sexual Offences Act) offence, the NDPP (and not the provincial DPP) has a prosecutorial discretion regarding a s 15 (Sexual Offences Act) offence.

[123] See 6 above.

offence and the interests of society".[124] The minimum age of criminal capacity is set at ten years in section 7 of the Child Justice Act. Section 7(2) of the Child Justice Act determines that a child between the ages of ten years and fourteen years is presumed to lack criminal capacity.[125] The onus is on the state to prove otherwise.[126] Section 10 of the Child Justice Act sets out the factors that must be taken into account when considering whether or not to prosecute such a child, including the age and maturity of the child and the nature and seriousness of the alleged offence.[127]

One of the main focus areas of the Child Justice Act is the diversion away from formal court procedures of criminal matters involving children.[128] The objectives of diversion, as set out in section 51 of the Child Justice Act, are commendable and include dealing with children outside the formal criminal justice system, meeting the needs of the individual child and preventing the child from acquiring a criminal record. As the section 15 and 16 (Sexual Offences Act) offences committed by children[129] are seen to be "victimless crimes" (as the acts are consensual), some of the objectives seem not to be applicable to said offences, for example "encouraging the child to be accountable for the harm caused by him or her", "provide an opportunity to those affected by the harm to express their views on its impact on them", and "promote reconciliation between the child and the person or community affected by the harm caused by the child".[130] Section 52(1) states that diversion may be considered if the child acknowledges responsibility for the commission of the offence (but has not been unduly influenced to do so), if there is a *prima facie* case against the child, if the child (and, if available, his or her parent or guardian) consents to the diversion, and if the prosecutor or DPP, as the case may be, indicates that the matter may be diverted.

Section 53 of the Child Justice Act lists the available diversion options. Section 53(2) provides that a level one diversion option applies to offences referred to in Schedule 1 to the Child Justice Act. As the section 15 and 16 (Sexual Offences Act) offences fall under Schedule 1 to the Child Justice Act, a prosecutor may divert such a matter and may select a level one diversion option.[131] Level one

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[124] S 3(a) of the Child Justice Act.
[125] S 8 of the Child Justice Act provides that the minimum age must be reviewed within five years of the coming in operation of the Child Justice Act. This has not yet happened.
[126] In this regard, s 11(1) states as follows: "The State must prove beyond reasonable doubt the capacity of a child who is 10 years or older but under the age of 14 years to appreciate the difference between right and wrong at the time of the commission of an alleged offence and to act in accordance with that appreciation." See also Skelton and Badenhorst *The Criminal Capacity of Children in South Africa – International Developments & Considerations for a Review* (2011).
[127] This is particularly important regarding children between the ages of twelve and fourteen years who commit offences in terms of sections 15 and 16 of the Sexual Offences Act. See 7 4 above.
[128] See the definition of "diversion" in s 1 of the Child Justice Act. See also Gallinetti "Child justice in South Africa: The realisation of the rights of children accused of crime" in *Child Law in South Africa* (ed Boezaart) (2009) 635-664, specifically 656-658.
[129] See 7 4 above.
[130] Ss 51(b), (e) and (g) of the Child Justice Act.
[131] S 41 of the Child Justice Act.

diversion options are wide-ranging – from oral or written apologies, to community service.[132] The factors that must be taken into account when selecting a diversion order are set out in section 54 of the Child Justice Act. Section 55 of the Child Justice Act determines the minimum standards that are applicable to diversion. Of particular importance is section 55(2) of the Child Justice Act where it is stated, amongst others, that the diversion programme must "include an element which seeks to ensure that the child understands the impact of his or her behaviour on others, including the victims of the offence, and may include compensation or restitution".[133] Section 58 of the Child Justice Act deals with the consequences when a child fails to comply with a diversion order, whilst section 59 of the Child Justice Act states that a diversion order does not constitute a previous conviction. According to section 60 of the Child Justice Act, a register of children in respect of whom a diversion order has been made, must be established and maintained. A child justice court is also empowered to divert a matter in terms of section 67 of the Child Justice Act.

Even though the Child Justice Act provides protection to children who have allegedly committed a criminal act, it is submitted that such children will still, to some degree, come into contact with the criminal justice system, be it at the police station, during discussions with the prosecutor and the probation officer,[134] or in court.[135] In addition, even if a matter is diverted, non-compliance with the diversion order may lead to a conviction and a criminal record. Some of the guiding principles of the Child Justice Act and the section 55 (Child Justice Act) minimum standards applicable to diversion are not reconcilable with consensual adolescent sexual experimentation.

7 6 Constitutional challenge: *The Teddy Bear Clinic for Abused Children and RAPCAN v Minister of Justice and Constitutional Development and National Director of Public Prosecutions*[136]

In 2010, the Teddy Bear Clinic for Abused Children and RAPCAN[137] approached the North Gauteng High Court[138] to challenge the constitutionality of those aspects of the Sexual Offences Act "that criminalise consensual sexual activity between children, and the consequential reporting and registration as sex offender requirements"[139] (the so-called "impugned provisions").

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[132] S 53(3) of the Child Justice Act. Options may also be used in combination, see s 54(2)(a) of the Child Justice Act.
[133] S 55(2)(c) of the Child Justice Act.
[134] Every child who allegedly committed an offence must be assessed by a probation officer in terms of Chapter 5 of the Child Justice Act (s 34 of the Child Justice Act). See also Gallinetti and Waterhouse 9-20 – 9-21.
[135] See also par 79 of the Applicants' Heads of Argument in the *TBC* case.
[136] (73300/2010) [2013] ZAGPPHC 1 (4 January 2013).
[137] Resources Aimed at the Prevention of Child Abuse and Neglect.
[138] The *TBC* case was heard on 23-25 April 2012 and judgement was delivered on 15 January 2013.
[139] Par 24 of the judgement.

In the event that their application regarding the constitutionality of aspects of sections 15 and 16 of the Sexual Offences Act failed, the applicants challenged the constitutional validity of requirements relating to compulsory reporting of knowledge of offences committed by children under the age of eighteen years, and the registration of children as sex offenders in the National Register for Sex Offenders (aspects of sections 54(1)(a), 50(1)(a)(i) and 50(2)(a)(i) of the Sexual Offences Act)[140] to the extent that they are applicable to adolescents who engage in consensual sexual activities.[141] The constitutional challenge only related to consensual acts and not to non-consensual acts between children over the age of twelve years.[142]

The applicants were The Teddy Bear Clinic for Abused Children (first applicant) and RAPCAN (second applicant), and the respondents the Minister of Justice and Constitutional Development (hereinafter "Minister") (first respondent) and the NDPP (second respondent). The Trustees for the Time Being of the Women's Legal Centre Trust, the Tshwaranang Legal Advocacy Centre and the Justice Alliance of South Africa (hereinafter "JASA") were admitted as the first, second and third *amici curiae*, respectively.

7 6 1 Applicants' Heads of Argument

It is important to highlight a number of aspects of the applicants' case.[143] The definition of sexual violation includes a wide variety of acts which constitute generally accepted normal adolescent behaviour. The definition of sexual penetration includes many forms of consensual sexual play and exploration – some of which have no risk of pregnancy or the transmission of STDs.[144] The applicants included the Alan Flisher and Anik Gevers Expert Opinion in its Founding Affidavit, which provided support to their arguments relating to normative adolescent sexual behaviour, as well as statistics on the large number of adolescents affected by the impugned provisions.[145]

Even though the Minister stated that the purpose of the provisions is "to protect children from predatory adults", the applicants reasoned that the relevant parts of the impugned provisions go much further.[146] The applicants argued that criminal prosecutions would be selective and arbitrary –

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[140] See 7 4 above.
[141] Par 12 of the Applicants' Heads of Argument, pars 1 and 2 of the judgement.
[142] Pars 1-3, 6 and 8-10 of the Applicants' Heads of Argument. The case therefore does not deal with s 3-7 of the Sexual Offences Act (rape and sexual assault), 57(1) of the Sexual Offences Act (a child under the age of twelve years cannot lawfully consent to any sexual act), and the criminalisation of adults who engage in consensual sexual acts with adolescents. According to the applicants, the respondents misunderstood the nature of the application as they stated that the applicants wished to do away with the age of consent, the relief sought would render children vulnerable to sexual exploitation by adults and would exclude children from criminal prosecution for all sexual offences and the application sought to promote sexual activity between adolescents.
[143] Applicants' Heads of Argument in the *TBC* case.
[144] See also 7 4 above.
[145] The studies cited in the Alan Flisher and Anik Gevers Expert Opinion. See 3 above.
[146] Par 33.

exacerbated by the "wide and unguided prosecutorial discretion" contained in the Sexual Offences Act.[147] The applicants' interpretation, and view, of the relevant sections can be summarised as follows:

a Section 15 of the Sexual Offences Act and the offence of consensual sexual penetration:

i Where A is an adult and B an adolescent, only A will be guilty. This is justifiable as adolescents are vulnerable to the psychological influence of adults.

ii Where A is between sixteen and eighteen years old and B an adolescent, only A will be guilty, as a person sixteen years or older is seen as an adult for purposes of this section. This is a violation of A's rights if the age gap is two years or less.

iii Where A and B are adolescents, both are guilty. This is a violation of the rights of the adolescents.

b Section 16 of the Sexual Offences Act and the offence of consensual sexual violation, read with the section 56(2)(b) "close in age" defence:

i Where A is an adult and B an adolescent, only A is guilty. This is justifiable as adolescents are vulnerable to the psychological influence of adults.

ii Where A is between sixteen and eighteen years old and B an adolescent, A is only guilty if he/she is more than two years older than B. This is justifiable in light of the age disparity.

iii Where both A and B are adolescents, both A and B are guilty if there is an age gap of more than two years between them. This is not justifiable and constitutes a violation of the rights of the adolescents.

iv When comparing b ii with b iii, the result in b iii is "irrational, anomalous and absurd insofar as the position of the younger adolescent is concerned".[148] The applicants provided the following example: Where A is seventeen years old and B is fourteen years old, only A will be guilty, as the age difference is more than two years. However, if A is fifteen years old, and B is twelve years old, both A and B will be guilty, even though there is also an age difference of more than two years. Therefore, only if the older child is older than sixteen years, the younger child is protected.

c Section 56(2)(a) of the Sexual Offences Act relating to the "deception" defence: The applicants argued that the provisions are irrational in certain circumstances and provided the following example: Where B is a fifteen year old girl, A is a sixteen year old boy and C is a fifteen year old boy, and B deceives A and C into believing that she is sixteen years old,

147 Pars 18 and 19.
148 Par 29.

> neither A nor B may be convicted if B engages in sexual penetration with A. However, if B engages in consensual sexual penetration with C, both must be prosecuted if either is prosecuted. C may raise the defence of deception, and if successful, only B may be convicted.

The applicants submitted that the fact that the so-called "close in age exemption" contained in section 56(2)(b) of the Sexual Offences Act only applies to section 16 of the Sexual Offences Act is "arbitrary and irrational".[149] In addition, section 16 of the Sexual Offences Act is unconstitutional as (a) it criminalises conduct if the age difference of the adolescents is more than two years, (b) the younger child will also be prosecuted, and (c) there is no "deception" defence[150] for a child who is deceived into believing the other child falls within the two year age difference.[151]

The applicants stated that there is no rational connection or relationship between the limitation and its purpose, as is required by section 36(1)(d) of the Constitution.[152]

However, the respondents argued that the purpose of the impugned provisions are to (a) protect children from, amongst others, sexual predators, (b) recognise the realities of adolescent sexual experimentation between adolescents, (c) protect children from the criminal justice system, (d) provide legal certainty with regard to the age of lawful consent and (e) regulate and correct adolescent sexual behaviour.

The applicants' response to the respondents' argument was that the purpose indicated by the respondents is served by other provisions which are not at issue in this case, including, amongst others, sections 15 and 16 of the Sexual Offences Act where adults are involved, sections 3 to 7 of the Sexual Offences Act (non-consensual acts), section 18 of the Sexual Offences Act (sexual grooming), and sections 10, 19 and 20 of the Sexual Offences Act (child pornography). The impugned provisions result in sexual experimentation being criminalised. In addition, there is currently no uncertainty regarding the age of consent (section 57 (twelve years) and sections 15 and 16 of the Sexual Offences Act (sixteen years)). Lastly, the provisions do not deter adolescents from engaging in sexual acts.

The applicants submitted that "[t]he only evidence before [the] Court shows that the offences will exacerbate harm and risk to adolescents, by undermining support structures, preventing them from seeking help, and driving adolescent sexuality underground" and, as a result, the provisions are not rationally connected to the stated purposes.[153] The offences are disproportionate and ineffective, and less restrictive means could include education, advice and support to adolescents.

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[149] Par 61.
[150] The defence contained in section 56(2)(a) of the Sexual Offences Act, see 7 4 above.
[151] Par 62.
[152] See 7 1 above.
[153] Pars 99.7 and 99.8.

In the event that the court dismissed their constitutional challenges to sections 15 and 16 of the Sexual Offences Act, the applicants also attacked the constitutional validity of:

a Section 54(1)(a) of the Sexual Offences Act relating to reporting a child under eighteen who is a party to sexual acts stipulated in sections 15(1) or 16(1) of the Sexual Offences Act; and

b Sections 50(1)(a)(i) and 50(2)(a)(i) of the Sexual Offences Act to the extent that the particulars of a child under the age of eighteen years must be included in the National Register for Sex Offenders if convicted of a section 15(1) or 16(1) (Sexual Offences Act) offence.[154]

With regard to section 54(1)(a) of the Sexual Offences Act, the applicants indicated that the section is not aligned to the protective measures in sections 2, 4 and 5 of the Choice on Termination of Pregnancy Act (lawful consent of a child to the termination of her pregnancy if all other requirements are met, and confidentiality in this regard) and sections 134 of the Children's Act (confidential access to contraceptives to children over the age of twelve years), 13(1)(d) and 129(2) of the Children's Act (right to confidentiality with regard to health status, and consent to medical treatment (including for STDs)). In this regard, medical personnel and all other persons with knowledge have to report the child for possibly having committed a section 15(1) or 16(1) (Sexual Offences Act) offence. Section 54(1)(a) of the Sexual Offences Act is unconstitutional as it is "arbitrary and irrational and thus in violation of the rule of law" and violates a child's rights to human dignity, freedom and security of person, privacy, access to health care services, basic health care services and that his or her best interests be paramount.[155] The sections 50(1)(a)(i) and 50(2)(a)(i) of the Sexual Offences Act inclusion in the National Register for Sex Offenders of particulars of adolescents convicted of section 15 or 16 (Sexual Offences Act) consensual sexual acts with other adolescents is inappropriate, as (a) it will harm the adolescent's dignity, prospects of employment and stance in society and (b) the adolescent does not pose a danger to society. Sections 50(1)(a)(i) and 50(2)(a)(i) of the Sexual Offences Act violate children's rights to human dignity, freedom and security of the person, privacy, freedom of trade, occupation and profession, and the right that their best interests be paramount.[156]

[154] In the event that the court accepted their ss 15 and 16 challenges, the challenges relating to ss 54(1)(a), 50(1)(a)(i) and 50(2)(a)(i) of the Sexual Offences Act would be resolved.

[155] Par 118, with reference to ss 1, 10, 12, 14, 27(1)(a), 28(1)(c) and 28(2) of the Constitution (see 7 1 above). In addition, international law supports the applicants' argument – General Comment No 4, which, amongst others, states that measures must be taken to ensure access to information, preventative measures and care by adolescents (art 30), as well as access to sexual and reproductive health services (art 31) (par 119). See also 6 and 7 1 above.

[156] With reference to ss 1, 10, 12, 14, 22 and 28(2) of the Constitution.

7 6 2 Respondents' Heads of Argument

According to the respondents' Heads of Argument, the applicants were incorrect to isolate and challenge individual provisions of only one of the statutes that comprise the suite of statutes that protect and promote children's rights and interests (the Sexual Offences Act, Children's Act and Child Justice Act). The implementation, and not the content, of the provisions must be interrogated.

The fact that the prosecutorial discretion is located at a high level ensures compliance with the Children's Act's general principles and the Child Justice Act's diversion provisions. As there is no victim, it is unreasonable to prosecute only one participant.[157] The respondents stated that "[t]he primary focus of the section is not the *'victim-less offence'* of consensual sexual penetration between adolescent children. It is rather the offence of statutory rape where an adult has sex with a child".[158] The respondents argued that section 15(2) of the Sexual Offences Act does not create an offence if both parties are adolescents, as it only confers a prosecutorial discretion on the NDPP. It is highly unlikely that adolescents would be prosecuted for sexual offences, convicted and registered on the National Register for Sex Offenders in terms of section 50 of the Sexual Offences Act.

The respondents' interpretation of the applicants' proposed formulation (as contained in the remedy the applicants sought)[159] was that children over the age of sixteen must be exempt from having their names entered into the National Register for Sex Offenders. According to the respondents, the applicants' arguments relating to section 50(2)(a)(i) of the Sexual Offences Act had the same flaws. With regard to section 54(1)(a) of the Sexual Offences Act, the respondents indicated that, according to them, the applicants want sexual offences committed against children to remain unreported (and un-investigated and thus unresolved).

If the court found the impugned provisions to be unconstitutional, they could be saved in terms of section 36 of the Constitution, as they ensure the protection and well-being of children, promote and monitor sound physical, psychological, intellectual, emotional and social development and ensure early intervention in potentially harmful activities and coordinated involvement by all organs of state. As society should regulate sexual interaction between adolescents because of immaturity, the respondents argued that the legitimate government purpose "should trump any over-breadth".[160]

In their Additional Heads of Argument,[161] the respondents stated that the impugned provisions "do not seek to completely take away the personal and sexual autonomy rights of adolescents",[162] but merely delay such behaviour. Therefore, the infringement is minor and does not have "grave and

[157] Pars 48-49.
[158] Par 50.
[159] Pars 128-141 of the Applicants' Heads of Argument.
[160] Par 85.
[161] Respondents' Additional Heads of Argument in the *TBC* case.
[162] Par 22.1.

irreparable effects on the right concerned".[163] It is interesting to note that, with regard to the relationship between the limitation and its purpose,[164] the respondents argued that "[t]he impugned provisions aim to protect the child by deterrence and prevention but at the same time recognise adolescent experimentation".[165] They conceded that the limitation would be arbitrary to some extent as individuals reach physical and psychological maturity at different times, but stated that society has a vital interest in ensuring that children are protected. The legitimate government purpose is the prevention of teenage pregnancies, the protection against STDs and HIV/AIDS, "[e]xercising oversight and scrutiny over sexual behaviour of adolescents with a view to distinguishing through the prosecutorial discretion between harmful sexual behaviour and normal adolescent experimentation",[166] and the protection of adolescents against themselves and those that might prey on their vulnerability. In addition, an adolescent's consent does not really constitute consent, as the act and its consequences are not fully appreciated. There are no less restrictive means to achieve the above-mentioned purpose and the impugned provisions can be saved in terms of section 36(1) of the Constitution. The section 54 (Sexual Offences Act) reporting obligations are necessary and the entering of information in the National Register for Sex Offenders has sufficient safeguards (section 50 of the Sexual Offences Act).

It is submitted that the respondents' arguments in their Heads of Argument and Additional Heads of Argument warrant critique. Even if the impugned provisions are implemented in accordance with the Children's Act and the Child Justice Act, certain fundamental children's rights, as set out by the applicants, are infringed. The respondents conceded that the primary focus in the impugned provisions is on sexual acts committed by adults with children and stated that the impugned provisions do not create offences of consensual sexual violation and consensual sexual penetration between adolescents. According to them, the impugned provisions only confer a sole discretion on the NDPP or DPP, as the case may be, which discretion is in line with the principles contained in the Children's Act and the Child Justice Act. These arguments are not legally valid and go against the principle of legality, as a person can under no circumstances be convicted if the corresponding crime does not exist.

[163] Par 22.6.
[164] See 7 1 above where this requirement (contained in section 36(1)(d) of the Constitution) is referred to.
[165] Par 23.4, footnote omitted.
[166] Par 23.14.3.

Snyman states that the rationale behind the principle of legality is that the rules of criminal law must be clear and precise in order for people to know how to behave to avoid committing a criminal act.[167] He defines the principle as follows:[168]

> An accused may not be found guilty of a crime and sentenced unless the type of conduct with which he is charged:
>
> (a) has been *recognised* by the law *as a crime* [the *ius acceptum* principle];
>
> (b) *in clear terms* [the *ius certum* principle];
>
> (c) *before the conduct took place* [the *ius praevium* principle];
>
> (d) *without the court having to stretch the meaning of the words* and concepts in the definition to bring the particular conduct of the accused within the compass of the definition [the *ius strictum* principle], and
>
> (e) after conviction the imposition of *punishment* also *complies with the four principles* set out immediately above [the *nulla poena sine lege* principle].

It is submitted that, even if it is highly unlikely that an adolescent will be prosecuted, convicted and registered on the National Register for Sex Offenders, the child's rights will be violated. In turn, the current situation also leads to legal uncertainty, as it is impossible to predict what the NDPP or DPP, as the case may be, will decide in a specific case. The respondents also failed to examine and apply the relevant international children's rights instruments in their Heads of Argument. The argument that they do not seek to completely take away the personal and sexual autonomy rights of adolescents, but rather delay these rights, also has to fail, as adolescents are children between the ages of twelve and sixteen years and their sexual autonomy rights are evidently limited, and, in some instances, totally taken away by the impugned provisions.

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[167] Snyman *Criminal Law* (2008) 38. He also states that "[o]ne of the reasons why an excessively widely formulated criminal provision violates the principle of legality is that such a provision can serve as a smoke-screen behind which the state authority can 'hide' a particular type of act which it wishes to proscribe but which, for tactical reasons, it does not wish to name expressly" (42-43). See *Director of Public Prosecutions, Western Cape v Prins and Others* 2012 (2) SACR 183 (SCA) pars 6-17, where the principle is explained in detail.

[168] Snyman 36-37. The principle is also referred to as the *nullum crimen sine lege* principle and dictates that a "punishment may only be inflicted for contraventions of a designated crime created by a law that was in force before the contravention" (Burchell and Milton *Principles of Criminal Law* (2005) 94). See also Michelman "The rule of law, legality and the supremacy of the Constitution" in *Constitutional Law of South Africa* (eds Woolman, Bishop and Brickhill) (2012) 11-i – 11-44 (especially 11-2 where he refers to s 1(c) of the Constitution and the rule of law).

7 6 3 Third *amicus curiae*'s Heads of Argument

Only the third *amicus curiae*'s arguments are discussed, as the first and second *amici curiae* supported the submissions and evidence of the applicants, but focussed on the right to equality and the right to access to health care services.

JASA, as the third *amicus curiae*, argued in its Heads of Argument[169] that sections 15 and 16 of the Sexual Offences Act are constitutionally valid, but did not support the obligatory prosecution of both children. Only adolescents (up to sixteen years of age) should be immune from the provisions of sections 50(1)(a)(i), 50(2)(a)(i) and 54(1)(a) of the Sexual Offences Act. Section 56(2)(b) of the Sexual Offences Act should be declared invalid. The court should read in into section 16(1) of the Sexual Offences Act: ", unless A is younger than 18 years of age and B is two years or less younger than A at the time of the sexual violation".[170] According to JASA, the infringement of the child's rights to dignity, privacy and freedom is justifiable. The legislation is an "expression of public *mores* and values tied to legal prohibition and criminal sanction".[171] The aims of the impugned provisions, as set out by the Minister, are achieved if they are read with the Children's Act and the Child Justice Act, as they:

a Protect children from sexual exploitation – not only with regard to adults, but also peers;

b recognise sexual experimentation by allowing sexual activities which fall short of penetration if the parties fall within the two year age gap;

c create certainty with regard to age; and

d provide protection from the criminal justice system through diversion and the high level discretion, where the personal circumstance of the child will be taken into account.

JASA stated that "[h]ealthy attitudes to sexual behaviour and development are promoted by indicating to adolescents that: (a) penetrative sexual activity is not appropriate for persons under the age of 16; and (b) non-penetrative sexual activity should be confined to peers".[172]

According to JASA, a court must balance the short-term interests of the child against his/her long-term interests and the interests of one child against the best interests of children generally. Other rights examined by JASA included the rights to dignity (to "protect children from the deleterious consequences of precocious sexual activity")[173] and privacy and freedom.[174] JASA argued that the prosecutorial discretion is a system of inherent flexibility and subject to the Constitution. The infringement is justified, but the sections 15(2)(a) and 16(2)(a) (Sexual Offences Act) obligation to

[169] JASA's Heads of Argument in the *TBC* case.
[170] Par 11.
[171] Par 34.
[172] Par 44.
[173] Par 90. See also 7 1 above.
[174] Pars 85-100.

charge both children and certain aspects relating to the National Register for Sex Offenders (sections 50(1)(a)(i) and 50(2)(a)(i) of the Sexual Offences Act) and the reporting requirements (section 54(1)(a) of the Sexual Offences Act) are unconstitutional.[175]

7 6 4 High Court judgement

Judgement in the *TBC* case was handed down by Rabie J on 15 January 2013. The judgement examined the the arguments of the applicants, respondents and *amici curiae*, as well as the rights relevant to the matter at hand. In conclusion, the court made an order.

7 6 4 1 Court's analysis of the applicants' case

The court summarised the *status quo* as follows:[176]

> Subject to certain narrow defences in section 56(2) of the [Sexual Offences] Act, these sections also criminalise consensual acts of sexual penetration and sexual violation between: […] 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 […] two children aged 12 to 15 years.

It is interesting to note that the High Court judgement is by and large a reflection of the arguments raised by the applicants.[177]

The court stated as follows:[178]

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

After examining the consequences of the provisions dealing with the National Register for Sex Offenders and the provisions dealing with the reporting requirements,[179] the court stated that section 54 of the Sexual Offences Act (relating to the obligatory reporting of sexual offences committed against children) may in future become the subject of a separate constitutional challenge, but that its effects play a role in considering whether the impugned provisions are constitutional.[180]

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[175] Pars 119-120.
[176] Pars 22-23.
[177] Pars 25-27 and 30-40. Compare eg pars 75-77; 78-82; 91; 93-96; 98; 110; 111; 112; and 123 of the judgement with pars 43-48; 49-57; 83; 83; 89; 101; 103; 104-105; and 132-133 and 145 of the applicants' Heads of Argument, respectively.
[178] Par 41.
[179] Pars 42-46.
[180] Par 46. See 8 and 9 below.

The court quoted paragraphs 51 to 63 of the applicants' Founding Affidavit, in which the applicants argued, amongst others, that adolescents are often not yet fully developed on a cognitive and emotional level and need guidance with regard to their developing sexuality; the impugned provisions go too far as it also criminalises developmentally healthy acts; the unintended consequences of the impugned provisions are that they promote unhealthy sexual behaviour; adolescents will be discouraged from seeking help and advice regarding their sexuality; and there is a stark contrast between the impugned provisions and sections 5(2) of the Choice on Termination of Pregnancy Act[181] and 134 of the Children's Act,[182] which aim to promote access by teenagers to reproductive and sexual health services.[183]

The court concurred with the applicants' arguments regarding experiences relating to the criminal justice system by victims and offenders.[184] Children would be regarded as sex offenders and exposed to public humiliation and stigma. This would cause emotional stress and would contribute to a negative attitude towards sexual matters.[185] The court continued by summarising the applicants' conclusions regarding the impugned provisions:[186]

> …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.

The court stated that the impugned provisions have serious implementation difficulties and cause real damage to children. In addition, the provisions will probably prevent adolescents from seeking help in fear of being charged, leading to risky behaviour and unhealthy sexual contact.[187] The court referred to the applicants' argument that the impugned provisions may discourage the pursuit of rape charges by both victims and the NPA – it would be easier for the NPA to prove a section 15 (Sexual

[181] See 7 2 above.
[182] See 7 3 above.
[183] Par 49.
[184] Par 50.
[185] Par 50.
[186] Par 51.
[187] Pars 52-53.

Offences Act) offence, than a section 3 (Sexual Offences Act) (rape) offence. Where the alleged rapist is under the age of sixteen years, the victim must also be charged with contravention of section 15 of the Sexual Offences Act – meaning that the victim must prove that the sex was non-consensual, failing which he/she would also be convicted. This will result in discouraging the reporting of rape.[188]

7 6 4 2 Court's analysis of the respondents' case

The respondents' primary argument, as identified by the court, was that there is no infringement of any constitutional rights by the impugned provisions if the impugned provisions are read with the constitutional safeguards contained in the relevant provisions of the Children's Act[189] and the Child Justice Act.[190] According to the court, the respondents' main submission was that the impugned provisions:[191]

> …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.

The respondents argued that the best interests of children would weigh heavily when the prosecutorial discretion is exercised, often resulting in diversion.[192] A constitutionally valid interpretation of sections 15 and 16 of the Sexual Offences Act is therefore, according to the respondents, possible.

The court replied to this argument by stating as follows:[193]

> 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.

7 6 4 3 Court's analysis of the third *amici curiae*'s arguments

The third *amicus curiae* (JASA)[194] argued that adolescents need to be protected against adults and themselves,[195] to which the applicants replied that there is a need to be open and honest about teenage

[188] Par 54.
[189] Par 62.
[190] Pars 61-65.
[191] Par 67.
[192] Par 68.
[193] Par 71.
[194] As stated in 7 6 3 above, the first and second *amici curiae* supported the submissions and evidence of the applicants, but focussed on the right to equality and the right to access to health care services.
[195] Pars 55-56.

sexuality and to allow adolescents to make informed choices regarding the age at which to start exploring their sexuality and having sex – to use the criminal justice system to deal with adolescent sexuality will marginalise children and will have harmful effects. The court indicated that it is currently extremely difficult to inform children and to attempt to persuade them to take the best decisions. In this regard, the importance of the relationship of trust was reiterated by the court.[196]

7 6 4 4 Court's examination of the relevant rights

The court found that the impugned provisions violated the section 28(2) constitutional right relating to the paramountcy of the child's best interests, in that they may cause harm to children and "constitute an unjustified intrusion of control into the intimate and private sphere of children's personal relationships".[197] The court referred to section 10 of the Constitution relating to human dignity and agreed with the applicants' arguments in this regard. (The court stated that the findings by the Constitutional Court in *National Coalition for Gay and Lesbian Equality v Minister of Justice*[198] are also relevant to the criminalisation of the consensual sexual conduct between children and stigmatise and degrade children on the basis of their consensual sexual conduct.)[199] In addition, the court referred to section 12 of the Constitution relating to freedom and security of the person.[200] With regard to the constitutional rights affected by the impugned provisions, the court came to the same conclusion as the applicants. The court's findings in this regard can be summarised as follows:

a The impugned provisions:[201]

> …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

and

[196] The court stated as follows: "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 [*sic*] 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 led and guided on the right path, not frightened or intimidated into avoiding the topic" (par 60).

[197] Par 74. See 7 1 above.

[198] 1999 (1) SA 6 (CC), with regard to (adult) sexual autonomy and the right to dignity.

[199] Pars 75-77. See 7 1 above.

[200] Pars 78-82. See 7 1 above.

[201] Pars 83 and 84, respectively.

> …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. … Criminalising these activities undermine the best interests and rights of the children concerned and of children generally.

b Sections 15 and 16 of the Sexual Offences Act:[202]

> …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.

c The fact that children are either not prosecuted or diverted, does not avoid the trauma and harm of coming into contact with the criminal justice system, impacting on their dignity and privacy, and resulting in victimisation.[203]

The court agreed with the applicants' argument that protective measures contained in other legislation do not afford complete protection to the child. The child must choose between acknowledging responsibility and possibly being diverted, or facing a trial. The complete process invades children's rights. It is traumatic and inappropriate as there is no victim and therefore there should be no offender. With regard to the prosecutorial discretion, the court did not accept the respondents' argument that, instead of attacking the constitutionality of the provisions, so-called "bad" prosecutorial decisions should rather be subjected to judicial review. The court made it clear that judicial review would in most cases not protect children.[204] Taking a strong stance, the court found that "prosecutorial discretion could never cure the existence of constitutionally invalid criminal offences"[205] and "prosecutorial discretion similarly only creates the possibility of non-prosecution or diversion. The possibility of prosecution and conviction remains".[206] No statutory guidance was provided for the exercise of the judicial discretion, or on how to determine whether adolescent sexual development is permissible and acceptable, and "[s]ince 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".[207] The directives[208] are vague and lack guidance regarding its

[202] Par 83.
[203] Par 85.
[204] Pars 87-89.
[205] Par 90.
[206] Par 91. The same arguments were submitted by the applicants.
[207] Par 92.
[208] See par 85 of the Applicants' Heads of Argument.

exercise.[209] As a result, "the existence of the prosecutorial discretion does not save the impugned provisions from unconstitutionality".[210]

The court continued by examining whether the limitations on the rights referred to are justified in light of section 36(1) of the Constitution.[211] The evidence put forward by the applicants and the *amici curiae* indicates that the impugned provisions severely limit certain constitutional rights. The limitations are not rationally related to the purpose they seek to achieve and less restrictive means are available.[212] The court agreed with the applicants that the impugned provisions are not rationally connected to the purposes set out by the respondents[213] and that in the event that children are charged under said provisions, they would be severely harmed. The reality of sexual experimentation between adolescents is not recognised and is rendered a criminal offence. The impugned provisions are not necessary to provide certainty regarding the age of consent.[214]

The court also referred to the fact that the respondents conceded that the state does not have a legitimate interest in the prevention of sexual behaviour that is healthy[215] and stated that the provisions that render such sexual behaviour a criminal offence are therefore "overbroad".[216]

According to the court, the "less restrictive means" test in section 36(1)(e) of the Constitution had not been satisfied and that the limitations could not be permitted.[217] The impugned provisions will not ameliorate the risks involved in sexual conduct, but will rather exacerbate the harm and risks as the provisions concerned will undermine support structures and prevent children from seeking advice and support. This reiterates the fact that there is no relation between the limitation and its purpose.[218] The impugned provisions are "extraordinarily broad" and "goes beyond what is necessary to achieve the primary purpose of the provisions".[219] Many of the acts are committed by large numbers of normal adolescents, are not harmful to anyone involved and are developmentally normative and healthy.[220] The court agreed with the applicants' argument that:[221]

> [t]he 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.

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209 Par 94.
210 Par 97. See 7 1 above.
211 Par 98. See 7 1 above.
212 Par 103.
213 Par 104.
214 Pars 105-107.
215 Pars 107-108.
216 Par 108.
217 Par 108. See 7 1 above.
218 Par 109 (as required by s 36(1)(d) of the Constitution).
219 Par 111.
220 Par 111.
221 Par 112.

Other offences serve the purposes and other methods can be used to encourage adolescents to lead both healthy and responsible sexual lives.[222]

As the court found the impugned provisions to be unconstitutional, it did not examine the provisions relating to reporting requirements and the National Register for Sex Offenders (sections 50(1)(a)(i), 50(2)(a)(i) and 54(1) of the Sexual Offences Act).[223]

7 6 4 5 High Court order and High Court amendments

With regard to the remedy, the court once again supported the applicants' stance[224] and confirmed that reading in would be the best option as it would allow sections 15 and 16 of the Sexual Offences Act to still serve their primary purpose (i.e. the protection of children from predatory adults). It would not be in the interests of justice or the interests of the adolescents subjected to the unconstitutional and invalid criminal prohibitions, to refer the matter to the legislature.[225] The tests laid down by the cases referred to by the applicants[226] for reading in, were complied with.[227] The court made the following order (b. and d. below hereinafter "High Court amendments"):[228]

a A declaratory order that sections 15 and 56(2)(b) of the Sexual Offences Act and the definition of "sexual penetration" in section 1 of the Sexual Offences Act are inconsistent with the Constitution and invalid to the extent that they (a) criminalise an adolescent ('A') for engaging in an act of consensual sexual penetration with another adolescent ('B'), and (b) criminalise a child ('A') who is between sixteen and eighteen years of age for engaging in an act of consensual sexual penetration with an adolescent ('B') who is two years or less younger than A.

b Section 15 of the Sexual Offences Act will read as follows (subject to possible confirmation by the Constitutional Court):

> 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.

c A declaratory order that sections 16 and 56(2)(b) of the Sexual Offences Act and the definition of "sexual violation" in section 1 of the Sexual Offences Act are inconsistent with

[222] Par 112.
[223] Pars 120-121.
[224] Pars 113-117.
[225] Par 118.
[226] Par 137 of the Applicants' Heads of Argument.
[227] Par 119.
[228] Par 123.

the Constitution and invalid, to the extent that they criminalise an adolescent ('A') for engaging in an act of consensual sexual violation with another adolescent ('B'), where there is more than a two year age difference between A and B.

d Section 16 of the Sexual Offences Act will read as follows (subject to possible confirmation by the Constitutional Court):

> 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.

The matter has been referred to the Constitutional Court for confirmation by the Constitutional Court in terms of section 157(5) of the Constitution. No interim order was made. The matter is set down to be heard on 30 May 2013. Until the Constitutional Court decides on the matter, the *status quo* continues (i.e. the situation remains as before the High Court amendments).

8 Critical analysis

A number of points of critique regarding the current statutory framework and the *TBC* judgement and the *status quo* need to be highlighted.

8 1 Critical analysis of the current statutory framework

The Constitution[229] provides, amongst others, for the right to human dignity, privacy and freedom and security of the person (*inter alia* the right to bodily and psychological integrity, including the right to make decisions regarding reproduction). It also provides for access to health care services, including reproductive health care. In addition, the best interests of the child has been elevated to a principle of paramountcy.

The 1996 Choice on Termination of Pregnancy Act[230] is a liberal piece of legislation with a clear focus on the autonomy rights of female children. It provides for the right of female children of any age to consent to the termination of a pregnancy if all the requirements are met. The legislature decided that if the female child is able to make an informed decision, her consent will be sufficient during the first twelve weeks of her pregnancy.[231] She also has the right to confidentiality.

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[229] See 7 1 above.
[230] See 7 2 above.
[231] The child must be advised to consult with her parents, but their consent is not required by law. It is submitted that this approach is correct, as the child herself should be afforded the opportunity to decide on the termination of a pregnancy. The Choice on Termination of Pregnancy Act therefore makes provision for guidance and advice by parents (if the child decides to consult them), but does not make her consent dependent on their consent.

In terms of the 2005 Children's Act,[232] persons who are responsible for the care of a child (i.e. parents, guardians and caregivers) must guide, advise and assist such child with regard to the decisions he/she has to make. A child's age, maturity, stage of development, as well his/her intellectual, emotional and social development must be taken into account when determining the best interests of such child. A child must have access to information regarding sexuality and reproduction, and has clear rights from a young age with regard to consenting to medical treatment and HIV testing, as well as to access to contraceptives. In addition, the child has the right to confidentiality. The Children's Act took a liberal (and realistic – based on the prevalence of sexual acts by children)[233] view of the decision-making powers of children regarding their health and their sexuality. The autonomy rights of children are protected by the Children's Act.

Taking into account the fact that both the Choice on Termination of Pregnancy Act and the Children's Act take an open-minded approach with regard to a relatively young child's right to consent to a number of serious matters, such as the termination of a pregnancy, medical treatment, HIV testing and contraceptives, it is surprising that the legislature subsequently (in 2007) opted for a more conservative and paternalistic approach to matters relating to sexual acts between children. Sections 15 and 16 of the Sexual Offences Act[234] deal with consensual sexual acts with adolescents, including acts between adolescents. In terms of section 15 of the Sexual Offences Act, a person who commits an act of sexual penetration with an adolescent is, despite the consent of such adolescent, guilty of the offence of having committed an act of consensual sexual penetration with a child. Section 16 of the Sexual Offences Act provides that a person who commits an act of sexual violation with an adolescent is, despite the consent of such adolescent, guilty of the offence of having committed an act of consensual sexual violation with a child.

It is important to note that the person who commits the offence does not necessarily need to be an adult – adolescents and children between the ages of sixteen and eighteen years can also be offenders.[235] There is a prosecutorial discretion applicable to these sections if both parties were between the ages of twelve and sixteen years (i.e. adolescents) (for a section 15 (Sexual Offences Act) offence, the NDPP's and for a section 16 (Sexual Offences Act) offence, the DPP's discretion). However, this will lead to divergent decisions and to children coming into contact with the criminal

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[232] See 7 3 above.
[233] See 3 above.
[234] See 7 4 above. See also Gallinetti and Waterhouse 9-10 – 9-21.
[235] The DoJCD, in an info sheet on the Sexual Offences Act (*The New Sexual Offences Act – Protecting Our Children from Sexual Predators* (n.d.)), states that both s 15 and 16 of the Sexual Offences Act were drafted to criminalise acts by *adults*. In addition it states that "children who engage in certain acts with each other, such as kissing, cannot be prosecuted for doing so if both agreed to such acts and the age difference between the two children is not more than two years. The Act even goes further to ensure that children who innocently engage in certain acts with each other are not prosecuted by affording the Directors of Public Prosecutions with the discretion to decide whether prosecutions should be instituted or not in those cases where there are two children involved". Combrink argues that the safeguards are sufficient ("And seal it with a kiss ..." 2008 *Article 40* 4-5).

justice system at least during early investigations.[236] The reality that many children are involved in sexual experimentation has not been taken into account by the legislature. There is one defence applicable to section 15 of the Sexual Offences Act (the "deception" defence) and two to section 16 of the Sexual Offences Act (the "deception" and "close in age" defences), leading to the infringement of children's rights. There is an obligation on a person with knowledge of a sexual offence that has been committed to report said offence to the South African Police Service and the particulars of a person convicted of a section 15 or 16 (Sexual Offences Act) offence must be inserted in the National Register for Sex Offenders (prohibiting such a convicted person from certain types of employment).[237] These reporting obligations also, in effect, limit the child's rights to consent to the termination of a pregnancy, to access contraceptives and confidential contraceptive advice and to consent to HIV testing. It also limits the ability of adults to provide children with sex education, advice and guidance. It aims at protecting children, but, in doing so, deprives them of their rights of autonomy.

An analysis of the Child Justice Act[238] as it relates to section 15 and 16 (Sexual Offences Act) offences committed by children clearly illustrates that numerous challenges arise when the Child Justice Act is applied to such matters. A child between the ages of twelve and fourteen years is presumed to lack criminal capacity. In order to rebut this presumption, the state must prove, beyond reasonable doubt, that the child had the capacity to, firstly, distinguish between right and wrong during the commission of the alleged offence, and, secondly, act accordingly.[239] This implies that the child must have known that the act committed was wrong. Thus, a matter can only be diverted if the child had criminal capacity.[240]

It is submitted that a large portion of the South African population between the ages of twelve and eighteen years see sexual experimentation as normative behaviour, and, therefore, not wrong.[241] As a result, most children in this age group will not understand why they must be held accountable. It is, in addition, also clear that diversion may only be considered if the child in question acknowledges responsibility for the offence (the same arguments relating to children between the ages of fourteen and sixteen years also apply to children between the ages of sixteen and eighteen years).[242] The diversion programme must, amongst others, ensure that the child understands the impact of his or her

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[236] Gallinetti and Waterhouse 9-12.
[237] In *S v RB; S v DK* 2010 (1) SACR 447 (NCK), the court stated that minors are not excluded from the provisions dealing with National Register for Sex Offenders.
[238] See 7 5.
[239] Skelton and Badenhorst 19. See also Snyman 178-181; Badenhorst *Overview of the Implementation of the Child Justice Act, 2008 (Act 75 of 2008): Good Intentions, Questionable Outcomes* (2011) 26-30.
[240] Skelton and Badenhorst 25.
[241] See 3 above. See Snyman 123-127 where he states that the consent of A (the so-called "victim") may in certain instances render B's (the offender) otherwise unlawful conduct lawful. However, it must be noted that the sections 15 and 16 (Sexual Offences Act) crimes do not recognise consent as a ground of justification. He further states that "it is difficult to pinpoint the dividing line between harm to which one may and harm to which one may not consent" (125).
[242] Badenhorst 29.

behaviour on the victim. This, it is submitted, is irrelevant, as the section 15 and 16 (Sexual Offences Act) offences committed by children constitute victimless crimes.

In the event of a diversion order not being granted or not being complied with, the matter may go to trial. If the child concerned is convicted, he/she will have a criminal record. In order to avoid this, it is likely that many children will consent to diversion. However, it must be borne in mind that if the act was consensual, it is probable that the parties will not provide evidence against each other. In addition, there will in most instances be no witnesses. This will result in the state's case being weak. As such, the state will then have difficulty proving that the offence was committed beyond reasonable doubt, resulting in an acquittal. It is submitted that most children alleged to have committed a section 15 or 16 (Sexual Offences Act) offence will not be provided with proper legal advice, and, as a result, will, often to their detriment, opt for diversion if given the option.

The provisions of section 5 of the Choice on Termination of Pregnancy Act and section 134 of the Children's Act have an indirect relationship with the legal ability of children to consent to sexual acts as they provide for consent to the termination of pregnancies and access to contraceptives, while sections 15 and 16 of the Sexual Offences Act deal directly with the legal ability of children to consent to sexual acts. In the analysis and discussion of the different statutory provisions, it has been shown that these provisions are, indeed, in contrast to one another, as different ages of consent are provided for in the various Acts.

To summarise, there are a number of discrepancies between the provisions of the Sexual Offences Act and the UNCRC, ACRWC and the other relevant national Acts (the Choice on Termination of Pregnancy Act, Children's Act and the diversion provisions of the Child Justice Act). In terms of the UNCRC and ACRWC, children should have the right to seek and receive information and should have the freedom of thought and conscience and the right to receive sex education and information about sexuality. The Constitution provides for the right to make decisions regarding reproduction and to access reproductive health care. The 1996 Choice on Termination of Pregnancy Act enables a female child to decide on the termination of a pregnancy. In terms of the 2005 Children's Act, a child has the right to information on sexuality and reproduction. Children above the age of twelve years have the right to access to contraceptives. Children also have the right to confidentiality in this regard. Notwithstanding these rights of autonomy, the 2007 Sexual Offences Act criminalises certain consensual sexual acts between children and provides for the mandatory reporting thereof.[243] This makes two-sided communication with adolescents about sexual matters almost impossible and impacts on a child's rights regarding the termination of a pregnancy and contraceptives. As a result, there is

[243] Sloth-Nielsen (2011) 18-6. See also McQuoid-Mason "Some consent and confidentiality issues regarding the application of the Choice on Termination of Pregnancy Act to girl-children" June 2010 *South African Journal of Bioethics and Law* 12-15; McQuoid-Mason (2011) 74-78.

an urgent need for statutory reform in order to align the Sexual Offences Act with the Choice on Termination of Pregnancy Act and the Children's Act.

8 2 Critical evaluation of *The Teddy Bear Clinic* judgement and the *status quo*

From the analysis of the international children's rights framework[244] and the current national statutory framework,[245] it is clear that the *status quo* (prior to the possible confirmation of the High Court amendments by the Constitutional Court) is untenable as there are numerous statutory discrepancies, leading, amongst others, to legal uncertainty. In this sense, the judgement in the *TBC* case can be applauded.[246]

However, three main issues remain unaddressed by the High Court amendments in the *TBC* case. Firstly, the provisions in the Choice on Termination of Pregnancy Act relating to the child's right to consent to the termination of a pregnancy and the Children's Act relating to the child's right to access contraceptives, are still, in effect, in contrast to the High Court amendments, as these provisions still send out contradictory messages and lead to legal uncertainty: In terms of the Choice on Termination of Pregnancy Act, female children of any age can consent to the termination of a pregnancy, while children over the age of twelve years still have the right to access contraceptives in terms of the Children's Act (if all requirements are met). However, the High Court amendments provide that if one of the parties is between the ages of sixteen and eighteen years, and the age gap between such party and the younger child is more than two years, the younger child still cannot legally consent to sexual penetration or sexual violation.[247]

Secondly, the diversion provisions of the 2008 Child Justice Act need to be amended as they are not, in totality, relevant to consensual sexual acts between children, and still, to a certain degree, expose children to the criminal justice system.

Thirdly, the analysis of the international instruments, the Constitution and the Children's Act, indicates that children have the right to bodily and psychological integrity, to access reproductive health care and to receive information regarding sexuality and reproduction (both from the state and parents, guardians and caregivers). In addition, children have certain rights relating to confidentiality.

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[244] See 6 above.
[245] See 7 above.
[246] See also De Vos *Why the Criminalisation of Consensual Sexual Exploration between Teenagers is Unconstitutional* (17 January 2013). It is disappointing that the Department of Social Development, as the administering department of the Children's Act (and responsible for the Child Protection Register) was not joined.
[247] Provided that none of the defences are applicable. McQuoid-Mason refers to the Canadian *Criminal Code R.S.C., 1984, c. C-46*, which provides that children between the ages of twelve and thirteen can consent to sexual activity with a person not more than two years older than them. A child between the ages of fourteen and fifteen years can consent to sexual activity with a partner who is no more than five years older than them (s 150.1) (McQuoid-Mason (2011) 74-78). It is submitted that these provisions are too wide, and will expose children to sexual abuse and sexual exploitation.

A 2009 report by the Human Sciences Research Council[248] analysed trends in teenage fertility and indicated that policy instruments related to information dissemination, family planning services and expanding access to education, had a profound impact on teenage pregnancy rates in the country. The report contained a number of recommendations and stated that sex education plays a major role in prevention. However, a comprehensive approach, advocating not only abstinence, but also safe sex practices, is preferred.[249] A statement by Freeman that "if you withhold information from a child it is less likely they can make an informed decision" is also relevant.[250] Eriksson[251] states that "[t]he most significant measure to reduce adolescent pregnancy and unsafe abortion would be to make contraceptive services and information, as well as education in general, accessible to adolescents world-wide".[252] Eriksson[253] also discussed the European Court of Human Rights judgement in *Kjeldsen, Madsen and Pedersen v Denmark*,[254] where parents were opposed to compulsory sex education by the state, preferring to conduct it themselves on ethical grounds. The court found that even though the considerations were of a moral order, they were general. A democratic State may regard the considerations as in the public interest and the state could provide such education.

In this regard, the reporting provisions of the 2007 Sexual Offences Act still pose serious challenges. It is submitted that education, advice and support regarding sexuality and reproduction must be provided to all children in order to enable them to make their own informed, autonomous, decisions and to appreciate the act and its consequences. In order for this to occur and for children to be able to engage in two-way communication (and enter into a relationship of trust) with adults regarding sexuality, the reporting provisions also need to be amended.

The South African Government's Integrated School Health Policy (2012)[255] provides, amongst others, that all learners must receive sexual and reproductive health counselling. In addition, dual protection contraception,[256] HIV counselling and testing and STD screening must be provided to sexually active learners. The Department of Basic Education, however, stated that the distribution of condoms at schools would not form an integral part of the implementation of the policy and that each school would be able to decide on this.[257] The Integrated School Health Programme was launched on

[248] Panday, Makiwane, Ranchod, and Letsoalo *Teenage Pregnancy in South Africa – With a Specific Focus on School-going Learners* (2009).
[249] The report also recommended that condoms be made available to learners. An analysis by Reddy *et al* indicates that sexual education needs to be individualised to each group, as well as contextualised to the specific circumstances under which sexual acts take place (84).
[250] Freeman 320.
[251] Eriksson 300.
[252] Eriksson 300, footnote omitted.
[253] Eriksson 300.
[254] ECHR, Judgment of 7 December 1976, Ser A, No 23.
[255] Department of Health and Department of Basic Education *Integrated School Health Policy* (2012) 13.
[256] Providing protection against STDs and pregnancy.
[257] Rademeyer "Kondome is nie noodsaaklik by skole, meen staat" *Beeld* (2012-10-04); Du Plessis "Veiliger seks gou deel van leerplan" *Rapport* (2012-10-20).

11 October 2012, prior to the judgement in the *TBC* case.[258] The current provisions of the 2007 Sexual Offences Act exposes state officials involved in the implementation of the 2012 Policy to criminal sanctions. Even if the Constitutional Court were to confirm the High Court amendments, the reporting requirements of the Sexual Offences Act will still pose serious challenges to all officials involved. If these challenges are not sufficiently addressed, children's rights regarding confidentiality, consent to the termination of a pregnancy, access to contraceptives and access to reproductive health information will remain limited.

Taking the above into account, it is acknowledged that the state has a duty to protect children from sexual abuse and sexual exploitation. However, the High Court amendments alone are not sufficient to address the Sexual Offences Act's shortcomings. In this regard, a number of additional recommendations are made in 9 below.

9 Recommendations

Based on the above analysis of the relevant provisions of the Constitution, binding international law instruments (the UNCRC and ACRWC) and the Choice on Termination of Pregnancy Act, Children's Act, Sexual Offences Act and Child Justice Act, as well as of the decision in the *TBC* case, a number of recommendations can be identified and should be considered for implementation. These include:

a A nation-wide information campaign. If the Constitutional Court confirms the High Court order in the *TBC* case, it will be vitally important for Government to immediately embark on such a campaign to address all the uncertainties regarding the age of consent. In addition, all state employees involved in the prosecution of section 15 and 16 (Sexual Offences Act) cases urgently need focussed training, in addition to detailed guidelines.

b The review, rationalisation and alignment of the national statutory and institutional framework. It is recommended that the review, rationalisation and alignment of the Choice on Termination of Pregnancy Act, Children's Act and Sexual Offences Act take place, with the aim of fully incorporating the UNCRC and ACRWC principles, to ensure, amongst others, coordination between the various government departments responsible for the administration of the Choice on Termination of Pregnancy Act, Children's Act, Sexual Offences Act and Child Justice Act.[259] Within this context, the legislature should ensure that

[258] Department of Health *President Jacob Zuma Launches the Integrated School Health Programme to Ensure Optimal Development of Children in Tshwane* 11 October 2012. However, in November 2012, the Minister for Basic Education stated that it is not the Department's responsibility to teach children about sex, but rather parents' responsibility (SAPA "Pupils don't 'make sex' at school – minister" *IOL news* (2012-11-08)).

[259] This will also address the challenges experienced with regard to the overlap between the National Register for Sex Offenders (administered by the DoJCD) and the Child Protection Register (administered by the Department of Social Development). See also 7 3 and 7 4 above. It is recommended that an intergovernmental committee be established in line with the Intergovernmental Relations Framework Act 13

section 36 of the Constitution, relating to the constitutional requirements regarding the limitation of rights enshrined in the Bill of Rights, are fully complied with. In addition, the diversion provisions of the Child Justice Act should be amended to ensure that children enjoy complete protection from the negative aspects of being exposed to the criminal justice system.

c The dissemination of information relating to the appropriate education of children. It is recommended that Government (in partnership with civil society) disseminates information to parents, guardians and caregivers in order to enable them to better educate their children with regard to adolescent sexuality and the consequences and risks thereof. It is also recommended that parents should be educated on the evolving capacities of children in line with the judgements in *Gillick v West Norfolk and Wisbech Area Health Authority*[260] and *Christian Lawyers Association v The Minister of Health (Reproductive Health Alliance as* amicus curiae*)*.[261] As stated in 5 above, it was found in the *Gillick* judgement[262] that a child does not lack capacity by virtue of age alone. Capacity is reached when such child has sufficient understanding and intelligence (intellectual ability and maturity) to make up his or her own mind and parental rights terminate when a child acquires the capacity to make his or her own, independent decisions. As discussed in 7 2 above, the High Court in the *Christian Lawyers Association* case stated that there is a need to recognise and accommodate a child's individual position based on his/her intellectual, psychological and emotional state,[263] and that a rigid age-based approach without taking into account the child's individual characteristics, is not appropriate.[264]

d The amendment of the reporting requirement (section 54(1)(a) of the Sexual Offences Act). In order to address the challenges referred to in 8 above regarding the Sexual Offences Act reporting requirements, it is recommended that section 54(1)(a) of the Sexual Offences Act be amended to limit instances where there is an obligation on persons to report knowledge of the commission of a sexual offence against a child. It is submitted that in the event that there are no indications or evidence of sexual abuse or sexual exploitation and both parties

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of 2005 and consisting of officials from the DoJCD, Department of Social Development and Department of Health in order to coordinate the implementation of policies and legislation.

260 [1985] 3 All ER 402. See also Freeman 309-325.

261 2005 (1) SA 509 (T). See also Bonthuys *et al* par 458; Carstens and Pearmain 88-114; Boezaart 13-15; Schäfer 192-195.

262 Couzens states that "the State can indirectly stimulate a change in parental practices through court decisions that discuss a child's capacity for autonomy, and which send a message about what constitutes good parental practice" (438). She also reiterates the importance of educating parents regarding the child's capacity for autonomy.

263 Page 48.

264 Page 49.

are under the age of eighteen years, there should be no reporting obligation. In this regard, the following amendment clause is proposed:[265]

> **54 Obligation to report commission of sexual offences against children or persons who are mentally disabled**
>
> (1)(a) A person who has knowledge that a sexual offence has been committed against a child must report such knowledge immediately to a police official: Provided that this subsection does not apply if –
>
> (i) the offence is a section 15 or 16 offence;
>
> (ii) both parties are under the age of eighteen years; and
>
> (iii) there are no –
>
> (aa) indications; or
>
> (bb) evidence,
>
> of sexual abuse or sexual exploitation of the child concerned.

The above proposed amendment will ensure that sex education, guidance and advice may be provided to all children. In addition, two-way communication will be possible where two children engage in consensual sexual acts with each other (which may or may not be criminalised) and where there is no indication or evidence of sexual abuse or sexual exploitation.

10 Concluding remarks

The well-known phrase "sweet sixteen and never been kissed" is no longer a depiction of the reality in South Africa. It is a fact that adolescent sexual activity has serious consequences for the children involved and society as a whole.

South Africa is a country of moral diversity. The autonomy and moral integrity of individuals are important and must be respected. Adolescents have different views regarding sexual acts and, as is clear from the findings of the empirical research referred to above,[266] often start with sexual experimentation at an early age. They have an increased need for autonomy as they become older.

On the one hand, the state and parents have a duty in terms of international law, the Constitution, Children's Act and Sexual Offences Act to protect children from sexual abuse and sexual exploitation. On the other hand, children have rights of autonomy and specifically, the right to make decisions regarding the termination of a pregnancy, and the rights to bodily integrity, access to (confidential)

[265] Additions indicated by way of underlining.
[266] See 3 above.

reproductive health care, information regarding sexuality and reproduction, and contraceptives. In addition the capacities of children and adolescents evolve as they mature and this has to be taken into account.

As is clear from this dissertation, these children's rights and the duties to be exercised by the State and parents, guardians and care-givers are not in all instances reconcilable and aligned to one another.

The direct impact of the Choice on Termination of Pregnancy Act, Children's Act and Sexual Offences Act on one another results in discrepancies and contradictions, both in approach and content, leading to legal uncertainty. It is submitted that if the High Court amendments to the Sexual Offences Act (as set out in the *TBC* judgement) and the recommendations contained in 9 above are implemented, these discrepancies and contradictions will be ameliorated.

List of acronyms

Acronym	Meaning
ACRWC	African Charter on the Rights and Welfare of the Child (1990)
AIDS	Acquired Immunodeficiency Syndrome
DPP	Director of Public Prosecutions
DoJCD	Department of Justice and Constitutional Development
HIV	Human Immunodeficiency Virus
JASA	Justice Alliance South Africa
NDPP	National Director of Public Prosecutions
RAPCAN	Resources Aimed at the Prevention of Child Abuse and Neglect
STDs	Sexually Transmitted Diseases
UNCRC	United Nations Convention on the Rights of the Child (1989)

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