

## COMMENTS

# Decriminalising consensual sexual acts between adolescents within a constitutional framework: *The Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Others Case: 73300/10 [2013] ZAGPPHC 1 (4 January 2013).*

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### 1. Introduction

The case under discussion reflects upon the decriminalisation of consensual sexual activity between adolescents within a constitutional realm. The Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007 (hereinafter referred to as the 'Act') came into operation on 16 December 2007 (see CR Snyman *Criminal Law* 5ed (2008) 353; D Smythe and B Pithey *Sexual Offences Commentary* (2011) v). The Act repealed various common-law crimes and more specifically the common-law crime of rape with an expanded definition and scope, also providing for a gender-neutral definition (Snyman *supra* 353). In addition, the common-law offence of indecent assault was repealed and replaced with the statutory crime of sexual assault (see in general Smythe and Pithey *supra* 3-4-3-7; Snyman *supra* 353). Various other common-law offences such as bestiality, incest and intercourse with a corpse were replaced with new statutory offences (Snyman *supra* 353). A unique aspect of the Act relates to the chapters dealing with comprehensive new offences relating to sexual acts against children (see Snyman *supra* 392-399; Smythe and Pithey *supra* Chs 9-13). The initial purpose behind the Act during its inception was, in addition, to specifically deal with sexual offences against children

(Smythe and Pithey *supra v*). It was, however, later decided that the Act should pertain to sexual offences perpetrated against both adults and children (Smythe and Pithey *supra v*). The Act accordingly provides for numerous sexual offences against children. The decision under discussion specifically dealt with the provisions of sections 15 and 16 of the Act. Section 15 deals with acts of consensual sexual penetration with certain children (also referred to as statutory rape); whereas section 16 deals with acts of consensual sexual violation with certain children. As the Act is still fairly new, the interpretation of the various sections by the courts remains a daunting reality both at present and in future. The decision under discussion is of particular importance as it is the first decision where sections 15 and 16 of the Act were interpreted within a constitutional framework. The decision sheds light as to the various anomalies which can potentially arise during the application of these sections in practice, emphasising yet again the important interplay between the Constitution and the substantive criminal law and more specifically the law relating to sexual offences.

## 2. Background

The salient facts appear from the judgment given by Rabie J: The first applicant was the Teddy Bear Clinic for Abused Children, a non-profit company providing a full range of services to abused children, including forensic medical examinations, forensic psychological counselling, psychological assessments, play therapy, preparation for court appearances as well as various programmes designed with the aim of diverting young sex offenders away from the criminal justice system. The second applicant was RAPCAN (Resources Aimed at the Prevention of Child Abuse and Neglect), also a non-profit company dedicated to the prevention of child victimisation and the promotion of children's rights. The second applicant's work in addition, includes primary, secondary and tertiary prevention approaches in respect of child sexual abuse, corporal punishment and child offending with specific reference to sexual and violent offending. The first respondent was the Minister of Justice and Constitutional Development and the second respondent was the National Director of Public Prosecutions. The three *amici curiae* who also participated were firstly the Women's Legal Centre Trust directed towards advancing and protecting the rights of all women and girls in South Africa and addressing the discrimination and disadvantage that women face; secondly the Tshwaranang Legal Advocacy Centre aimed at the promotion and protection of women's rights; and thirdly the Justice Alliance of South Africa aimed at upholding and developing Judaeo-Christian values.

The applicants brought the application in pursuit of challenging the constitutional validity of certain sections of the Act, and more specifically the constitutional validity of aspects pertaining to sections 15, 16 and 56(2) which deals with defences in respect of sections 15 and 16. The applicants, in addition, brought the application in their own interests as organisations dedicated to upholding and protecting children's rights pursuant to section 38(a) of the Constitution of the Republic of South Africa, 1996 (hereinafter 'Constitution'), on behalf of children facing the risk of being criminalised in terms of sections 15 and 16 of the Act and accordingly facing the reality of being processed by the criminal justice system pursuant to section 38(c) of the Constitution and section 15(2)(c) of the Children's Act 38 of 2005 (hereinafter 'Children's Act') and finally in the public interest, pursuant to section 38(d) of the Constitution, and section 15(2)(d) of the Children's Act.

### **3. Sections 15 and 16 in context**

In order to fully comprehend the judgment it is pivotal to assess the relevant sections forming the cornerstone of the constitutional challenge by the applicants in the North Gauteng High Court.

Section 15 pertains to consensual sexual penetration with children also more commonly referred to as 'statutory rape' and as such criminalises acts of consensual sexual penetration with children (see section 15 of the Act). Section 16 relates to consensual sexual violation with children and is also commonly referred to as statutory sexual assault criminalising acts of consensual sexual violation with children (see section 16 of the Act). It is also necessary for purposes of clarity to note that 'child' is defined in section 1(1) of the Act as follows:

"child" means—

- (a) a person under the age of 18 years; or
  - (b) with reference to sections 15 and 16, a person 12 years or older but under the age of 16 years,
- and "children" has a corresponding meaning.'

Accordingly, for purposes of sections 15 and 16, a child is a person of the age of 12, 13, 14 or 15 years and as such denotes the consensual 'sexual penetration' and the consensual 'sexual violation' of a child in the age group of 12 to 15 years (see Smythe and Pithey *supra* 9-10 – 9-11).

In terms of section 57(1) a child below the age of 12 years is incapable of consenting to any sexual act. In addition, a 'sexual act' is defined in the Act as 'an act of sexual penetration or an act of sexual violation'. The provisions of sections 15 and 16 thus also criminalise all acts of sexual penetration and sexual violation committed by any person with

a child below the age of 12 years. In the latter instance the perpetrator will be guilty of rape as the consent of the child in such an instance is regarded as invalid (Snyman *supra* 393). Statutory rape in terms of section 15 stretches much further than merely sexual intercourse due to the much wider definition accorded to the term 'sexual penetration' in the Act (see Smythe and Pithey *supra* 9-11). As such, penetration can include penetration of the child's vagina, anus or mouth and can also be performed with other parts of the body such as fingers or toes or the genital organs of an animal or even objects such as a sex toy for example (Snyman *supra* 393-394). Section 15(2)(a) provides that if both parties concerned were children at the time of the commission of the crime, written authorisation to prosecute has to be given by the National Director of Public Prosecutions (see Smythe and Pithey *supra* 9-11; Snyman *supra* 393; D Minnie 'Sexual offences against children' in T Boezaart (ed) *Child Law in South Africa* (2009) 550-551).

A specific anomaly which arises relates to the situation where one of the parties is below the age of 16 years whereas the other is over the age of 16. In the latter instance only the older party will be prosecuted (Minnie *supra* 550). Section 15 as such criminalises all consensual forms of sexual penetration between adults and children as well as amongst children themselves. The applicants in the decision under discussion specifically sought to challenge the criminalisation of consensual sexual acts between adolescents and not between adults and children (see paras [21]-[22] of the judgment).

Section 16 criminalises all acts of sexual violation between adults and children as well as between children themselves. It is evident from the definition of 'sexual violation' in terms of the Act that it covers a wide spectrum of non-penetrative contact of a sexual nature (Smythe and Pithey *supra* 9-17). Smythe and Pithey correctly note that the wide definition of sexual violation seeks to protect children from 12 to 16 years from adults who engage in these acts with children in circumstances where the children provide consent. The wide range of non-penetrative acts becomes highly problematic when they are committed between two consenting children (Smythe and Pithey *supra* 9-18). Consensual sexual acts between adolescents are an inescapable reality at present and have been since time immemorial. Research suggests that various biological changes that take place during puberty are considered to be the precipitating cause for increased sexual interest and behaviour amongst adolescents (Smythe and Pithey *supra* 9-18).

Similar to section 15, section 16(2)(a) also provides that where both parties are children, both have to be prosecuted provided that the National Director of Public Prosecutions has authorised the prosecution in writing (Smythe and Pithey *supra* 9-19; Minnie *supra* 551-553; Snyman *supra* 395-396).

Sections 15 and 16 should also be read in conjunction with the defences provided for in section 56(2) of the Act. Section 56(2) reads as follows:

- (2) Whenever an accused person is charged with an offence under—
- (a) section 15 or 16, it is, subject to subsection (3), a valid defence to such a charge to contend that the child deceived the accused person into believing that he or she was 16 years or older at the time of the alleged commission of the offence and the accused person reasonably believed that the child was 16 years or older; or
  - (b) section 16, it is a valid defence to such a charge to contend that both the accused persons were children and the age difference between them was not more than two years at the time of the alleged commission of the offence.'

Section 56(3) provides that these defences cannot be invoked if the accused person is related to the child within the prohibited degrees of blood, affinity or an adoptive relationship. The problematic aspect relating to the defence afforded to a charge of contravention of section 16 is that where the age difference between the children is more than two years it will inevitably result in both children facing the possibility of prosecution. The applicants in the case under discussion specifically sought to challenge the provisions of section 16 as far as it relates to consensual sexual activity between adolescents and not consensual sexual violation between adults towards children.

#### **4. Arguments advanced by applicants**

It was argued on behalf of the applicants that adolescents find themselves in peculiar situations in that physically they are developing and maturing rapidly, but that psychologically they remain vulnerable to the influences of adults. As such the applicants did not seek to challenge the provisions of sections 15 and 16 as far as they criminalise sexual conduct by adults, but contended that as far as they criminalise the sexual conduct of children, they are unconstitutional (para [24]). The impugned provisions which were challenged were specifically those that criminalise sexual activity between children as well as the consequential reporting and registration as sex offender provisions (para [24]). It was submitted that 'sexual violation' is so broadly defined that it could include conduct that virtually every normal adolescent participates in at some stage such as for example kissing, or light petting (para [26]).

It was submitted that much of the conduct provided for in the definition of 'sexual violation' is developmentally normative and could contribute to positive development if conducted in a consensual and respectful manner (para [26]). It was further argued that in terms of the definition of 'sexual penetration' many forms of consensual sexual

play and exploration is included which could not be harmful by for example resulting in pregnancy or the transmission of diseases (para [27]). It was contended that in terms of expert studies, large numbers of adolescents engage in the kind of conduct covered by the definitions of 'sexual penetration' and 'sexual violation' (para [28]). It was noted that practically, sections 15 and 16 result in a number of qualitatively different results which can be summarised as follows (para [31]):

#### Section 15

- Where A is an adult and B is 12 to 15 years old and A and B engage in an act of consensual sexual penetration, A will be guilty of an offence despite B having consented and accordingly only A commits an offence;
- Where A is a child 16 to 17 years of age and B is 12 to 15 years of age, and A and B engage in act of consensual sexual penetration, A is guilty of an offence despite B having consented and only A commits an offence;
- Where both A and B are 12 to 15 years of age, and A and B engage in an act of consensual sexual penetration, both A and B are guilty of the offence created in section 15 despite the fact that they consented to the act. If prosecution is authorised, both A and B have to be prosecuted.

#### Section 16

- Where A is an adult and B is 12 to 15 years of age, and A and B engage in an act of consensual sexual violation, A is guilty of the offence despite consent and accordingly only A has committed an offence;
- Where A is a child between 16 or 17 years of age and B is 12 to 15 years of age, and A and B engage in an act of consensual sexual violation whether A is guilty of the offence in section 16(1) will depend on whether A is more than two years older than B. If so, only A may be prosecuted.
- Where both A and B are 12 to 15 years of age, and A and B engage in an act of consensual sexual violation, the question of whether a criminal offence has been committed depends on whether A is more than two years older than B. If an age gap of more than two years exists, an offence has been committed and both A and B have committed an offence. Accordingly it was emphasised that in such scenario the younger adolescent is also guilty of the offence where he or she is more than two years younger than the older adolescent.'

The applicants submitted that the criminalisation of A in a situation of consensual 'sexual violation' where A is 16 to 17 years of age and B is more than two years younger, would be justifiable within the context of the age disparity between them (para [35]). The applicants submitted that the different outcomes as discussed above, constitute a result which is irrational and anomalous (para [37]). The applicants argued that the criminalisation of acts of consensual sexual violation between adolescents where the age difference is more than two years violates their constitutional rights (para [38]). A further important

aspect raised by the applicants related to the National Register for Sex Offenders created in terms of chapter 6 of the Act. In terms of section 43 such register contains particulars of persons convicted of any sexual offence against a child or a person who is mentally disabled, or are alleged to have committed a sexual offence against a child or a mentally disabled person (para [42]). A sexual offence refers to any offence in terms of chapters 2, 3 and 4 of the Act and accordingly also pertains to the provisions of sections 15 and 16. Entry in the Register is an extremely serious matter and a person whose details have been included in the Register may, *inter alia*, not be employed to work with a child in any circumstances, supervise or take care of a child or operate any business or trade in relation to the supervision over or care of a child. As such this Register inevitably holds dire consequences for adolescents convicted in terms of sections 15 or 16.

It was further submitted that sections 15 and 16 should be assessed in conjunction with the provisions of section 54(1) of the Act which provides that a person who has knowledge that a sexual offence has been committed against a child must report such knowledge immediately to a police official and failure to do so constitutes an offence for which the person is liable upon conviction to a fine or imprisonment for a period not exceeding five years or both a fine and such imprisonment. This section inadvertently also applies to the consensual offences criminalised in terms of sections 15 and 16 (para 44). The applicants in addition, relied heavily on the expert evidence presented by Professor Alan Flisher, who was a child and adolescent psychiatrist at the University of Cape Town before his passing; and Ms Gevers, a clinical psychologist specialising in child and adolescent mental health. The expert opinion by the relevant experts concluded that intimate relationships between adolescents are developmentally normative and that it is usually within these intimate relationships that adolescents begin to explore a wide range of sexual behaviours such as kissing, petting, oral sex, vaginal intercourse and even anal intercourse (para [54]). Accordingly, on a psychological level, adolescents begin to develop the cognitive and emotional aspects of sexuality, which if coupled with the physiological development, motivates them to explore their sexuality and to satisfy their curiosity for affection and connection with a partner (para [55]). The experts contended that children who are accused of or charged with offences in terms of sections 15 and 16 are likely to experience emotional distress in the form of shame, embarrassment, anger and regret (para [60]). As such, the criminalisation of consensual sexual acts will discourage adolescents from seeking help and advice about their sexuality as they may be prosecuted for such conduct and the social stigmas of sexuality may be reinforced (para [60]).

The experts also submitted that the criminalisation of consensual sexual acts limits the ability of support organisations to educate, empower and support adolescents in their sexual development. Despite the discretion afforded to the National Director of Public Prosecutions whether or not to prosecute as well as the process of diversion for child offenders, the reality remains that even if the children are not ultimately prosecuted for sections 15 and 16 offences, the children will still be subjected to the initial stages of the criminal justice system which can include arrest, providing detailed statements, questioning by the police, appearance at the preliminary enquiry and the possibility of detention. Even if the child is diverted, he or she would still be regarded as a sex offender and would have to admit responsibility for the sections 15 and 16 offences. The applicants accordingly contended that children, by the mere fact of being charged with an offence, will experience emotional stress in the form of shame, embarrassment, anger, and regret as well as estranged peer relationships (para [60]). It was submitted that the negative impact of criminalisation by far outweighs any positive effects that it may have (para [51]). It was further argued that these provisions will in all probability prevent the vast majority of adolescents from seeking help as a result of fear of being prosecuted (para [53]). Any councillor or other person in authority would, in addition, be placed in the unbearable situation that once they have received such information they would be required to report the child for the behaviour which will in turn cause the child to become isolated from potentially supportive systems (para [53]). It was argued that the existence of these offences increases the risk that children will experience unhealthy sexual contact by teaching them that consensual developmentally normative sexual behaviour is wrong and should be punished (para [53]). The first and second *amici curiae* supported the submissions made on behalf of the applicants and emphasised the right to equality and access to healthcare services which they submitted are infringed by the provisions of sections 15 and 16 (para [55]).

## 5. Arguments advanced by respondents

The respondent's main argument in opposition to the application by the applicants was that the impugned provisions did not violate any constitutional rights of children (para [61]). The respondents also specifically contended that the provisions of section 15 and 16 had to be considered against the backdrop of the Children's Act 38 of 2005 as well as the Child Justice Act 75 of 2008 (para [62]). It was submitted by the respondents that one of the aims of the Child Justice Act was to prevent children from being exposed to the negative effects of the



criminal justice system by making use of processes more suitable to the needs of children and in line with the Constitution one of which was the process of diversion (para [65]). Accordingly to the respondents the provisions of sections 15 and 16 did not create offences but merely conferred upon the National Director of Public Prosecutions or the Director of Public Prosecutions the sole discretion as to whether or not to institute prosecution where adolescents engaged in the conduct provided for in the said sections (para [67]). As such the discretion conferred would determine whether a prosecution in fact ensues and accordingly the exercise of such prosecutorial discretion would be done in line with the provisions of the Constitution, the Children's Act and the Child Justice Act with specific reference to the best interests of the child (para [68]).

The third *amicus curiae* submitted a number of affidavits including that of a gynaecologist, a sexologist, a social worker, a principal of a High School, paediatrician and a psychologist (para [56]). The latter all emphasised the health and psychological risks for sexually active adolescents and they all emphasised that adolescents should be protected not only against adults, but also against themselves due to their immaturity, irresponsibility, susceptibility to peer pressure and generally their poor decision-making abilities (para [56]). It was argued on behalf of the third *amicus* that it is necessary to have the deterrent of the criminal law to protect children from psychological harm as well as the risk of pregnancy, HIV as well as the transmission of sexually transmitted diseases. It was contended that the decriminalisation would send out the message that sex between children is acceptable with no consequences (para [57]).

The respondents, in addition, submitted that the law which infringes the constitutional rights of adolescents are reasonable and justifiable in an open and democratic society based on freedom and equality and as such aim to protect children by means of deterrence and prevention, whilst at the same token recognising adolescent sexual experimentation (para [102]).

## **6. Judgment**

After analysing the submissions on behalf of both the applicants as well as the respondents, Rabie J in delivering his comprehensive judgment held that section 28(2) of the Constitution which provides that a 'child's best interests are of paramount importance in every matter concerning a child', has a wide purport and should be considered in all matters concerning children (para [72]. See also *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) para [15]).

It was held that the impugned provisions constitute an unjustified invasion of control into the intimate and private sphere of children's personal relationships in such a way as to cause them great harm and as such constituted a violation of section 28(2) of the Constitution and stigmatised and degraded children on the grounds of their consensual sexual conduct (para [74] and [77]). The impugned provisions in addition violates the rights of children to control over their body, and to make their own decisions concerning reproduction with specific reference to section 12(2) of the Constitution which reads as follows (para [78]). It was in addition held that the provisions violated children's right to private and intimate personal relationships as enshrined and protected in terms of section 14 of the Constitution (para [79]). In respect of children's right to privacy within the context of their personal relationships, Rabie J held as follows (para [83]):

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

It was held that even in absence of being prosecuted under sections 15 and 16 or where diversion takes place following a decision to prosecute, children would still endure considerable and substantial trauma as a result of being exposed to the earlier processes in the criminal justice system such as arrest, statement-taking, police questioning and detention in police cells (para [85]).

In addition, the system of diversion does not completely protect the potential child offender as some of the consequences of this process include that the child may be arrested, taken to the police station, signing warning statements, appearing at a preliminary enquiry, being assessed by a probation officer whilst the parents are present and more condemning, the child has to acknowledge responsibility for the offence (see paras [87]-[88]). It was held that there exists no legislation or other guidelines to assist the relevant official to decide which cases to prosecute and such discretion cannot save the constitutionality of these provisions (para [92]). Rabie J, in addition, held that the criminalisation of consensual sexual acts between adolescents bears no relationship to the purpose of protecting children from predatory adults and as such children who are prosecuted in terms of the impugned provisions will be severely harmed (para [105]). Rabie J, in addition, held the following (para [112]):

‘The use of damaging and draconian criminal law offences to attempt to persuade adolescents to behave responsibly is a disproportionate and ineffective method which is not suited to its purpose. There are plainly less restrictive means available for achieving the purpose sought to be pursued.’

It was accordingly held by Rabie J that sections 15(1) and 16(1) would remain unchanged as far as it related to criminalising sexual conduct by adults towards children (para [118]). It was held that as far as these provisions criminalised consensual sexual acts between adolescents, they were invalid. It was held that the appropriate constitutional remedy to cure the defects in the provisions of section 15(1) and 16(1) would be one of reading in as it ensures that the impugned provisions are consistent with the Constitution and in addition interferes with the laws adopted by the legislature as little as possible (para [119]). The following order was consequently made by Rabie J (para [123]):

- ‘Sections 15 and 56(2)(b) of the ... Act and the definition of “sexual penetration” in section 1 of the Act are inconsistent with the Constitution ... and invalid to the extent that they criminalise
- A child (‘A’) who is between twelve and sixteen years of age for engaging in an act of consensual sexual penetration with another child (‘B’) between twelve and sixteen years of age
- A child (‘A’) who is between sixteen and eighteen years of age for engaging in an act of consensual sexual penetration with (‘B’) who is younger than sixteen and is two years or less younger than A.’

In order to remedy the abovementioned defects, it was ordered that section 15 of the Act read as follows:

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

... Sections 16 and 56(2)(b) of the Act and the definition of “sexual violation” in section 1 of the Act are inconsistent with the Constitution and invalid to the extent that they criminalise a child (‘A’) who is between twelve and sixteen years of age for engaging in an act of consensual sexual violation with another child (‘B’) between twelve and sixteen years of age, where there is more than a two year age difference between A and B.

In order to cure the defects, it was ordered that section 16 of the Act should read as follows:

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

## 7. Assessment

From a purely constitutional perspective, the judgment by Rabie J is sound and in line with the basic premise that the best interests of the child remains paramount in any decision concerning the rights of children (see in general section 28 of the Constitution; CJ Davel and AM Skelton *Commentary on the Children's Act* (2012) 2-5-2-10; B Clark 'A gold thread? Some aspects of the application of the standard of the best interests of the child in South African Law' (2000) 11 *Stell LR* 3-20; K Muller and M Tait 'The best interest of children: A criminal law concept' (1999) 32 *De Jure* 322-329; Article 2 and 3 of the United Nations Convention on the Rights of the Child (GA Res 44/25, 20 November 1989) hereinafter UNCRC); Articles 4, 16 and 17 of the African Charter on the Rights and Welfare of the Child (CAB/LEG/24.9/49 (1990)). Save for the best interest of the child principle once again being confirmed by Rabie J in the judgment, the judgment opens the door to critical analysis of other aspects pertaining to children's rights.

The judgment to a larger extent confirms that adolescents are autonomous beings who should be afforded the right to sexual autonomy. It could be argued that the latter forms part of the child's inherent right to be treated as an equal and to have his or her right to individual autonomy respected (S Human 'The theory of children's rights' in T Boezaart (ed) *Child Law in South Africa* (2009) 255). Research on adolescent teenage sexual behaviour suggests that sexual exploration is a normal and expected phase of development (see S Meiners-Levy 'Challenging the prosecution of young "sex offenders": How developmental psychology and the lessons of *Roper* should inform daily practice' (2006) 79 *Temp LR* 499 at 506). Criminalising consensual sexual acts between adolescents could accordingly prove severely detrimental to children infringing not only their autonomy interests with reference to the child's right to freedom of choice of lifestyle and social relations; but also developmental interests of the child to enter adulthood free from prejudice and stigmatisation (see Human *supra* 256-257).

It is submitted that emphasis should rather be placed on educating children about sex and the inherent dangers associated with sex and the transmission of sexually transmitted diseases and HIV/AIDS. It is submitted that instead of punishing one or both adolescents for engaging in consensual sexual acts, it would better serve the best interests of the child to educate children as to the potential consequences flowing from unsafe sex and as such enabling the adolescent to make his or her own decision when to have sex for the first time. With proper education, children can approach their future and possible sexual encounters with the necessary knowledge and responsibility without potentially facing the risk of being labelled as sex offenders for consensual acts. The aim

behind the enactment of sections 15 and 16 from the point of view of an adult perpetrating consensual sexual act with a child cannot be questioned. The application of these sections in respect of consensual sexual acts between adolescents, without a doubt, raises constitutional concern. Upon closer scrutiny of these sections, it becomes clear that a gap has erupted between the sexual predators that these sections were designed to monitor, and the larger scale of persons actually affected by it, namely adolescents engaging in consensual sexual acts. Stine encapsulates the latter dilemma by stating: 'While one may be morally opposed to two teenagers having sexual relations with each other, "sex" is not the proper area for expansive legislation on morality. There is a fine line between immorality and criminality.' (EJ Stine 'When yes means no, legally: An eighth amendment challenge to classifying consenting teenagers as sex offenders' (2011) 60 *DePaul LR* 1169 at 1171).

It remains an undeniable reality that society fears the 'paedophile' preying on young children to satisfy his or her sexual desires. Sections 15 and 16 were clearly drafted to protect minors from predatory adults, yet as a protected class they face potential prosecution in terms of these sections for engaging in consensual sexual acts.

Another problematic aspect in respect of sections 15 and 16, relates to the fact that an adolescent convicted in terms of these sections, faces the risk of his or her name being entered in a national register for sex offenders in terms of the Act (see sections 40-53 of the Act). In terms of section 50(1)(a)(i), the particulars of a person who has been convicted of a sexual offence against a child, *must* be included in the register. The wording of the latter provision is such that the logical inference to drawn is that it is a mandatory provision. As such minors engaging in consensual sexual acts face the risk of potentially being entered in the register for sex offenders. It is hard to conceive that the legislature had the latter result in mind when drafting the Act. It could be argued that this result infringes the child's right not to be punished in a cruel inhuman or degrading manner in terms of section 12(1)(e) of the Constitution. The consequences flowing from having one's particulars entered in the register are such that it could be viewed as a form of punishment (see specifically section 41 of the Act; Stine *supra* 1188 and 1194). Adolescents further face the dilemma of being labelled as paedophiles – a label society has a great disdain for (Stine *supra* 1196; see also DM Northcraft 'A nation scared: children, sex and the denial of humanity' (2011) 12 *Am U J Gender, Soc Pol'y & L* 483 at 489). Being labelled as a sex offender 'carries with it shame, humiliation, ostracism, loss of employment and decreased opportunities for employment, perhaps even physical violence, and a multitude of other consequences' (Stine *supra* 1199).

It is trite that the judgement will in all probability face numerous criticisms from a morality point of view in that it could possibly be argued that the judgment opens the door to sexual immorality between adolescents exacerbating the risks of early pregnancies or the transmission of sexually transmitted diseases and even HIV. The reality, however, remains that criminalising consensual sexual acts between adolescents will not necessarily minimise these risks and concomitantly the consequential harm that children face by being prosecuted for behaviour which is normative to their development as children could prove detrimental to their best interests as was clearly indicated in the judgment. The reality, however remains that the order still has to be confirmed by the Constitutional Court.

Consensual sexual activity between adolescents has been a phenomenon since time immemorial and remains a reality at present. Criminalising such conduct will cause more harm to adolescents and will in all probability not eradicate this behaviour.

As the evidence in the decision under discussion clearly indicated, such behaviour by adolescents is more often part and parcel of growing up and exploring having regard also to the fact that it is consensual. To criminalise such conduct will, as was indicated in the judgement, result in these adolescents facing the possibility of being prosecuted and being exposed to the harsh realities of the criminal justice process. In conclusion the wise words of Timothy Magaw come to mind where he states: 'If our job is to protect our children, why in the heck would we want to make them sex offenders for the rest of their lives.' (T Magaw as quoted in Stine *supra* 1169).