IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT No.: 170/17
Case No.: 29573/16

In the matter between:

NICOLE LEVENSTEIN	First Applicant
PAUL DIAMOND	Second Applicant
GEORGE ROSENBBERG	Third Applicant
KATHERINE ROSENBERG	Fourth Applicant
DANIELA MCNALLY	Fifth Applicant
LISA WEGNER	Sixth Applicant
SHANE ROTHQUEL	Seventh Applicant
MARINDA SMITH	Eighth Applicant

and

The Estate of the late SIDNEY LEWIS FRANKEL	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG	Third Respondent
THE TRUSTEES FOR THE TIME BEING OF THE WOMEN'S LEGAL CENTRE TRUST	Fourth Respondent
THE TEDDY BEAR CLINIC	Fifth Respondent
LAWYERS FOR HUMAN RIGHTS	Sixth Respondent

FOURTH RESPONDENT'S WRITTEN SUBMISSIONS

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INTRODUCTION

1. The fourth respondent, the Women's Legal Centre Trust, supports the application for confirmation of the order of constitutional invalidity granted by the Gauteng Local Division, Johannesburg on 19 June 2017.[1] In doing so, the WLC seeks leave to adduce new evidence to assist this Court in determining the impact of the impugned section and the extent of the constitutional defect.[2]

2. The High Court ordered that section 18 of the Criminal Procedure Act 51 of 1977 ("CPA") is inconsistent with the Constitution and invalid to the extent that it bars, in all circumstances, the right to institute a prosecution for all sexual offences, other than those listed in sections 18(f), (h) and (i) after the lapse of a period of twenty years from the time when the offence was committed.[3]

3. The WLC supports the findings and conclusions of the High Court that:

    3.1. Section 18 is arbitrary and irrational in that it excludes certain sexual offences (most notably, rape and compelled rape) from a period of prescription, but imposes a blanket time bar on the prosecution of all other sexual offences after a period of twenty years;[4]

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[1] The WLC participated as *amicus curiae* in the High Court but has since been cited as a respondent in these proceedings because of its direct and substantial interest in the order granted by Hartford AJ.

The order of Hartford AJ is at Vol 7, p634.

[2] The application to adduce further evidence is contained in Volumes 1 & 2 of the Supplementary Record.

[3] The sub-sections in section 18 that exclude certain sexual offences from prescription are:

- section 18(f): "rape or compelled rape as contemplated in section 3 of SORMA respectively";
- section 18(h) "trafficking in persons for sexual purposes by a person as contemplated in section71(1) and (2) of the SOMRA";
- section 18(i) "using a child or person who is mentally disabled for pornographic purposes as contemplated in sections 20(1) and 26(1) of SORMA."

[4] Vol 7, p596 – 611, paras 43 – 69, High Court Judgment.

3.2. The prescription of sexual offences arising from the operation of section 18 infringes the right to dignity and equality of survivors;[5] and

3.3. The operation of section 18 impedes the performance of the state's obligations under section 7 of the Constitution.[6]

4. In the High Court, the applicants narrowed their case to challenge the constitutionality of section 18 only to the extent that it imposed a twenty-year time period on the right to institute a prosecution for the offence of indecent assault against children. The WLC and other amici curiae urged the High Court to declare the section unconstitutional to the extent that it imposed a prescription period on all sexual offences committed against adults and children.[7] In these confirmation proceedings, the applicants support the broader order of constitutional invalidity granted by the High Court.[8] The WLC therefore aligns itself with the applicants' submissions on the confirmation of the declaration of constitutional invalidity.[9]

5. The WLC expands upon the applicants' submissions in two respects:

5.1. Firstly, the WLC advances four additional reasons why the differentiation between rape and compelled rape, and all other sexual offences, in section 18 is irrational.

5.1.1. The primary rationale for the differentiation between sexual offences in section 18 is that certain sexual

[5] Vol 7, p615, para 78, High Court Judgment.

[6] Vol 7, p623, para 98, High Court Judgment.

[7] Vol 5, p376, para 4, WLC Amicus Application.

[8] Para 60 – 63, Applicants' written submissions.

[9] para 52, Applicants' written submissions.

offences are more serious than others. The perceived harm or moral gravity of sexual offences in this context is clearly linked to the penetrative or non-penetrative nature of the offence.

5.1.1.1. WLC submits that there is no factual basis or policy reasons to support the view that sexual offences involving penetration are more traumatic or harmful than other sexual offences.

5.1.1.2. Secondly, the assumption that certain sexual offences are more morally offensive than others is imbued with outdated, patriarchal ideas about the moral gravity and harmfulness of different sexual offences.

5.1.2. Moreover, the exclusion of certain sexual offences from prescription but not others creates an artificial distinction between sexual offences, when in fact, the context and consequences of these offences is substantially the same. There is no rational basis to treat rape and compelled rape differently from other sexual offences for the purposes of prescription. This is so because:

5.1.2.1. all sexual offences occur within the same social and political context. Sexual offences are disproportionately committed against women and children. To the extent that the Legislature

considered it necessary for certain sexual offences to be excluded from prescription in order to achieve the objects of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ("SORMA") and to protect vulnerable groups, such a rationale must apply to all sexual offences.

5.1.2.2. The survivors of all sexual offences are faced with similar personal, social and structural disincentives to reporting the offence committed against them. This leads to delayed and under-reporting of all sexual offences. To the extent that the Legislature considered it necessary for certain sexual offences to be excluded from prescription in order to cater for the concerns of delayed reporting, such a rationale must apply to all sexual offences.

5.2. Second, the WLC submits that the bar on prosecution of certain sexual offences after twenty years unjustifiably hampers the state's fulfilment of its constitutional obligation to prosecute sexual offences in order to respect, protect, promote and fulfil the fundamental rights in the Bill of Rights;

5.3. In respect of remedy, the WLC submits that no suspension of the declaration of constitutional invalidity is necessary and that a reading in is required.

6. The Second Respondent, the Minister for Justice and Correctional Services, ("the Minister") through the Chief Directorate: Legislative Development, was responsible for the preparation and enactment of SORMA, and the subsequent amendments to the impugned section 18 of the CPA.[10] The Minister did not oppose the initial or amended relief sought by the applicants' in the High Court[11] nor attempt to defend or justify the irrationality, or the infringement of rights, arising from the operation of section 18 in relation to sexual offences.[12] Similarly, in these proceedings, the Minister not oppose the confirmation of the declaration of constitutional invalidity.

7. These heads of argument are organised as follows:

   7.1. First, we consider the manner in which section 18 differentiates between sexual offences, and the state's rationale for the differentiation;

   7.2. Second, we demonstrate that the differentiation between sexual offences (and particularly, between penetrative and non-penetrative offences) in section 18 is irrational;

   7.3. Third, we submit that the operation of section 18 hampers the state's fulfilment of their constitutional obligation to prosecute sexual offences;

   7.4. Fourth, we request this Court to grant the WLC leave to adduce the further evidence dealing with the impact of sexual offences on adults;

[10] Vol 4, p340, para 2.

[11] Vol 4, p341, para 8.

[12] Despite reference, in passing, to section 36 of the Constitution - Vol 4, p347, para 33.

7.5. Last, we deal with the question of remedy.

SECTION 18 DIFFERENTIATES BETWEEN SEXUAL OFFENCES

8. Section 18 provides that: "*The right to institute a prosecution for any offence … shall, unless some other period is expressly provided for by law, lapse after the expiration of a period of 20 years from the time when the offence was committed.*" At present, the section excludes nine categories of offences from the operation of prescription.[13] Of these nine excluded categories of offences, three of these categories are sexual offences:

8.1. rape or compelled rape as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively;

8.2. offences as provided for in section 4, 5 and 7 and involvement in these offences as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013;

8.3. using a child or person who is mentally disabled for pornographic purposes as contemplated in sections 20 (1) and 26 (1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.[14] ("the excluded sexual offences")

[13] Section 18 of the Criminal Procedure Act was originally introduced in 1977. It was subsequently amended by SORMA in 2007. SORMA required an amendment of section 18 primarily because it expanded the offence of the common law of rape to include all forms of sexual penetration without consent.

Sub-sections (a) – (i) of section 18.

[14] Sub-sections (f); (h) and (i) of section 18

9. It is striking that it is primarily the non-penetrative sexual offences contained in SORMA that are not expressly excluded from the ambit of section 18 and which prescribe after 20 years. This includes offences such as sexual assault, compelled self-sexual assault, causing a person to witness a sexual offence or sexual acts, and exposure to child pornography.

10. The WLC has set out in its supporting affidavit a comprehensive list of these sexual offences in SORMA along with similar sexual offences under the common law and in other legislation.[15]

11. Apart from the offences occurring in the context of pornography using children or vulnerable people, and human trafficking, it is only sexual offences involving sexual penetration that can be prosecuted after twenty years.[16]

12. Mr Basset, the deputy chief state law advisor, who deposed to the Minister's affidavit, explains that the differentiation between sexual offences for the purposes of prescription was historically made on the basis that certain offences could attract the death penalty.[17] Thereafter, certain offences were excluded from the ambit of section 18 because they were regarded as

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[15] Supplementary Record, Vol 1, p675 – 682. The WLC's position that none of the current sexual offences in statute or common law should prescribe should not be considered a concession as to the constitutionality of the criminalisation of certain conduct and behaviour, or an endorsement of the prosecutions of certain of these offences. Indeed, there are certain sexual offences that the WLC considers to be inappropriate or unconstitutional. That issue is not before the Court today, and should not prevent this Court from confirming the declaration of invalidity.

[16] SORMA defines "sexual penetration" as:

> "*including 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*."

[17] Vol 4, p344, para 16.

"*particularly serious*"[18] and were subject to discretionary minimum sentences.[19] After the enactment of SORMA, the exclusions in section 18 were expanded to include "*all forms of sexual penetration*" along with compelled rape.[20] Mr Basset does not explain why the categories of sexual offences relating to pornography using vulnerable adults and children, and trafficking for sexual purposes in sub-sections 18(h) and (i) were excluded from the scope of the section 18 prescription period.

13. The stated purpose of the additional offences included in SORMA, and their corresponding inclusion in section 18, was to "*respond to the scourge of sexual violence*" and to "*give recognition to the constitutional prohibition against the invasion of privacy and dignity*."[21] Ultimately, the changes to the Sexual Offences Act 23 of 1957 ("SOA") sought to ensure the "*progressive development of a Criminal Justice System that is victim-centred, responsive and caring*"[22] and that is "*quick, more protective, least traumatising, more sensitive to the plight of victims, and promotes a cooperative response between all Government departments*."[23]

14. The Minister accepts that given the serious nature of all sexual offences and the vulnerability of the victims of such offences, any policy position that seeks to distinguish between penetrative and non-penetrative sexual offences in

[18] Vol 4, p344, para 18.

[19] Vol 4, p344, para 19.

[20] Vol 4, p345, para 20.

[21] Vol 4, p345, para 21.

[22] Vol 4, p356, para 55.

[23] Vol 4, p358, para 58.

relation to section 18 of the CPA cannot pass constitutional muster[24] and that such a position is not informed by the Government purpose that underpins the SOA and SORMA.[25] The WLC agrees.

THE DIFFERENTIATION BETWEEN SEXUAL OFFENCES IN SECTION 18 IS IRRATIONAL

15. One of the key rationales underlying the differentiation in section 18 is that rape and compelled rape are more 'serious' than other sexual offences and that their perpetrators should be prosecuted regardless of the fact that the period of twenty years has elapsed.

16. The grading of the severity of sexual offences in a manner that places penetrative sexual offences in a position as the 'most serious' is informed by the assumption that penetrative sexual offences are more harmful, or morally worse than other non-penetrative sexual offences.[26]

17. The differentiation in section 18 based on these assumptions is deeply problematic, wholly inappropriate and an irrational basis upon which determine which sexual offences should be excluded from the operation of section 18 because:

    17.1. All sexual offences cause trauma and harm at a level that is serious enough to warrant exclusion from prescription. The assumptions about the perceived 'harm' or 'trauma' suffered by survivors of sexual

[24] Vol 4, p361, para 68.

[25] Vol 4, p361, para 69.

[26] There are two ways in which seriousness of an act may be judged. Firstly, the moral gravity of committing the act which requires a normative evaluation of the act. Secondly, the act may be judged on the basis of the harm or damage that the act brings upon the victim.

offences reflected in the differentiation in section 18 are not supported by research which shows that the characteristics of the assault are only one factor (and often not the most important) when determining the trauma experienced by the survivor.

17.2. The positioning of ‘rape’ as the most serious sexual offence is based in outdated and patriarchal notions of the perceived moral gravity and harmfulness of different sexual offences, and in particular, that the perpetrators of such offences are more deserving of punishment than the perpetrators of other sexual offences.

18. Furthermore, the commonality in the context and consequences of all offences of a sexual nature, far outweigh any differences in the particular characteristics of the offence arising from social and legal definitions:

18.1. In the first instance, all sexual offences are committed within the same the social and political context. Sexual offences are disproportionately committed against women and children. These offences cause broader and more complex harm to both their direct victims, to communities and to society as a whole. This is the case whether or not the sexual offence involves penetration or not.

18.2. Secondly, all sexual offences have the same capacity to cause trauma, harm and long-lasting effects on the survivor. For this reason, the decision to not report, and delayed reporting, are key features of all sexual offences committed against both adults and children.

All sexual offences are traumatic and harmful

19. The distinction between sexual offences for the purposes of prescription cannot rationally be based on a gradation of the perceived trauma experienced by a survivor because there is no correlation between the type of sexual offence (as defined in the law) and the level and extent of trauma experienced by the survivor. Indeed, as the High Court found, the trauma suffered by victims may be worse in non-penetrative sexual offences than penetrative sexual offences.[27]

20. Ms Kathleen Dey ("Dey"), the Director of the Rape Crisis Cape Town Trust, highlights that physical harm or injuries are not necessarily an indication of the trauma arising from sexual violence.[28] Rape Trauma Syndrome, despite its name, refers to the response arising from all sexual violence regardless of how that offence is characterised by the law.[29]

21. A number of studies have explored the nature of the harm and trauma arising from the commission of sexual offences, and the factors that influence the severity of the trauma.

22. We highlight the primary findings of this research to demonstrate that the assumption that penetrative offences are more harmful is simply not supported by the research or evidence:

[27] Vol 7, p608, para 63, High Court Judgment.

[28] Supplementary Record, Vol 1, p687, para 10.

[29] Supplementary Record, Vol 1, p686, para 8.

22.1. In the first instance, physical and psychological trauma is an inherent and intentional aspect of sexual violence.[30] This is so regardless of whether the offence is characterised by the law as 'rape' or 'compelled rape'. Post-traumatic stress disorder ("PTSD") or Rape Trauma Stress Disorder is a common consequence of all sexual offences.[31]

22.2. The research reveals that the legal and social characterisation of a sexual offence, or the fact that the offence involved penetration, is not the primary indicator of the level of trauma or PTSD endured by the survivor.

22.2.1. Trauma has a complex impact and will manifest in a variety of ways including physical, behavioural and psychological symptoms. Its effects on a survivor will vary on a case by case basis depending on the many other environmental influences or past experiences.[32]

22.2.2. In two different studies Ullman examined the broad range of factors that may affect PTSD symptom severity in female survivors of sexual offences:

22.2.2.1. In the 2001 study, Ullman[33] found that neither the physical injury suffered by the victim resulting from the sexual attack nor the relationship between the

[30] Supplementary Record, Vol 1, p687, para 11.

[31] Ullman ES, Henrietta H. Filipas, Stephanie M. Townsend, and Laura L. Starzynski Psychosocial Correlates of PTSD Symptom Severity in Sexual Assault Survivors Journal of Traumatic Stress Vol. 20 No. 5 October 2007 p821.

[32] Supplementary Record, Vol 1, p688 – 691.

[33] Supplementary Record, Vol 2, p762 – 764 (Extract). Ullman ES, Filipas HH Predictors of PTSD Symptom Severity and Social Reactions in Sexual Assault Victims Journal of Traumatic Stress, Vol. 14, No. 2, 2001 p 384

victim and the offender were significant predictors of PTSD.[34]

22.2.2.2. In a 2007 study, Ullman found that few sexual assault characteristics predicted symptom severity when controlling for trauma history and post assault factors.[35] Trauma history and child sexual abuse were more significant correlates to PTSD symptom severity than "*offender violence, assault severity, and victim-offender relationship*."[36]

22.2.3. In 1987 the National Institutes of Mental Health Intramural Research Programme[37] developed a conceptual framework which sought to integrate concepts of psychological adjustment to sexual abuse. Central to this model was the notion that characteristics of sexual abuse are complex and more than just the physical act. These characteristics include the duration of the abuse, the frequency of the abuse, the relationship to the abuser, the presence of physical and other forms of violence and the age of onset. It is these characteristics that play a major role in the degree of trauma experienced and the disclosure of abuse.

[34] Ibid at p383

[35] Supplementary Record, Vol 2, p758. Ullman (2007) at p828.

[36] Supplementary Record, Vol 2, p758. Ullman (2007) at p828.

[37] Supplementary Record, Vol 2, p779. Putnam FW, Trickett PK. The Psychobiological Effects of Child Sexual Abuse. New York; W.T. Grant Foundation 1987.

23. The research confirms that there are many factors that influence the trauma or harm arising from a particular sexual offence. The characteristics of the offence are only one factor. The fact that a particular offence involves sexual penetration does not automatically render it more harmful, more traumatic or more serious than other non-penetrative sexual assaults. The 'minimisation of trauma' through the assumption that penetrative sexual offences are more serious or harmful than other sexual offences is itself harmful to survivors.[38] The blanket differentiation in section 18 founded on the flawed assumption that offences that do not involve sexual penetration are automatically less traumatic or harmful is simply without any factual basis. The failure to include all sexual offences in the exclusions in sub-sections (a) to (i) of section 18 for this reason is irrational.

The role of patriarchy in the perception of rape as a more serious sexual offence

24. The assumption that rape and compelled rape are more serious and morally more reprehensible than other sexual offences requires careful interrogation in light of constitutional values and the objects of SORMA.

25. An unquestioning reliance on these assumption - originally incorporated into the Criminal Procedure Act in 1977 - permits the policy considerations and beliefs of an inherently patriarchal society to artificially determine the severity (and therefore prescription) of sexual offences. In this way, the law embodies and perpetuates the harmful gender relations found in society.

[38] Vol 6, p529, para 31, Affidavit of Nataly Woollet.

26. Historically patriarchy has dictated that women are seen as property of men, an asset that had reproductive value; the virginity of women was valued and protected by men as it assured men of the legitimacy of their children and continuation of their genetic line. The value of women depended on her ability to marry and to produce heirs. If a woman were raped, her value would be diminished in the eyes of men as it reduced the reliability of the progeny. The rape of a wife or daughter fundamentally undermined the notion of ownership of the woman by a man (husband or father), seen as stealing the property of another man, and reducing a woman's value. Therefore sexual intercourse in the traditional sense of penile penetration of the vagina is inextricably linked to the concept of rape; the very act of penetration led to the devaluation of women as it threatened ownership and the guarantee to produce legitimate heirs. A sexual offence that did not involve penetration therefore did not threaten the value of women as much as penetrative sexual offences, and in that way seen as not as serious.

27. These ideas of the 'harm' caused by penetrative sexual offences focus on the proprietary impact of the offence on men, rather than the psychological and physical impact on the survivors.

28. This distinction has remained today, entrenched in modern thinking and the analysis of the seriousness of various sexual offences. The WLC submits that these assumptions must be deconstructed to reveal the underlying patriarchal and misogynist principles informing them.

29. The differentiation in section 18 between rape and compelled rape, and the many other sexual offences contained in SORMA, based on outdated

assumptions that offences involving sexual penetration are inherently more serious and worthy of criminal censure than other offences, is irrational. It is simply not supported by fact or aligned with the principles and values of our constitutional democracy. Nor is the differentiation one that accords with the objectives of SORMA. The policy reasons for grading the severity sexual offences for the purposes of prescription must accord with constitutional values and norms.[39] In the present case, the failure to carefully deconstruct and challenge historical assumptions about sexual offences merely re-enforces "the stubborn persistence of patriarchy" in our society[40] and entrenches it in our legal system.

All sexual offences are disproportionally committed against women and children

30. The very high levels of sexual violence against women and children in South Africa, and their broader impacts, are well documented and recognised by this Court:

30.1. In *Carmichele*[41] this Court emphasised that:

> *"sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self–determination of South African women."*

30.2. In *Masiya* Justice Nkabinde reiterated the widely accepted notion that:

[39] Paulsen and another v Slip Knot Investments 777 (Pty) Ltd [2015] ZACC 5, 2015 (3) SA 479 (CC) at para 69 & 70; Barkhuizen v Napier [2007] ZACC 5, 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC) at para 28 & 29. Carmichele at para 56.

[40] Gumede (Born Shange) v President of the RSA & others [2008] JOL 22879 (CC) at para 1.

[41] *Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC) at para 62.*

"sexual violence and rape not only offends the privacy and dignity of women but also reflects the unequal power relations between men and women in our society."[42]

30.3. Indeed, in *F v Minister of Safety & Security* the Court stressed that:

"The threat of sexual violence to women is indeed as pernicious as sexual violence itself. It is said to go to the very core of the subordination of women in society. It entrenches patriarchy as it imperils the freedom and self-determination of women."[43]

31. The preamble of SORMA recognises the prevalence of sexual offences in South Africa and the vulnerability of women and children in particular to these offences. It acknowledges South Africa's international and constitutional obligations, including the right to equality, the right to privacy, the right to dignity, the right to freedom and security of the person, which incorporates the right to be free from all forms of violence from either public or private sources, and the rights of children and other vulnerable persons to have their best interests considered of paramount importance. Added to this, the preamble to SORMA commits to affording complainants of sexual offences the maximum and least traumatising protection that the law can provide, to introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act, and to combat and, ultimately, eradicate the relatively high incidence of sexual offences committed in the Republic.

32. The vulnerable position of women in South Africa has also been recognised internationally. The June 2016 report of the United Nations Special Rapporteur

[42] *Masiya v Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies and Another, Amici Curiae)* 2007 (5) SA 30 (CC) at para 29.
[43] *F v Minister of Safety & Security & another (Institute for Security Studies & others as amici curiae) [2012] JOL 28228 (CC)* at para 57.

on Violence Against Women notes that the violence inherited from apartheid still resonates in South African society which remains dominated by deeply entrenched patriarchal norms and attitudes towards the role of women. This makes violence against women and children, especially in rural areas and in informal settlements, a way of life and an accepted social phenomenon.[44]

33. It is undisputed that sexual offences are overwhelmingly committed against women and children. The state is required to put in place legislative and other measures to prevent the violation of the rights of privacy, dignity and security of this vulnerable group. There is no reason that the special legal protection afforded to survivors of rape and compelled rape through the operation of the exclusion in section 18 should not afforded to all survivors of sexual violence.

Delayed and under-reporting is a feature of all sexual offences

34. Both the applicants and the Teddy Bear Clinic set out extensive argument, supported by research, of the reasons why children delay in reporting all forms of sexual offences.[45] This evidence also confirms that significant psychological harm, complex trauma and post-traumatic stress can follow from both sexual assault and rape.[46]

35. The WLC expands on this point and submits that delayed and under-reporting is a recognised feature of all sexual offences whether they are committed

[44] Supplementary Record, Vol 2, p729. 'Report of the Special Rapporteur on Violence Against Women, its causes and consequences on her mission to South Africa' UN A/HRC/32/42/Add.2 14 June 2016

[45] Teddy Bear Clinic - Vol 6, p451 – 533. The affidavit of Nataly Woollet, (p518) and Shaheda Omar (p456).

[46] Vol 6, p520, para 8.

against adults or children. The further evidence adduced by the WLC provides a factual basis for this submission.[47]

35.1. We have demonstrated above that research reveals that serious trauma can arise from all sexual offences. Survivors of sexual violence experience symptoms of post-traumatic stress disorder on a physical, behavioural and psychological level.[48] These symptoms of rape trauma syndrome may last for long periods and even for the remainder of the survivor's life.[49]

35.2. While we do not know precisely how many sexual offences in South Africa go unreported, it is safe to say that there is massive under-reporting of gender-based violent crimes and sexual offences against adult women:

35.2.1. The 2011 report of the Medical Research Council and Gender Links provides statistics from a survey conducted in Gauteng. The research reveals that while 25% of women had experienced sexual violence in their lifetime, only 3.9% of women interviewed had reported these incidences of violence against them and only 4% of rapes had been reported.[50] There is serious under-reporting to the police. Sexual violence by an intimate partner was

[47] Supplementary Record, Vol 1, p668, para 18.

[48] Supplementary Record, Vol 1, p687, para 11.

[49] Supplementary Record, Vol 1, p692, para 16.

[50] Supplementary Record, Vol 1, p694, para 21. "The war @ home" Preliminary findings of the Gauteng Gender Violence Prevalence Study" Gender Links and the Medical Research Council (2011) is at p713.

least often reported, and half of all survivors never go to the police.[51]

35.2.2. The under-reporting of all forms of gender-based violence crimes is referred to as an "*unchallenged fact*" by the Special Rapporteur. [52]

35.2.3. The 2015/2016 Victims of Crime Survey[53] indicates that only 35.5% of individuals reported sexual offences to the SAPS. The proportion of rape victims who report their victimisation to the police decreased by 21% between 2011 and 2014 and by 27% between 2015 and 2016.[54]

35.2.4. Statistics South Africa reports that in 2015/16 only 35.5% of sexual offences are reported by the police. Earlier data shows that 56.2% of rape victims reported the offence.[55]

35.2.5. The statistics gathered by Rape Crisis show that only 52% of survivors of sexual offences report these sexual offences to the SAPS.[56]

[51] Supplementary Record, Vol 1, p717.

[52] Supplementary Record, Vol 1, p732, para 10.

[53] Supplementary Record, Vol 1, p720. Statistics South Africa "Statistical Release PO341" Victims of Crime Survey 2015/16 (2017).

[54] Supplementary Record, Vol 1, p719, National Victims of Crime Survey 2015/2016 STATS SA.

[55] Supplementary Record, Vol 1, p728. The Report "Quantitative research findings on Rape in South Africa" by Statistics South Africa (2000).

[56] Supplementary Record, Vol 1, p697, para 27.

35.2.6. The Special Rapporteur notes that there are significant societal and institutional barriers and powerful disincentives to reporting gender-based violence.[57]

35.2.7. South African studies indicate the high levels of dissatisfaction of the criminal justice system experienced by sexual offences victims, accounting for many victims withdrawing from the process[58] or not approaching the police at all out of the concern that the criminal justice system would cause them additional distress[59].

35.3. The reasons adult victims do not report sexual offences may apply for a number of years after the offence has occurred. For this reason, it is common for there to be delay in reporting of all sexual offences against adults:

35.3.1. Delayed reporting by victims of sexual offences is well documented in the literature.[60] Dey confirms that in her experience it is very common for adult survivors of sexual offences to delay for a period of time before disclosing

[57] Supplementary Record, Vol 1, p744, para 2.

[58] Vetten, L., Jewkes, R., Sigsworth, R., Christofides, N., Loots, L., & Dunseith, O. (2008). *Tracking justice: The attrition of rape cases through the criminal justice system in Gauteng.* . Johannesburg: Tshwaranang Legal Advocacy Centre, The South African Medical Research Council and the Centre for the Study of Violence and Reconciliation.

[59] Patterson, D (2009)

[60] Muller, KD and Hollely, KA 2000 Introducing the Child Witness; Chapter 4 Disclosure: a process of truth p124; Campbell, R., Dworkin, E., & Cabral, G. (2009). An ecological model of the impact of sexual assault on women's mental health. *Trauma, Violence & Abuse, 10*(3), 225-246; Campbell, R. (2010). The psychological impact of rape victims' experiences with legal, medical and mental health systems. *American Psychologist, 63*, 702-717;

P765 at 771, Patterson, D., Greeson, M., & Campbell, R. (2009). Understanding rape survivors' decisions not to seek help from formal social systems. *Health & Social Work, 34*, 127-136.

what happened to them and being in a position to report the sexual offence to the authorities.[61]

35.3.2. Ullman's research reveals that delayed disclosure was related to more severe current PTSD systems.[62]

35.3.3. Dey provides insight into the social reasons[63], personal reasons,[64] and structural reasons[65] for delayed reporting. Statistics South Africa confirms the main reasons for not reporting is fear of reprisals, a belief that the police would not be able to solve the crime and shame.[66]

35.4. Adult victims of sexual offences may report the offence after a long period. Dey confirms that she has witnessed this in her work. There are many reasons why this may occur. In particular, the personal circumstances of a survivor may change, or another person may report an offence by the same perpetrator.[67]

[61] Supplementary Record, Vol 1, p703, para 49.

[62] Supplementary Record, Vol 2, p758. Ullman (2007) at p828.

[63] Supplementary Record, Vol 1, p698, para 29 – 30.

[64] Supplementary Record, Vol 1, p699, para 34 – 39.

[65] Supplementary Record, Vol 1, p701, para 40 – 46.

[66] Supplementary Record, Vol 1, p728. The Report "Quantitative research findings on Rape in South Africa" by Statistics South Africa (2000)

[67] Supplementary Record, Vol 1, p702, para 48.

SECTION 18 HAMPERS THE FULFILMENT OF THE STATE'S CONSTITUTIONAL OBLIGATIONS

36. The High Court found that section 18 infringes the right to dignity and equality.[68] The WLC supports this finding and the submissions of the applicant that section 18 also violates the right to be protected from abuse as children, to be free from all forms of violence, access to courts and a fair trial.[69]

37. The WLC adds that the bar on prosecution unjustifiably hampers the state's fulfilment of its constitutional obligations under section 7(2) of the Constitution. The applicants advance a similar argument in these proceedings.[70]

38. The absolute bar to the prosecution of all sexual offences (except for the three categories expressly excluded) after 20 years infringes all these rights in a manner that is constitutionally unreasonable and unjustifiable. WLC submits that it is not possible to interpret section 18 in a manner that would render it constitutionally compliant, nor there is any justification for the blanket ban on the prosecution of sexual offences (other than the excluded categories) after 20 years.[71]

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[68] Vol 7, p614, para 76 (dignity); Vol 7, p615, para 78 (equality);

[69] Para 15, Applicants' Written Submissions.

[70] Para 52.3, Applicants' written submissions.

[71] The primary reason for the prescription of criminal offences arises from the constitutional imperative that an accused have a fair trial. The concern exists that accurate and reliable evidence may diminish after time, and that it makes it more difficult for the accused to locate and obtain evidence to support their defence. The accused should be able to be certain, after a clearly prescribed time, that they can no longer be prosecuted for the crime. Jurisdictions where no criminal statute of limitations exist address these concerns by ensuring that the accused is protected, for example by proving the right to bring an 'abuse of process' application.

39. The High Court correctly accepted the WLC's submissions that section 18 impedes the State's constitutional obligations in terms of section 7(2).[72] We do not repeat these arguments save to highlight the key points.

39.1. Sexual violence implicates a number of rights in the Bill of Rights including sections 9, 10, 11, 12 and 28.[73]

39.2. Section 7(2) of the Constitution imposes a duty on the state to "*respect, protect, promote and fulfil"* the rights in the Bill of Rights. This obligation is positive, direct, and powerful.[74] The state's duty extends beyond its own action, and it must also take steps to protect these rights against damaging acts that may be perpetrated by private parties.[75]

39.3. There are several specific aspects of the state's duty that are now well-entrenched in our constitutional jurisprudence:

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[72] Vol 7, p623, para 98, High Court Judgment.

[73]

- Section 9(1) and 9(2): *Everyone is equal before the law and has the right to equal protection and benefit of the law. Equality includes the full and equal enjoyment of all rights and freedoms*
- Section 10: *Everyone has inherent dignity and the right to have their dignity respected and protected.*
- Section 11: *Everyone has the right to life.*
- Section 12(1)(c); *Everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources and not to be treated or punished in a cruel, inhuman or degrading way.*
- Section 12(2)(b): *Everyone has the right to bodily and psychological integrity, which includes the right to security in and control over their body.*
- *Section 28: Every child has the right to be protected from maltreatment, neglect, abuse or degradation. A child's best interests are of paramount importance in every matter concerning the child.*

[74] *S v Baloyi (Minister of Justice and Another Intervening) 2000 (2) SA 425 (CC) at* para 11; *Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC) at para 47; *Carmichele v Minister of Safety and Security* 2001(4) SA 938 (CC) at paras 44 to 45; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at para 20.

[75] *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae) President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA) at para 27.

39.3.1. The state bears the primary responsibility to protect women and children against this prevalent plague of violent crime;[76]

39.3.2. The state is obliged "*directly to protect the right of everyone to be free from private or domestic violence*";[77]

39.3.3. The state is obliged to "*take appropriate steps to reduce violence in public and private life*";[78]

39.3.4. The state is obliged in certain circumstances "*to provide appropriate protection to everyone through laws and structures designed to afford such protection*" which may imply "*a positive obligation on the authorities to take preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual*".[79]

39.4. One of the ways in which the state protects, promotes and fulfils constitutional rights is through the criminal justice system and particularly the prosecution of criminal offences by the National Prosecuting Agency.[80]

[76] F v Minister of Safety & Security & another (Institute for Security Studies & others as *amici curiae*) [2012] JOL 28228 (CC) at para 57.

[77] *Baloyi* 2000 at para 11.
[78] *Christian Education at* para 47.
[79] *Carmichele at* paras 44 to 45, citing with approval, *Osman v United Kingdom* 29 EHHR 245 at 305, para 115.
[80] S v Basson 2005 (1) SA 171 (CC) at para 31.

39.4.1. The state's power and responsibility to prosecute criminal offences arises directly from the Constitution in section 179.[81]

39.4.2. There is a "*constitutional duty of the state to initiate criminal proceedings."*[82]

39.4.3. The power to prosecute "*enables the state to fulfil its constitutional obligations to prosecute those offences that threaten or infringe the rights of citizens*".[83]

39.4.4. "*effective prosecution of crime is an important constitutional objective*";

39.4.5. "*The constitutional obligation upon the state to prosecute those offences which threaten or infringe the rights of citizens is of central importance in our constitutional framework*".[84]

40. Over and above this general duty, the WLC Trust submits that the state has a heightened constitutional obligation to ensure the prosecution of sexual offences against women and girl children.

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[81] Section 179(1) of the Constitution provides for a single National Prosecuting Authority structured in terms of an Act of Parliament. In terms of subsection (2) the Prosecuting Authority has the power to institute criminal proceedings on behalf of the State.

Section 179(2) of the Constitution confers on the state the authority to institute criminal proceedings and provides: "The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings."

[82] S v Basson 2007 (1) SACR 566 (CC) at para 144.

[83] National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and another [2014] JOL 32401 (GP) at para 13.

[84] S v Basson 2005 (1) SA 171 (CC) at para 32.

40.1. There is overwhelming evidence, and it is generally accepted, that women and children are disproportionately affected by sexual violence.

40.2. South Africa's obligation to protect the rights of women, particularly from violence, also arises from its international law duties. In particular, the duty to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent a violation of those rights.[85] These obligations were expressly recognised by the High Court.[86]

41. Section 18 places an absolute ban on the prosecution of sexual offences (other than the excluded categories) after 20 years. Section 18 therefore prevents the state's fulfilment of its constitutional obligations in respect of sexual offences that took place 20 years ago. We submit that the limitation and impediment on the state's fulfilment of its constitutional obligation is unjustifiable and constitutionally impermissible.

THE NECESSITY OF THE BROADER ORDER

42. The factual situation of the applicants meant that they required only the relief necessary for the prosecution of the offences of indecent assault that were committed against them as children more than twenty years ago. For this

[85] *Baloyi* para 13; Carmichele at para 62; *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) para 15. See, Convention on the Elimination of All Forms of Discrimination Against Women Articles 2,3,6,11,12 and 16. General Recommendation No. 19; Universal Declaration of Human Rights and article 4(d) of the Declaration on the Elimination of Violence Against Women. U.N. GAOR, 48th Sess., art. 1 UN.doc. A/Res/ 48/104 (1994). Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa article 3, 4 and 25. SADC Protocol on Gender and Development (South Africa has signed but not yet ratified the SADC Protocol on Gender and Development.)

[86] Vol 7, p623, para 99 – 100.

reason, the applicants sought only an order declaring section 18 unconstitutional to the extent that it does imposes a twenty- year time bar on the prosecution of the offence of indecent assault against children.[87]

43. The WLC and other amici curiae argued that any order of constitutional invalidity, and any remedy, should go beyond the factual circumstances of the applicants' case and that the High Court should declare the section unconstitutional in respect all sexual offences and regardless of whether the survivors were adults or children at the time of the offence.

44. The High Court agreed with these submissions and held that despite the fact that the applicants were children when the offences were committed, the relief granted need not be confined to dealing with children only because:

    44.1. The provision in question, section 18(f) of the CPA, makes no distinction between offences against children and those against adults;[88] and

    44.2. The common law offence of indecent assault was not an offence confined to children.[89]

45. There is no opposition to the broader order in these confirmation proceedings.[90]

46. The WLC supports this reasoning and submits that the High Court was permitted, and indeed required, to consider the broader constitutional question and grant the broader order for the following additional reasons:

[87] Vol 7, p593, para 34, High Court Judgment.

[88] Vol 7, p596, para 36, High Court Judgment.

[89] Vol 7, p596, para 37, High Court Judgment.

[90] Paragraphs 60 – 63, Applicants Heads of Argument.

46.1. The applicant's challenge was a direct, facial challenge to the constitutionality of section 18. The matter involved the exercise the Court's broader power to *"test legislation against the Constitution" and "to ensure that legislative provisions are constitutionally compliant."*[91] In such a case, Nkabinde J expressly stated in *Masiya* that this Court is "*at liberty to provide relief beyond the facts of the case".*[92]

46.2. The impact of section 18 on adults who have endured sexual abuse over 20 years ago is inextricably linked to the facts raised by the applicants. It is a "*separate but related issue*".[93] The determination of the constitutional defects in relation to these vulnerable people is clearly a matter of public importance.

46.3. The WLC submits that it was in the interests of justice for the High Court to consider and grant the expanded declaration so as to ensure the protection of adult survivors and survivors of all sexual offences.

46.4. This is, of course, in line with the Court's obligation under section 172 to declare that any law that is inconsistent with the Constitution is invalid "*to the extent of its inconsistency*."

46.5. The expanded constitutional challenge to section 18 was contemplated in the applicants' founding affidavit.[94] The original notice of motion

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[91] Masiya v Director of Public Prosecutions & others; Centre for Applied Legal Studies & another [2007] JOL 19790 (CC) at para 31.

[92] *Masiya* at footnote 68. Citing as examples: *Mabaso v Law Society, Northern Province and another 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC) and Mohlomi v Minister of Defence 1997 (1) SA 124 (CC); 1996 (12) BCLR 1559 (CC)."*

[93] *Coughlan NO v Road Accident Fund [2015] JOL 33137 (CC) at para 12.*

[94] Vol 1, p12; para 20 of the Founding Affidavit; Vol 4, p354, para 52 of the Minister's Affidavit.

requested a declaration that went beyond the facts of indecent assault against children to include all sexual offences in SORMA.

46.6. In any event, the facts before the High Court provided a sufficient factual basis for the broader order. The applicants were victims of sexual offences. Section 18 prevented the NPA from instituting a prosecution against the perpetrator because 20 years has passed. The broader declaration that prescription should not apply to any sexual offences (perpetrated against a person of any gender or age) falls within this factual matrix.

46.7. All the parties, including the Minister, were provided an opportunity to deal with the broader challenge both on affidavit, in written legal submissions, and at the hearing of the matter. The Minister noted that "the constitutional validity" of section 18 was challenged in the High Court proceedings[95] and that the "crux of the applicant's claim" is that there is no rational basis for distinguishing rape and compelled rape from other forms of sexual offences.[96] None of the parties were prejudiced by the consideration of the broader constitutional issue.

47. However, even if this Court finds that the High Court should not have entertained the broader challenge, we submit where the interests of justice require, this Court may exercise its discretion to confirm a declaration of invalidity made in relation to the invalidated provisions.[97] We submit that the

[95] Vol 4, p349, para 37.

[96] Vol 4, p354, para 52.

[97] *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others (CCT 36/08) [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (2) SACR 130 (CC); 2009 (7) BCLR 637 (CC) (1 April 2009)* para 60.

Court should exercise its discretion in the present case to avoid uncertainty and to come to the aid of survivors of sexual offences committed more than twenty years ago.

THE APPLICATION TO ADDUCE FURTHER EVIDENCE

48. WLC applies in terms of Rule 31 of the rules of this Court for leave to adduce the evidence contained in:

    48.1. The affidavit of Kathleen Dey, the director of Rape Crisis Centre Cape town;[98]

    48.2. A number of reports and articles which were relied upon during the High Court hearing and which were expressly relied upon by the High Court.[99]

49. In finding that it was irrational to differentiate between rape, compelled rape and other sexual offences for purposes of prescription, the High Court relied on evidence placed before it by the applicants and *amici curiae* documenting the reasons why, in respect of children, there is often delayed disclosure in relation to all sexual offences and not just in relation to those of rape and compelled rape.[100]

50. The High Court also noted the evidence that demonstrates that sexual offences "*inflict deep continuous trauma on victims, many of whom suffer quietly, and either never disclose the offences at all, enable the perpetrator to escape all*

[98] Supplementary Record, Vol 1, p683.

[99] Supplementary Record, Vol 1 and 2, p713 to 792.

[100] Vol 7, p611, para 67, High Court Judgment. Para 16 of the Supporting Affidavit to the WLC's Application to Adduce Evidence.

consequences, or disclose over varying lengths of time after the offences were committed, dependent on each victim's unique circumstances and emotional fragility."[101]

51. The WLC has secured additional evidence to demonstrate that this is also true in respect of adult survivors of sexual offences.

52. There are three key requirements for admission of evidence under Rule 31(1)(a). The evidence must be relevant, it must not appear on the record, and it must either be common cause or incontrovertible, or it must be of an official, scientific, technical or statistical nature capable of easy verification.

    52.1. The evidence tendered by the WLC is relevant to the issues in this matter. The new evidence to be adduced by the WLC covers the same issues highlighted in the evidence before the High Court except that it is directed at the impact and effect of sexual offences against adults. It includes the personal, structural and social disincentives for reporting, and the psychological and physical reasons for delayed disclosure. [102] It is highly relevant to the confirmation of the High Court's declaration of constitutional invalidity and will assist the Court in its adjudication of the case.[103]

    52.2. There is no dispute as to the veracity or accuracy of the data or factual material to be adduced.[104] The evidence is incontrovertible and, in some cases, official and statistical in nature. It is easily verifiable, and

[101] Vol 7, p611, para 67, High Court Judgment.

[102] Para 22.1, Supporting Affidavit to the WLC's Application to Adduce Evidence.

[103] Para 22.2, Supporting Affidavit to the WLC's Application to Adduce Evidence.

[104] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at para 6.

generally accepted as reliable. It is not disputed by any party in the present proceedings, nor was it the subject of a factual dispute before the High Court.[105]

52.3. The evidence is from reliable and recognised sources.

52.3.1. Kathleen Dey, the director of Rape Crisis Cape Town Trust, has twenty-one years of experience dealing with adult survivors of sexual offences in South Africa. Her experience and expertise qualifies her as an expert on the matters on which she expresses an opinion in the affidavit.[106]

52.3.2. The reports are published by reputable non-governmental organisations and recognised bodies.[107]

52.4. There is no prejudice to any other party arising from the admission of the further evidence. The application to adduce the further evidence was filed on 28 July 2017. All parties have had ample opportunity to dispute or respond to the evidence if they deemed it necessary.

53. For these reasons, the WLC respectfully submits that the evidence contained in Annexures B to I to the Supporting Affidavit of the Application ought to be admitted under Rule 31.

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[105] Supplementary Record, Vol 1, p670, para 22.3, Supporting Affidavit to the WLC's Application to Adduce Evidence. The WLC's proposition, based on the evidence to be adduced, that there are high levels of underreporting and delayed reporting of sexual offences committed against adults was not an issue of factual dispute in the High Court. Nor was it disputed that many of the reasons why children delay in reporting sexual abuse apply to adults survivors.

[106] Ms Dey's CV is at Supplementary Record, Vol 1, p705.

[107] Supplementary Record, Vol 1, p671, para 22.5.

REMEDY

54. The High Court found that it was necessary to suspend the order of constitutional invalidity in order for Parliament to remedy the constitutional defects. The High Court provided immediate relief by reading in until such time as the legislative amendments were effected.[108]

55. In confirmation proceedings, the Court is obliged to exercise its remedial discretion in terms of section 172 of the Constitution afresh.[109]

56. The WLC submits that this is not a case where suspension of the declaration of constitutional invalidity is necessary. A final and operative order declaring section 18 unconstitutional should be accompanied by an order 'reading in' the necessary words to section 18 to remedy the constitutional defect. The final reading in should take the same form as the interim reading in ordered paragraph 3 of the High Court order.[110]

57. Mr Basset indicates that government has been attempting to "*infuse the changing norms, values and interests of society*" into pre-1994 statutory framework[111] and in this regard, advises that further amendments to section 18 are currently under consideration to include other offences relating to the trafficking of children and torture.[112] This work can continue in line with the reasoning of this Court's judgment, but without leaving survivors of sexual offences without recourse during this period.

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[108] Vol 7, p628, para 115, High Court Judgment.

[109] *Sibiya and others v Director of Public Prosecutions JHB and others* 2005(5) SA 315 (CC) at para 44.

[110] Vol 7, p634.

[111] Vol 4, p342, para 13.

[112] Vol 4, p349, para 38.

58. That being said, the WLC acknowledges that the issue of remedy is one that lies in the discretion of the Court. The WLC makes the submissions above in order to assist this Court, and does not resist or oppose an order of constitutional validity with an order of suspension provided that a limited time period is imposed within which Parliament should take the necessary action to remedy the unconstitutionality of section 18.

CONCLUSION

59. The WLC therefore submits that:

    59.1. The declaration of constitutional invalidity on the terms granted by the High Court should be confirmed;

    59.2. This Court should order a final reading in of section 18 in the same form as the interim reading in ordered paragraph 3 of the High Court order;

    59.3. The WLC should be granted to leave to adduce the new evidence as per its application to this Honourable Court.

60. The WLC abides by the decision of the Court on the first respondent's appeal on the issue of costs.

61. The WLC does not seek costs against any party, and submits that it should not be burdened with a costs order in the event that either the application for confirmation or the application to adduce further evidence is unsuccessful.[113]

[113] Biowatch Trust v Registrar Genetic Resources and Others 2009 (6) SA 232 (CC).

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28 September 2017

Chambers,
Johannesburg and Cape Town

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