IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case no: 29573/16

In the matter between:

NICOLE LEVENSTEIN	First Applicant
PAUL DIAMOND	Second Applicant
GEORGE ROSENBERG	Third Applicant
KATHERINE ROSENBERG	Fourth Applicant
DANIELA MCNALLY	Fifth Applicant
LISA WEGNER	Sixth Applicant
SHANE ROTHQUEL	Seventh Applicant
MARINDA SMITH	Eighth Applicant
and	
SIDNEY LEWIS FRANKEL	First Respondent
MINISTER OF JUSTICE AND	Second Respondent
CORRECTIONAL SERVICES	
DIRECTOR OF PUBLIC PROSECUTIONS,	Third Respondent
GAUTENG	
and	
THE TRUSTEES FOR THE TIME BEING OF THE	First Amicus Curiae

WOMEN'S LEGAL CENTRE TRUST

THE TEDDY BEAR CLINIC Second Amicus Curiae

LAWYERS FOR HUMAN RIGHTS Third Amicus Curiae

FILING SHEET

KINDLY TAKE NOTICE THAT the following documents are filed herewith:

1. First Amicus Curiae Practice Note
2. First Amicus Curiae Heads of Argument, including list of authorities

DATED AT **CAPE TOWN** ON THIS **10th** DAY OF **MARCH 2017.**

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Subject: Levenstein & Others // Frankel & Others, Case no. 29573/16
Attachments: WLC Heads of Argument 10 March2017.docx.pdf

Dear Colleagues

Please find herewith Women's Legal Centre Trust Heads of Argument in the above matter.

Regards

Adv. Bronwyn Pithey
Legal Consultant

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DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG	Third Respondent
THE TRUSTEES FOR THE TIME BEING OF THE WOMENS LEGAL CENTRE TRUST	First Amicus Curiae
THE TEDDY BEAR CLINIC	Second Amicus Curiae
THE LEGAL RESOURCES CENTRE	Third Amicus Curiae

THE WOMENS' LEGAL CENTRE'S PRACTICE NOTE

1 NAME OF PARTIES, CASE NUMBER, AND NUMBER ON THE ROLL

1.1 The name of the parties and the case number appear above.

1.2 The matter has not yet been allocated a number of the motion roll.

2 NAMES AND TELEPHONE NUMBER OF COUNSEL

2.1 For the Women's Legal Centre Trust
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3 NATURE OF THE MOTION AND RELIEF SOUGHT

3.1 Opposed Application.

3.2 The applicants seek an order declaring section 18 of the Criminal Procedure Act 51 of 1977 inconsistent with the Constitution. If they are successful in this constitutional challenge, they ask that the Director of Public Prosecution be directed to reconsider its decision to refuse to prosecute.

4 ISSUES TO BE DETERMINED

4.1 Whether section 18 of the Criminal Procedure Act 51 of 1977 inconsistent with the Constitution?

4.2 The appropriate remedy.

5 THE THIRD AMICUS CURIAE'S CONTENTIONS

5.1 The WLC Trust aligns itself with the applicants to the extent that they seek an order declaring section 18 of the Criminal Procedure Act unconstitutional.

5.2 The WLC Trust accepts that the prescription of criminal offences is constitutionally permissible, but submits that:

5.2.1 No sexual offence (as currently defined in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, and previously founded in the common law) should prescribe.

5.2.2 The determination of which sexual offences should be excluded from the reach of section 18 must be rational;

5.2.3 Special considerations apply and must be taken into account when considering which sexual offences prescribe because of the unique nature of sexual offences and the state's constitutional obligations to prosecute these offences.

5.3 Section 18 provides that all sexual offences prescribe except for the three categories of sexual offences excluded in the sub-sections. The only basis upon which this distinction between sexual offences is made is the 'seriousness' of the sexual offence.

5.4 The WLC Trust submits that the concept of 'seriousness' of offences is not an appropriate or rational basis upon which to differentiate between sexual offences for the purposes of prescription.

5.4.1 Sexual offences are unique in their nature and impact. They should be treated differently. An appropriate concept that can be used to determine which other offences prescribe or not, should not be used for sexual offences. This is particularly so in relation to prescription because of the well-documented and recognised reasons for the delay in prosecuting such offences.

5.4.2 The concept of seriousness based on 'harm' or moral gravity does not take into account the level of trauma endured by victims of sexual offences which varies independently of the 'seriousness' of the offence;

5.4.3 In respect of sexual offences, particularly against women, the concept of seriousness of the offence is imbued with patriarchal notions which no longer have a place in our constitutional dispensation. For example, section 18 proceeds on the assumption that penetrative sexual offences are more serious (and should therefore be excluded from prescription) than non-penetrative sexual offences.

5.5 This exclusion of certain sexual offences in section 18 is therefore arbitrary and a breach of the rule of law entrenched in section 1 of the Constitution.

5.6 The operation of the section which prevents the Director of Public Prosecutions from instituting a prosecution for sexual offences against women and girl children on an arbitrary basis also constitutes a breach of the state's constitutional obligations under section 7 of the Constitution.

6 ESTIMATE OF THE PROBABLE DURATION OF THE MOTION

Two days

7 NECESSITY OF READING THE PAPERS

It is necessary to read all the paginated papers.

Frances Hobden

Bronwyn Pithey

First Amicus Curiae's Counsel

Chambers, Sandton and
Cape Town

10 March 2017

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HEADS OF ARGUMENT OF THE WOMEN'S LEGAL CENTRE TRUST

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INTRODUCTION

1. The eight applicants in this matter allege that they were sexually assaulted by the first respondent, Mr Sidney Frankel, at various places and times, between 1976 and 1991.[1] The applicants only gained full appreciation of the criminal acts committed against them between 2012 and 2015. They brought a civil claim and laid criminal charges against Mr Frankel in respect of these offences. The Director of Public Prosecutions has declined to prosecute on the basis that the applicants' claims to institute a criminal prosecution has lapsed (or prescribed) in terms of section 18 of the Criminal Procedure Act 51 of 1977.[2] ("**the Criminal Procedure Act**")

2. The applicants challenge the absolute bar imposed by section 18 on the prosecution of the sexual offences committed against them more than 20 years ago.[3] They seek an order declaring section 18 inconsistent with the Constitution. If they are successful in this constitutional challenge, they ask that the Director of Public Prosecution be directed to reconsider its decision to refuse to prosecute.

3. The Women's Legal Centre Trust ("**the WLC Trust**") was admitted as an *Amicus Curiae* on 1 February 2017.

    3.1. The WLC Trust aligns itself with the applicants to the extent that they seek an order declaring section 18 of the Criminal Procedure Act unconstitutional.

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[1] Page 13, 15 - 47, paras 22, 30 to 37, Founding Affidavit.

[2] The eight certificates nolle prosequi are attached at pages 107 – 114 of the Founding Affidavit. Page 49, para 43, sets out when each of the various offences against the applicants have purportedly prescribed.

[3] Page 8, para 5 and 6, Founding Affidavit.

3.2. The WLC Trust accepts that the prescription of criminal offences is constitutionally permissible, but submits that:

3.2.1. No sexual offence (as currently defined in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, and previously founded in the common law) should prescribe.

3.2.2. The determination of which sexual offences should be excluded from the reach of section 18 must be rational.

3.2.3. Special considerations apply and must be taken into account when considering which sexual offences prescribe because of the unique nature of sexual offences and the state's constitutional obligations to prosecute these offences.

3.3. Section 18 provides that all sexual offences prescribe except for the three categories of sexual offences excluded in the sub-sections. The only basis upon which this distinction between sexual offences is made is the 'seriousness' of the sexual offence.

3.4. The WLC Trust submits that the concept of 'seriousness' of offences is not an appropriate or rational basis upon which to differentiate between sexual offences for the purposes of prescription.

3.4.1. Sexual offences are unique in their nature and impact. They should be treated differently. An appropriate concept that can be used to determine which other offences prescribe or not, should not be used for sexual offences. This is particularly so in relation

to prescription because of the well-documented and recognised reasons for the delay in prosecuting such offences.

3.4.2. The concept of seriousness based on 'harm' or moral gravity does not take into account the level of trauma endured by victims of sexual offences which varies independently of the 'seriousness' of the offence;

3.4.3. In respect of sexual offences, particularly against women, the concept of seriousness of the offence is imbued with patriarchal notions which no longer have a place in our constitutional dispensation. For example, section 18 proceeds on the assumption that penetrative sexual offences are more serious (and should therefore be excluded from prescription) than non-penetrative sexual offences.

3.5. This exclusion of certain sexual offences in section 18 is therefore arbitrary and a breach of the rule of law entrenched in section 1 of the Constitution.

3.6. The operation of the section which prevents the Director of Public Prosecutions from instituting a prosecution for sexual offences against women and girl children on an arbitrary basis also constitutes a breach of the state's constitutional obligations under section 7 of the Constitution.

4. In the circumstances, the WLC Trusts asks that this Court declare section 18 of the Criminal Procedure Act in its forms before and after the amendments

introduced by Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ("**SORMA**") unconstitutional to the extent that it unjustifiably bars the prosecution of sexual offences after the period of 20 years from the time of the offence was committed.

5. We address the following issues in these heads of argument:

   5.1. The State's constitutional obligations;

   5.2. The content and effect of section 18;

   5.3. The exclusion of certain sexual offences from prescription;

   5.4. Section 18 is unconstitutional;

   5.5. The appropriate remedy.

THE STATE'S CONSTITUTIONAL OBLIGATIONS

Constitutional obligations of the state

6. 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.[4]

7. Sexual violence implicates the following rights in the Bill of Rights:

   7.1. 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*

[4] The Constitution of the Republic of South Africa 108 of 1996.

7.2. Section 10: *Everyone has inherent dignity and the right to have their dignity respected and protected.*

7.3. Section 11: *Everyone has the right to life.*

7.4. 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.*

7.5. 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.*

7.6. *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.*

8. The state's duty under section 7 includes both the negative obligation to protect these rights, but also the positive obligation to take steps to respect, promote and fulfil the rights.[5]

8.1. In doing so, the state may initiate appropriate legislation and ensure effective enforcement;

[5] *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.

8.2. 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.[6].

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

9.1. The state is obliged "*directly to protect the right of everyone to be free from private or domestic violence*";[7]

9.2. The state is obliged to "*take appropriate steps to reduce violence in public and private life*";[8]

9.3. 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*".[9]

Prosecutions of sexual offences are a constitutional imperative

10. The Constitutional Court in **F v Minister of Safety & Security & another (Institute for Security Studies & others as *amici curiae*) [2012] JOL 28228**

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[6] *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.
[7] *Baloyi* 2000 at para 11.
[8] *Christian Education at* para 47.
[9] *Carmichele at* paras 44 to 45, citing with approval, *Osman v United Kingdom* 29 EHHR 245 at 305, para 115.

(CC) at para 57 stressed that the state bears the primary responsibility to protect women and children against this prevalent plague of violent crime.

11. Effective policing is only the first step in the necessary protection of women and children. The prosecution of sexual offences is another essential element necessary for the state to protects, promotes and fulfils the rights of women.

12. This is apparent from the fact that the state's power and responsibility to prosecute criminal offences arises directly from the Constitution:

    12.1. 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.

    12.2. 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."*

    12.3. The vision of the NPA[10] is 'Justice in our society, so that people can live in freedom and security'; the mission 'Guided by the Constitution, we in the National Prosecuting Authority ensure justice for the victims of crime by prosecuting without fear, favour and prejudice and by working with our partners and the public to solve and prevent crime'.

[10] https://www.npa.gov.za

The concept of justice includes this vision and mission is a commitment to the protection of victims of crime, including sexual offences.

13. The Constitutional Court has expressly recognised the way in which the criminal justice system and particular the prosecution of criminal offences by the National Prosecuting Agency give effect to constitutional rights. The Court has held:

13.1. There is a "*constitutional duty of the state to initiate criminal proceedings.*"[11]

13.2. The power to prosecute "*enables the state to fulfil its constitutional obligations to prosecute those offences that threaten or infringe the rights of citizens*".[12]

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

13.4. "*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*".[13]

14. In **S v Basson 2005 (1) SA 171 (CC)** the Constitutional Court explained at para 31:

> *"In our constitutional state the criminal law plays an important role in protecting constitutional rights and values. So, for example, the prosecution of murder is an essential means of protecting the right to*

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

[12] 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.

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

life, and the prosecution of assault and rape a means of protecting the right to bodily integrity. The state must protect these rights through, amongst other things, the policing and prosecution of crime."

15. In that case, the Constitutional Court found that an interpretation of a section that permitted a charge to be quashed was "*an impediment to the performance by the state and the prosecuting authority of their duties to protect fundamental rights under the Constitution.*"[14]

16. The Court continued at para 33:

> *"By providing for an independent prosecuting authority with the power to institute criminal proceedings, the Constitution makes it plain that the effective prosecution of crime is an important constitutional objective. Where, therefore, a court quashes charges on the ground that they do not disclose an offence with the result that the state cannot prosecute that accused for that offence, the constitutional obligation of the prosecuting authority and the state, in turn, is obstructed. The constitutional import of such a consequence is particularly severe where the state is in effect prevented from prosecuting an offence aimed at protecting the right to life and security of the person. In these circumstances the quashing of a charge in an indictment will raise a constitutional matter."*[15]

Special obligations in respect of women and girl children

17. 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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[14] S v Basson 2005 at para 34.

[15] S v Basson 2005 at para 33.

This arises from the high levels of sexual violence against women and South Africa's international obligations to protect women.

18. The South African Police Service Analysis of the Annual Crime Statistics for 2011/12 at page 20 reveals that 40.1% of sexual offences were perpetrated against children and 48% of sexual offences were perpetrated against adult women. Only 11.4% of sexual offences were committed against adult men.

High levels of sexual violence against women in South Africa

19. The very high levels of sexual violence in South Africa are well documented and recognised by our courts. In **Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC)**[16] the Constitutional Court recognised 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."*

20. In **Masiya v Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies and Another, Amici Curiae) 2007 (5) SA 30 (CC)** Nkabinde J reiterated the widely accepted notion that:

> *"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."*[17]

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[16] *Carmichele at para 62.*

[17] *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.

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

22. 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 and 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 the Act 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.

23. The vulnerable position of women in South Africa has also been recognised internationally. As recently as June 2016, the United Nations Special Rapporteur 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.[18]

The international law obligations

24. The Constitutional Court has recognised South Africa's international law 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.[19]

Convention on the Elimination of All Forms of Discrimination Against Women

25. South Africa is a signatory to a number of international human rights instruments, the most notable of which is the Convention on the Elimination of All Forms of Discrimination Against Women ("**CEDAW**").

26. CEDAW has been described as the definitive international legal instrument requiring respect for and observance of the human rights of women.[20] It is said to be "*universal in reach, comprehensive in scope and legally binding in character*".[21]

27. The South African Government ratified CEDAW on 15 December 1995 and is therefore bound by the obligations created by it.

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[18] '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

[19] *Baloyi* para 13; Carmichele at para 62; *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) para 15.

[20] Kathree F 'Convention on the Elimination of all forms of discrimination against women' *SAJHR* (1995) 421 at 421.

[21] Cook R 'Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women' (1990) 30 *Virginia Journal of International Law* 643 at 643.

28. CEDAW itself contains no less than six articles that indirectly relate to violence against women.[22] General Recommendation No. 19[23] explicitly states that the general prohibition of gender discrimination includes

> *"gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately".*[24]

29. General Recommendation No. 19 further recommends that in order to fulfil their duties under the Convention, states must take all measures necessary to provide effective protection to women, including comprehensive legal, preventative and other measures.[25]

30. The principles underpinning CEDAW are also evident in the preamble to the Universal Declaration of Human Rights and article 4(d) of the Declaration on the Elimination of Violence Against Women.[26]

African Charter on the Rights of Women

31. The South African Government ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa *("***the African Charter on the Rights of Women**") on 17 December 2004.

32. Article 3 of the African Charter on the Rights of Women guarantees that every woman shall have the right to dignity inherent in a human being and to the

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[22] Articles 2,3,6,11,12 and 16.

[23] U.N. Doc. HRI/GEN/1/Rev.1 at 84 (1994).

[24] Para 6.

[25] Para 24 (t).

[26] U.N. GAOR, 48th Sess., art. 1 UN.doc. A/Res/ 48/104 (1994).

recognition and protection of her human and legal rights and requires state parties to

> *"adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence."*

33. Article 4 states that "[e]very woman shall be entitled to respect for her life and the integrity and security of her person" and article 4(2) obliges the state to

> *"enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public".*[27]

34. In the event of violation of women's rights in this Protocol, Article 25 provides that parties:

> *"undertake to provide for appropriate remedies to any woman whose rights or freedoms, have been violated and ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law.""*

SADC Protocol on Gender and Development

35. Part six of the SADC Protocol on Gender and Development[28] addresses gender based violence and it creates an obligation on state parties to enact and enforce legislation prohibiting all forms of gender based violence.[29]

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[27] Article 4 (a).

[28] South Africa has signed but not yet ratified the SADC Protocol on Gender and Development.

36. What is clear from the Constitution and the state's international obligations is that the state has a constitutional duty to ensure that sexual offences are prosecuted. This duty is heightened in respect of sexual offences against women and girl children.

THE CONTENT AND EFFECT OF SECTION 18

Section 18 of the Criminal Procedure Act at present

37. Section 18 of the Criminal Procedure Act was originally introduced in 1977. It was subsequently amended by SORMA in 2007.

38. 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.[30] Of these nine excluded categories of offences, three of these categories are sexual offences:

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

    38.2. 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

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[29] Article 1 of SADC Protocol on Gender and Development.

[30] Sub-sections (a) – (i) of section 18.

38.3. 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.[31]

39. At present, all sexual offences apart from the three expressly excluded categories of sexual offences above prescribe after 20 years.

40. We highlight that it is primarily non-penetrative sexual offences (including sexual assault) that are not expressly excluded from the ambit of section 18 and which prescribe after 20 years.

Section 18 between 1977 and 2007 (when amended)

41. Prior to the SORMA amendment of 2007, the only sexual offence excluded from the ambit of section 18 was "rape". Between 1977 and 2007, all sexual offences, other than rape as defined by the common law, prescribed after 20 years. These were primarily non-penetrative sexual offences (including indecent assault).

42. 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. The offences in SORMA can broadly be divided into penetrative and non-penetrative offences.

42.1. Rape includes the penetration by the genitals organs of one person into or beyond the genital organs, anus or mouth of another person; the penetration by any part of the body of a person or object into or beyond

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

the genital organs or anus of another person; the penetration of the genital organs of an animal into or beyond the mouth of another person.

42.2. The remaining sexual offences in SORMA include, *inter alia*, sexual assault, sexual offences against children, and sexual offences against people who are mentally disabled.

43. The SORMA amendment to section 18 is not retrospective. This means that sexual offences committed before 2007 fall under the previous section 18 where prescription of 20 years is applicable to all sexual offences other than the common law of rape.

44. The WLC Trust submits that this anomaly is constitutionally problematic and for this reason urges this Court to extend the declaratory order of unconstitutionality to include section 18 as it was before the SORMA amendment.

THE PRESCRIPTION OF SEXUAL OFFENCES

45. The WLC Trust accepts that the prescription of criminal offences is constitutionally permissible, but submits that:

45.1. The determination of which sexual offences should be excluded from the reach of section 18 must be rational;

45.2. Special considerations apply when considering which sexual offences prescribe because of the unique nature of sexual offences and the state's constitutional obligations to prosecute these offences;

45.3. No sexual offence (as currently defined in SORMA, and previously founded in the common law) should prescribe.

46. There is no rational basis upon which to distinguish between the current sexual offences that are excluded, and the remaining sexual offences in the SORMA. While 'seriousness' may be a legitimate basis upon which to determine whether or not other offences should prescribe, it is not an appropriate test in the case of sexual offences. The distinction is therefore arbitrary and unconstitutional.

The prescription of criminal offences is constitutionally permissible

47. The WLC Trust accepts that there is a legitimate government purpose in the prescription of criminal offences.

48. The primary reason for the prescription of criminal offences arises from the constitutional imperative that an accused have a fair trial.[32] 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.[33]

[32] Suzette M Malveaux, 'Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation' (2005) 74 George Washington Law Review 68.

[33] Ibid

49. The second rationale is considerations of efficiency[34] of the criminal justice system. Most systems are overworked and under-resourced and face a growing backlog of cases. Prescription periods provide for certain, predictable cut off time periods when the courts can refuse to hear certain cases.

50. The third rationale is one of pragmatism in considering the feasibility of prosecuting a case after so many years has passed[35].

51. The question before this Court is whether the exclusion of certain sexual offences from the reach of prescription, but not others, is constitutionally permissible.

The approach taken in comparative jurisdictions

52. All jurisdictions, including South Africa as reflected in section 18 of the Criminal Procedure Act, have exceptions for some offences to prescription. The rationale for this seems to be based on the 'seriousness' of the offence. Most jurisdictions, like South Africa, have differing prescription periods for different offences, again largely based on what could be called 'perceived seriousness'.

53. Jurisdictions with no prescription period for sexual offences:

    53.1. Kenya: no prescription period applies other than to offences whose maximum penalty "*does not exceed imprisonment for six months, or a fine of one thousand shillings, or both*"[36]. The penalties for all sexual

[34] Ibid

[35] Ibid

[36] Criminal Procedure Code, Chapter 75, section 219

offences are above this threshold[37], meaning no sexual offences are subject to prescription in Kenyan law.

53.2. England & Wales: all sexual offences are either indictable offences or offences triable and accordingly, no prescription period applies to any sex offences, whether perpetrated against an adult or a child.

53.3. Canada: all sexual offences (with the exceptions of nudity & indecent exhibition) are classified as indictable or hybrid offences, meaning no prescription period applies.

53.4. Delaware: the Delaware Criminal Code, Title 11 imposes a general prescription period of five years in the case of all felonies[38]. However, a specific exception applies to sexual offences, meaning no prescription period applies[39]. The statute specifically provides that:

> *"This subsection applies to all causes of action arising before, on or after July 15, 1992, and to the extent consistent with this subsection, it shall revive causes of action that would otherwise be barred by this section."*

53.5. US Federal Law: since 2006 provision has been for the disapplication of prescription periods in sex offence cases:

> *"Notwithstanding any other law, an indictment may be found or any information instituted at any time without limitation for any offense under section 1201 involving a minor victim, and for any felony under chapter 109A, 110...or 117, or section 1591."*

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[37] The Sexual Offences Act (Number 3 of 2006)

[38] Delaware Criminal Code, Title 11, Chapter 2, §205(b)

[39] ibid, §205(e)

53.6. The offences covered by this provision include:

- *§1201: kidnapping;*
- *Chapter 109A: sexual abuse, aggravated sexual abuse, sexual abuse of a minor and abusive sexual contact;*
- *Chapter 110: sexual exploitation of children and child pornography offences;*
- *Chapter 117: transportation for illegal sexual activity; and,*
- *§1591: sex trafficking of children or by fraud, force or coercion.*

54. Clearly, however, this applies only to offences subject to the jurisdiction of federal as opposed to state courts.

55. Jurisdictions with no prescription for child sexual offences:

55.1. US Federal law provides that:

> *"No statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse, or kidnapping, of a child under the age of 18 years shall preclude such prosecution during the life of the child, or for ten years after the offense, whichever is longer."*[40]

55.2. Colorado: no statute of limitations applies to any sex offence committed against a child, or any attempt, conspiracy or solicitation to commit such an offence[41]. As in the Delaware statute, the Colorado law provides that

[40] US Code, Title 18, Part II, Chapter 213, §3283

[41] C.R.S. §16-5-401(1)(a)

"It is the intent of the general assembly in enacting th[is provision]...to apply an unlimited statute of limitations to sex offenses against children committed on or after July 1, 1996, and to sex offenses against children committed before July 1, 1996, for which the applicable statute of limitations...has not yet run on July 1, 2006."[42]

55.3. Alabama: the Alabama Code imposes a general five-year prescription period for felonies, with certain exceptions. These include a provision that no prescription period applies to any sex offence committed against a person under the age of 16[43].

56. Jurisdictions with varying prescription periods according to severity:

56.1. New Zealand: section 25 of the Criminal Procedure Act 2011 created a gradated system of prescription periods, based upon the categorisation of the offence and the severity of the maximum sentence available. Whilst the majority of sex offences are categorised so as to be subject to no prescription period[44], certain less severe offences (including the commission of indecent acts and indecent communications with those under 16) are subject to a prescription period of 5 years from the date of commission of the offence.

56.2. United States of America: the majority of US states adopt a gradated approach to prescription, whereby the perceived seriousness of the offence and/ or the severity of the potential sentence are used to place any given offence within one of several possible prescription periods.

[42] Ibid, §16-5-401(1.5)(c)

[43] Alabama Code, Title 15, §15-3-5(a)(4)

[44] Crimes Act 1961

Sexual offences fall, for the most part, across several of these possible periods, with rape and the 'most serious' child sex offences having no prescription periods, and periods of between 3 and 30 years for other types of sexual offending.

57. As is indicated above, a number of jurisdictions have recognised that all sexual offences are serious enough not to prescribe at all. As with South Africa, some jurisdictions have 'graded' sexual offences, determining some serious enough for no prescription time period, while others fall within prescribed prescription time periods.

Seriousness is not an appropriate criteria to distinguish between sexual offences for the purpose of prescription exclusions

58. Section 18 excludes certain sexual offences from its ambit but includes others. The basis of this exclusion is not apparent from the statute.

59. Section 18 appears to differentiate between penetrative and non-penetrative sexual offences for the purposes of prescription. This arises from the perceived seriousness of rape as opposed to other sexual offences;

60. The WLC Trust submits that the trauma experienced as a result of rape, and other sexual offences is not necessarily different.[45] For this reason, a criteria based on 'seriousness' is not appropriate.

61. The notion of seriousness can have more than one meaning, with two central ways in which seriousness of an act may be judged[46].

[45] Page 38, para 68, Founding Affidavit of WLC Trust Amicus Application.

61.1. Firstly, the moral gravity of committing the act, a normative evaluation of the act, referred to as perceived wrongfulness.

61.2. Secondly, the act may be judged on the basis of the harm or damage that the act brings upon the victim, the perceived harmfulness of the act[47]. Further research indicates that the perception of crime seriousness is complex, resting on some attributes of crime like the victim harm[48] and may vary considerably across individuals, cultures, and over time. The perceived seriousness of an offence can vary greatly depending on who the victim and offender are. Violence between strangers, for example, is perceived to be more serious than violence between intimates, even when the events are otherwise comparable. The physical vulnerability of the victim also affects seriousness judgments. In general, crimes against persons are perceived to be the most serious offenses[49]. It is clear that the perceptions of harm are linked to seriousness which is in turn linked to the rationale of prescription, and the reasons some offences do not prescribe.

62. Both aspects of seriousness need to be reconsidered in the light of our constitutional values and the constitutional obligations imposed on the state.

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[46] Warr, M What is the Perceived Seriousness of Crime Criminology: An Interdisciplinary Journal Vol. 27, No 4, pp.797-821, Nov. 1989

[47] Ibid

[48] http://law.jrank.org/pages/1899/Public-Opinion-Crime-seriousness-crimes.html">Public Opinion and Crime - The Seriousness Of Crimes

[49] Ibid

63. While the distinction based on the seriousness of offences may be an appropriate criterion for determining whether particular offences must prescribe, it is simply not appropriate when considering sexual offences. We say so for the following reasons:

Seriousness should not be linked to moral gravity

64. The seriousness of sexual offences – and whether or not they should prescribe - should not be linked to out-dated conceptions of the moral gravity of different sexual offences.

65. Although not expressly stated, it is apparent that section 18 distinguishes between the penetrative and non-penetrative sexual offences.

66. A reliance on these distinctions – originally incorporated into the Criminal Procedure Act in 1977 - permits the policy considerations of an inherently patriarchal society to determine the severity (and therefore prescription) of sexual offences. This is deeply problematic in light of the fact that sexual offences are disproportionately committed by men and committed against women.

67. Penetrative sexual offenses have historically been seen as more severe than other sexual offences in light of society's views of the ownership of women and the importance of regulating women's bodies.

68. The policy reasons for grading the severity sexual offences for the purposes of prescription must accord with constitutional values and norms.[50] The

[50] 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.

Constitutional Court has accepted "the stubborn persistence of patriarchy" in our society.[51] A distinction between offences based on patriarchal ideas of moral gravity cannot be sustained.

Seriousness cannot be linked to trauma

69. Seriousness also cannot be linked to a measure of trauma experienced by a victim. It is too simple to differentiate between penetrative and non-penetrative offences, ascribe graded seriousness to each category, and then link prescription time periods to the categories. Seriousness is a subjective concept and cannot be linked necessarily to the type of sexual offence experienced by a victim. Some victims, experiencing both types of sexual offences (penetrative and non-penetrative), may describe a penetrative offence as not as serious as the non-penetrative offence committed against them and *vice versa*.

70. The assumption made that the more serious offences (those excluded from prescription in section 18) result in higher levels of trauma is not supported in the research.

    70.1. Higgins[52] says that attempts to classify a type of abuse as sexual or physical as associated with a particular consequences for the victims seems to be less useful that looking at the frequency and severity of child abuse.

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

[52] Higgins, D. 2004. Differentiating between child maltreatment experiences. Family Matters, no 69, page 50-55

70.2. In 1987 the National Institutes of Mental Health Intramural Research Programme[53] 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.

70.3. There is therefore no clear link between the type of sexual offence (rape, indecent assault, sexual assault etc.) and the level and extent of trauma experienced. It is incorrect to assume some sexual offences are more serious than others, or that certain sexual offences result in more trauma experienced by the victim. The use of these incorrect links and assumptions to formulate prescription time frames for various sexual offences has no basis in fact.

70.4. To substantiate the above submissions, it is useful to reflect on research conducted in this area. A great deal of research has been done on sexual offences and the effects thereof on victims. Most studies have focused on posttraumatic stress disorder (PTSD) as a

[53] Putnam FW, Trickett PK. The Psychobiological Effects of Child Sexual Abuse. New York; W.T. Grant Foundation 1987

common consequence of sexual offences[54]. Trauma is described as events that overwhelm the ordinary human adaptations to life'[55]. This trauma negatively impacts on the mental health of victims which may manifest in many ways. Of importance is that the manifestation of trauma has complex impact and effects that vary on a case by case basis[56]. This manifestation may take the form of mental health challenges, substance abuse and high risk behaviours.

70.5. In the 2001 study by Ullman[57] it was found that neither the physical injury suffered by the victim resulting from the sexual attack nor the relationship between the victim and the offender were significant predictors of PTSD[58]. Other factors such as victim blame, perceived life threat during the assault, and access to services after the sexual offence contributed to PTSD[59]. In a 2007 study, Ullman examined the broad range of psychosocial factors that may explain post sexual offence symptoms. Pre-assault factors may include older age of the victim, levels of education, employment, support structures, and a history of child sexual which may lead to an increased risk of adult victimization. Assault related factors may include perceived life threat, the levels of violence used in the assault, and physical injury. Post-

[54] 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

[55] Wall L Acknowledging complexity in the impacts of sexual victimisation trauma Australian Centre for the Study of Sexual Assault No16 2014 p1

[56] Ibid at p3

[57] 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

[58] Ibid at p383

[59] Ibid

assault factors include self and societal blame, perceptions of control, fear of reprisal from the offender, denial, and unsupportive negative social reactions of family and communities[60].

All sexual offences should be excluded from prescription

The unique characteristics of sexual offences

71. The question of prescription and need for an appreciation of the specific circumstances of child sexual abuse have, however, been considered in other contexts.

71.1. In ***Bothma v Els & others*** **[2009] ZACC 27** the Constitutional Court held that a 37-year delay prior to the institution of a private prosecution for rape did not violate the accused's right to a fair trial. The case was argued on the basis of unreasonable delay, and did not directly concern prescription because the offence was one of rape and was therefore legally excluded from prescription. Strong policy reasons were cited for allowing the prosecution to continue, including the importance of encouraging reporting of child rape and supporting survivors who report their abuse[61]. At para [66] the court held:

> *"there…exist strong public policy reasons for allowing the nature of the crime to weigh heavily in favour of allowing these charges to be aired in court. Adults who take advantage of their positions of authority over children to commit sexual depredations against them, should not be permitted to reinforce their sense of*

[60] Supra Ullman 2007 at p821-822

[61] *Bothma v Els & others* [2009] ZACC 27 [45-47]

entitlement by overlaying it with a sense of impunity...the knowledge that one day the secret will out, acts as a major deterrent against sexual abuse of other similarly vulnerable children."[62].

71.2. A key issue in cases of this nature was identified at paragraph [78] of the court's judgment:

"the issue before us is not whether what [the complainant] says is the truth or an invention. The question is whether she should be stopped from giving her account to enable a criminal court to decide."[63]

71.3. Sachs J went on to identify numerous safeguards available to the accused in cases brought to trial after many years, most notably the presumption of innocence[64]. This case is useful in that it supports the principles of protection of victims of sexual violence irrespective of time frames. The reasoning of the court can be applied to all types of sexual offences and not just rape.

71.4. The issue of prescription in cases of sexual abuse has been addressed in civil matters. The impact of sexual abuse upon survivors' ability to bring an action has been expressly acknowledged, in particular by the Supreme Court of Appeal in ***Van Zijl v Hoogenhout*** **2005 (2) SA 93 (SCA); [2004] 4 All SA 427 (SCA)**. The court noted that

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[62] *Bothma at para 66.*

[63] Bothma at para 78.

[64] Bothma at para 81.

"the prescription statutes in force in this country were drafted in ignorance of and without consideration for the special problems afflicting such survivors"[65].

72. In addition, the court acknowledged that "[p]rescription penalizes unreasonable inaction not inability to act"[66].

73. The court ruled that the usual civil prescription period of three years[67] would only begin to run in sexual abuse cases from the date when the survivor gained an appreciation of their abuser's responsibility for the harm they suffered. This is similar to civil statutes of limitations in several American states which also rely upon a delayed discovery or realisation rule.

Delay in reporting

74. It is submitted that the issue of the period of time that has elapsed between the offence and when victim initiates criminal proceedings by reporting the matter is irrelevant in the context of prescription and should not play any role in the determination of when prescription starts to run. Memory and an understanding of the nature and extent of the offence by the victim does not become a factor if prescription time frames for all sexual offences do not apply.

75. In their application to be admitted as *amicus curiae* in this matter, the Teddy Bear Clinic set out extensive argument, supported by research, of the reasons why children delay in reporting sexual abuse. The Women's Legal Centre Trust supports the submissions of the Teddy Bear Clinic and does not intend to

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[65] *Van Zijl v Hoogenhout* (2005) (2) SA 93 (SCA) at para 7.

[66] *Van Zijl* at para 19.

[67] Prescription Act 68 of 1969.

repeat its content. However, it is submitted that many of the reasons why children delay in reporting sexual abuse apply to adults as victims as well. Legal provision must be made for delayed reporting for both adult and child victims in that it should not exclude the possibility for victims to lay charges and access the criminal justice system at any stage after the abuse. Delayed reporting by victims of sexual offences is well documented[68], and reasons therefore are extensive and complex.

76. Research[69] shows the extensive challenges and obstacles facing adult victims in accessing formal assistance, including the criminal justice system. In the United States it is believed that only 15.8% to 35% of all sexual assaults are reported to the police[70]. Campbell[71]states that approximately 20% to 40% of victims engage with the police, the legal system, the medical system and advocacy groups after the sexual offence.

77. Various research studies have shown that depending on the locality, as few as one in thirteen rapes are reported to the police[72]. The South African National Victims of Crime Survey 2016 results show that the proportion of rape victims

[68] 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; 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.

[69] Campbell (2009) and Campbell (2010)

[70] U.S. Bureau of Justice Statistics, M. Planty and L. Langton, "Female Victims of Sexual Violence, 1994-2010," 2013; Wolitzky-Taylor et al, "Is Reporting of Rape on the Rise? A Comparison of Women with Reported Versus Unreported Rape Experiences in the National Women's Study Replication," 2010

[71] Campbell (2009)

[72] https://africacheck.org/factsheets/factsheet-south-africas-201415-assault-and-sexual-crime-statistics/

who report their victimisation to the police decreased by 21% between 2011 and 2014 and by 27% between 2015 and 2016[73].

78. While we do not know how many sexual offences is South Africa go unreported, it is safe to say that many sexual offences are underreported. Those who do report experience secondary victimization ('unsympathetic, disbelieving, and inappropriate responses (exacerbating the effects of gender-based violence) that women experience at the hands of society in general and at each stage of the criminal justice process'[74]). 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[75].

79. Adult women are well aware of these systemic attitudes and resulting behaviour of officials in the criminal justice system. Reasons given by victims of why they did not approach the police state that they were concerned that the criminal justice system would cause them additional distress[76]. Further studies[77] include the following reasons given by victims for not reporting the sexual offence: fear of reprisal, belief that the police would not do anything to help, belief that the police could not do anything to help, did not want to get offender in trouble with

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[73] National Victims of Crime Survey 2015/2016 STATS SA p69

[74] Stanton, S., Lochrenberg, M., & Mukasa, V. (1997). *Improved justice for survivors of sexual violence? Adult survivor's experiences of the Wynberg Sexual Offences Court and associated services.* Cape Town: Rape Crisis Cape Town, African Gender Institute: University of Cape Town, Human Rights Commission.

[75] 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.

[76] Patterson, D (2009)

[77] D. Kilpatrick et al., "Drug-facilitated, Incapacitated, and Forcible Rape: A National Study," 2007; U.S. Bureau of Justice Statistics, M. Planty and L. Langton, "Female Victims of Sexual Violence, 1994-2010," 2013; Wolitzky-Taylor et al, "Is Reporting of Rape on the Rise? A Comparison of Women with Reported Versus Unreported Rape Experiences in the National Women's Study-Replication", 2010 D

law, did not want family to know, did not want others to know, not enough proof, fear of the justice system, did not know how to report, feel the crime was not "serious enough", and fear of lack of evidence. These reasons apply to the South African context.

80. The reasons adult victims do not report sexual offences may apply for a number of years after the offence has occurred. These reasons apply to both rape and other sexual offences. Over time circumstances may change which may place the victim in a situation where she desires recourse to the criminal justice system. The prosecution of rape committed against an adult is permitted by law; all other sexual offences are disallowed. The arguments above motivating to eliminate the distinction between rape and other sexual offences applies to those offences committed against children as well as adults.

81. In sexual offences, the focus of the perpetrator is on getting the victim not to disclose the abuse[78]. A myriad of strategies are used to achieve this, and the more 'successful' the perpetrator is in these strategies, the less likely the victim will be to disclose. The impact of prescription effectively provides a form of protection for those perpetrators who are successful in getting their victims not to disclose for long periods of time.

82. Although not directly applicable to the issue of prescription, section 60 of SORMA recognises the phenomenon of delayed reporting and does not allow the court to draw a negative inference only from the length of any delay between the alleged commission of the crime and the reporting thereof. One could argue that the legislature allows for delayed reporting; s18 effectively

[78] Muller, KD and Hollely, KA 2000 Introducing the Child Witness; Chapter 4 Disclosure: a process of truth p124

hampers that recognition by placing a time frame on delayed reporting for all sexual offences other than those contained in the exclusion clauses.

SECTION 18 IS UNCONSTITUTIONAL

The differentiation is arbitrary

83. We have demonstrated above that the criteria of 'seriousness' as currently understood and applied has no role to play in determining which sexual offences should escape prescription and which should not.

84. The trauma suffered by victims of sexual offences is independent of the 'seriousness' of the offence, particularly with regard to whether or not the offence involved penetration.

85. The lack of any apparent rational basis for treating certain sexual offences differently to others leads to the inevitable conclusion that the provision is arbitrary.

86. The Constitution requires that all legislation is rational. Section 1(c) of the Constitution provides that South African is founded on the value of the rule of law. The section is accordingly unconstitutional to the extent that it arbitrarily distinguishes between sexual offences for the purposes of prescription.

Breach of equality

87. Section 9(1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law.

88. The distinction in section 18 results in an unequal application of the law and discriminates against those victims who are sexually offended against but don't fall into the prescription exclusion categories of the perceived more serious offences. This allows perpetrators who committed sexual offences escape culpability simple as a result of the passage of time. These complainants who have endured sexual offences (other than those excluded) do not, for all intents and purposes, enjoy the equal protection and benefit of the law.

Breach of the state's obligation under section 7

89. We have described above the way in which the state's constitutional duty to protect, respect and fulfil the rights of women and girl children requires the state to effectively prosecute sexual offences against this group.

90. Section 18 imposes an arbitrary impediment to the prosecution of sexual offences by providing that all sexual offences prescribe, save for certain excluded offences.

91. The section does not afford any discretion to the National Prosecution Authority to make the necessary exceptions where the prosecution of a sexual offence is necessary in order to ensure the fulfilment of the state's obligations towards women and children.

92. The operation of section 18 therefore constitutes an unnecessary and unjustified limitation to the exercise of the state's constitutional obligations under section 7 of the Constitution.

THE APPROPRIATE REMEDY

93. The powers of the courts in constitutional matters are provided for in section 172 of the Constitution. That section requires a court to declare law and conduct inconsistent with the Constitution to be invalid, and then to make "*any order that is just and equitable*", including a suspension of the declaration of invalidity or the moderation of the retrospective effect of the declaration.[79]

94. In **Fose v Minister of Safety and Security 1997 (3) SA 786 (CC)**, Ackermann J writing for the majority of this Court stated that courts have–

> *"a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to forge new*

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[79] Section 172(1) provides:

"When deciding a constitutional matter within its power, a court -

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including -

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

tools and shape innovative remedies, if needs be, to achieve this goal".[80] (Our emphasis.)

95. In **Hoffmann v South African Airways 2001 (1) SA 1 (CC)**, Ngcobo J tabulated the elements of *"appropriate relief"* in terms of section 38 of the Constitution:

> *"The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional rights; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, we must carefully analyse the nature of the constitutional infringement, and strike effectively at its source."*[81] (Our emphasis.)

96. In this context, two questions arise: first, the legal consequences that flow from a declaration of invalidity of legislation; and second, the question of the just and equitable interim remedy in this case.

97. The WLC Trust submits that this Court should make a declaration in the following terms:

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[80] Fose v Minister of Safety and Security 1997 (3) SA 786 (CC) at para 68. See also Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others 2005 (3) SA 280 (CC) at paras 73 to 74.

[81] Hoffmann v South African Airways 2001 (1) SA 1 (CC) at para 45.

97.1. Section 18, in its present form, and prior to the amendments imposed by SORMA, is declared unconstitutional to the extent that it extinguishes the right to institute a prosecution for any sexual offence after the lapse of 20 years from the date the offence was committed.

98. The consequence of the declaration of invalidity is that the bar to prosecuting any sexual offence in SORMA or in the common law prior to 2007 is lifted prospectively. It is now open to the applicants to exercise their right to institute criminal prosecutions and the National Prosecuting Agency may exercise its right to prosecute without the restrictions imposed by section 18 in relation to sexual offences.

99. Alternatively, the application of the principle of objective constitutional invalidity means that section 18 has no effect since the coming into force of the Final Constitution. The doctrine of objective constitutional invalidity was laid out in **Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC)** at para 26 where the Constitutional Court held that finding a law to be in conflict with the Constitution "does not invalidate the law; it merely declares it to be invalid". A law that has been found to be inconsistent with the Constitution ceases to have any legal consequences.[82] In the present matter, this means that the applicants would retain their right to institute a prosecution for the offences committed against them, and the National Prosecuting Authority would not be prevented from initiating the prosecutions..

[82] CrossBorder Road Transport Agency v Central African Road Services (Pty) Limited and another [2015] JOL 33212 (CC)

CONCLUSION

100. The WLC Trust supports the relief sought by the applicants in the notice of motion for the reasons set out above.

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10 March 2017

FIRST AMICUS CURIAE WOMEN'S LEGAL CENTRE TRUST LIST OF AUTHORITIES

Cases:

1. *Barkhuizen v Napier* [2007] ZACC 5, 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC)

2. *Bothma v Els & others* [2009] ZACC 27 [45-47]

3. *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC).

4. *Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC)

5. *CrossBorder Road Transport Agency v Central African Road Services (Pty) Limited and another* [2015] JOL 33212 (CC)

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

7. *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC)

8. *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC)

9. *Gumede (Born Shange) v President of the RSA & others* [2008] JOL 22879 (CC)

10. *Hoffmann v South African Airways* 2001 (1) SA 1 (CC)

11. *Masiya v Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies and Another, Amici Curiae)* 2007 (5) SA 30 (CC)

12. *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* 2005 (3) SA 280 (CC)

13. *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA)

14. *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)

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

16. *Paulsen and another v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5, 2015 (3) SA 479 (CC)

17. *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 (CC)

18. *S v Basson* 2005 (1) SA 171 (CC)

19. *S v Basson* 2007 (1) SACR 566 (CC)

20. *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA)

21. *Van Zijl v Hoogenhout* (2005) (2) SA 93 (SCA)

South African legislation

1. The Constitution of the Republic of South Africa 1996

2. Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

3. Criminal Procedure Act 51 of 1977

4. Prescription Act 68 of 1969

5. National Prosecuting Authority Act 32 of 2008

Government publications

1. South African Police Service An Analysis of the National Crime Statistics Addendum to the Annual Report 2011/2012

Foreign legislation

Kenya:

Criminal Procedure Code, Chapter 75, section 219

The Sexual Offences Act (Number 3 of 2006)

United States of America, Delaware:

Delaware Criminal Code, Title 11, Chapter 2, §205(b)

United States of America, Federal Law

US Code, Title 18, Part II, Chapter 213, §3283

Colorado:

C.R.S. §16-5-401(1)(a)

Alabama

Alabama Code, Title 15, §15-3-5(a)(4)

New Zealand

Crimes Act 1961

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2. The Convention on the Elimination of all Forms of Discrimination Against Women

3. Declaration on Elimination of Violence Against Women

4. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

5. SADC Protocol on Gender and Development

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8. Kilpatrick D et al., "Drug-facilitated, Incapacitated, and Forcible Rape: A National Study," 2007

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