

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

CASE NO. 202427/22

In the matter between:

CAROLINE PETERS Applicant

and

THE MINISTER OF JUSTICE AND First Respondent

CORRECTIONAL SERVICES

MDG Second Respondent

THE CLOONEY FOUNDATION FOR Third Respondent

JUSTICE

and in the Intervention application of:

THE TRUSTEES FOR THE TIME BEING OF First Applicant for Intervention

THE MEDIA MONITORING AFRICA

BENEFIT TRUST

CAMPAIGN FOR FREE EXPRESSION NPC Second Applicant for Intervention

THE MINISTER OF JUSTICE’S HEADS OF ARGUMENT

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I. INTRODUCTION

- 1 Publication of the identity of victims of sexual violence is responsible for some of the worst psychological trauma experienced by victims.¹ Once publicly revealed, the social stigma and humiliation experienced by victims remains with them for the rest of their lives.² The risk of publication has serious consequences for the criminal justice system. It deters victims from coming forward to report crimes that carry social stigma, such as sexual offences and, to an admittedly lesser extent, extortion. And unless provision for anonymity exists, there is a real likelihood that many of these crimes will go unreported, leaving victims without justice.
- 2 For nearly a century, the legislature has sought to protect victims of sexual offences ,and of extortion, by creating a *temporary* prohibition on the publication of information that might reveal the victim's identity. Section 154(2)(b) of the Criminal Procedure Act 51 of 1977 (**the CPA**) and its related provision, section 335A, give effect to these objectives.
- 3 Section 154(2)(b) does this by creating a *temporary* prohibition on the publication of information concerning charges that relate to sexual offences or extortion. The prohibition only applies until such time that the accused pleads to the charge in terms of section 105, read with section 106 of the CPA. Section 335A was inserted into the CPA in 1987 to make it clear that the prohibition under section 154(2)(b) applies from the time

¹ Hansard *Debates of the House of Assembly*, 7 October 1987 rec 1003.

² *Centre for Child Law v Media 24 Ltd* 2020 (1) SACR 469 (CC) paras 39 – 40 (albeit in the context of child victims).

that the alleged sexual offence was committed and not from when the accused is formally charged.

4 The applicant, Ms Caroline Peters, (“**Ms Peters**”) challenges the constitutionality of sections 154(2)(b) and 335A of the CPA insofar as they relate to sexual offences. Initially the focus of Ms. Peters’ case was that section 154(2)(b) discriminated against *women* because it sought to protect the identity of perpetrators, who are overwhelmingly male. She argued that the section was “*clearly a relic of a time when women were silenced and misogynistic men’s reputations were protected*”.³ Ms Peters’ understanding of section 154(2)(b) was – and is – incorrect.

5 In fulfilment of her constitutional obligations,⁴ the Minister of Justice and Constitutional Development (**the Minister**) placed evidence before this Court – both statistical and historical – to demonstrate that section 154(2)(b) was enacted for the sole purpose of protecting victims and not perpetrators.

5.1 Various Commission reports that served before Parliament as well as the Hansard of Parliament’s proceedings confirm that its intention has always been to protect victims and not perpetrators.

5.2 The statistical evidence establishes that most sexual offences occur within close relational proximity. Most victims of sexual offences are familiar with the perpetrator, either because of a familial, community or institutional link. And

³ Peters’ FA rec 36 para 110.

⁴ *SAMWU v Minister of Cooperative Governance and Traditional Affairs and Another* 2025 (4) SA 1 (CC) para 63; *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 17.

because most sexual offences occur within close relational proximity, it is easy to identify victims if there is reportage about the charge.

5.3 When the media reports that “*John Doe sexually assaults 15 – year old daughter*” or “*University of ABC Professor sexually assaults student*” or “*Pastor at XYZ church sexual assaults congregant*”, it is fairly easy to identify the victim. Information about the incident, such as the time, place, area, and date of the sexual offence, facilitates easy identification of the victim. Parliament was aware of this risk, and it is for this reason that section 154(2)(b) temporarily imposes a prohibition on publication of information concerning the incident.

6 Since there is no evidence that section 154(2)(b) of the CPA was enacted to protect the identity of male perpetrators – and, indeed, the historical and statistical evidence prove the opposite – the Minister opposed Ms Peters’ application. As a reaction to the Minister’s evidence, Ms Peters amended her case. She now contends that sections 154(2)(b) and 335A of the CPA are irrational and unconstitutional because they deprive *victims of the right to reveal their own identities*.

7 The intervening applicants, the Trustees for the Time being of the Media Monitoring Africa Benefit Trust and the Campaign for Free Expression NPC (**the NGO applicants**) have sought to join Ms Peters application. They agree with Ms Peters that the impugned sections are irrational because they deprive victims of the right *to reveal their own identity*. The NGO applicants, however, go further by contending that publication bans are, *in general*, unconstitutional and that the prohibition on publication in relation to extortion specifically, is unconstitutional.

8 The Minister has filed a further answering affidavit dealing with Ms Peters' amended challenge as well as the challenge of the NGO applicants. The Minister's further answering affidavit clarifies the issues that are in dispute, and those that are not:

8.1 The Minister abides the intervention application of the NGO applicants. She accepts that the NGO applicants have a direct and substantial interest in the relief sought by Ms Peters, and that they should be joined to the proceedings as the second and third applicants.⁵

8.2 The Minister also abides Ms Peters' amended challenge.⁶ Since the purpose of section 154(2)(b) is to protect victims of sexual offences, it is irrational that the section does not allow victims to reveal their own identity. To this extent, the Minister agrees that the section falls to be declared inconsistent with the Constitution.⁷ In fulfilment of her obligations to this Court, the Minister has placed evidence before it explaining why the legislature determined that victims should not be able to reveal their own identity. The Minister explains that she does not regard these reasons as satisfactory or constitutional.

8.3 The Minister also abides the challenge of the NGO applicants to section 154(2)(b) in relation to the offence of extortion. The Minister does so for two reasons: first, the extortionee should be able to reveal their own identity, which section 154(2)(b) does not permit. Second, unlike the evidence regarding sexual offences, there is no evidence that revealing the identity of the perpetrator of extortion will readily, if

⁵ Ministers' FAA rec 876 para 9.1.

⁶ Minister's FAA rec 876 para 9.2.

⁷ In terms of section 172(1)(a) of the Constitution, a Court is required to declare legislation inconsistent with the Constitution and invalid "*to the extent of its inconsistency*".

at all, result in revealing the identity of the extortionee. The section is therefore overbroad insofar as it relates to the offence of extortion.

8.4 The Minister does not agree that sections 154(2)(b) and 335A are otherwise unconstitutional. To this extent, the Minister opposes a declaration of invalidity on the basis that the sections are irrational, or unjustifiability limit the right to freedom of expression (s 16), open justice (s 35(3)(c)), dignity (s 10), and equality (s 9).

8.5 The Minister also opposes the remedy sought by both Ms Peters and the NGO applicants.

9 These submissions are structured as follows:

9.1 **PART II** deals with the legislative scheme and structure of the provisions governing the prohibition of certain information in criminal proceedings. This legislative architecture is important because it explains why the rationality challenge is without merit.

9.2 **PART III** sets out the history and background to sections 154(2)(b) and 335A of the CPA. We do so to demonstrate the legislative purpose behind these sections, and to explain why the criticisms levelled by Ms Peters and the NGO applicants are unwarranted.

9.3 **PART IV** deals with rights violations alleged by Ms Peters and the NGO applicants, as well as the limitations analysis under section 36 of the Constitution. We explain why the impugned provisions are not unconstitutional, other than to the limited extent that they (a) prevent victims revealing their own identity; and (b) in the case of section 154(2)(b) in relation to extortion, is overbroad.

9.4 **PART V** concludes with the appropriate remedy.

II. THE LEGISLATIVE SCHEME AND STRUCTURE OF SECTIONS 154(2)(b) AND 335A OF THE CPA

10 Chapter 22 of the CPA governs the conduct of criminal proceedings. It does this by codifying the default position of open Court proceedings in relation to criminal trials, in section 152, which provides that –

“Except where otherwise expressly provided by this Act or any other law, criminal proceedings in any court shall take place in open court and may take place on any day”.

11 Section 152 clearly gives effect to the common law right of an accused to a public trial.⁸ The Constitution now codifies this right in section 35(3)(c).

12 The exceptions to a public hearing are set out, *inter alia*, in sections 153 and 154 of the CPA. Section 153 governs instances in which a criminal court may order that the proceedings be conducted behind closed doors, and section 154 regulates the publication of information relating to criminal proceedings.

⁸ *Van Breda v Media 24 Limited and Others; NDPP v Media 24 Limited and Others* 2017 (2) SACR 491 (SCA) para 11 and the cases at ft 12.

- 13 Section 153 empowers a Court to deviate from the principle of open justice in criminal proceedings, where *inter alia*:
- 13.1 a public trial would undermine the interests of state security, good order or public morals and the administration of justice (s 153(1)).
- 13.2 there is a real likelihood of harm befalling any person (other than an accused) if their evidence is given in open court (s 153(2)).
- 13.3 the complainant in respect of a charge relating to a sexual offence or any act for the purpose of furthering the commission of a sexual offence, or an extortion - related offence, requests the Court to order that the trial be conducted behind closed doors. If a Court makes this order, it is still required to give judgment in open Court provided that the identity of the complainant will not be revealed (s 153(3)).⁹
- 14 Section 153(3) of the CPA is clearly designed to protect complainants of sexual offences and extortion. It does this by allowing the Court to order that the proceedings take place

⁹ Section 153(3) reads as follows:

“in criminal proceedings relating to a charge that the accused committed or attempted to commit –

- (a) any sexual offence as contemplated in section 1 of the Criminal Law (Sexual offences and Related Matters Amendment Act, 2007, towards or in connection with any other person”.*
- (b) any act for the purpose of furthering the commission of a sexual offence as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, towards or in connection with any other person;*
- (c) extortion or any offence of demanding from any other person some advantage which was not due and, by inspiring fear in the mind of such other person, compelling him to render such advantage,*

the court before which such proceedings are pending may, at the request of such other person, or if he is a minor, at the request of his parent or guardian, direct that any person whose presence is not mentioned in the request, shall not be present at the proceedings: Provided that judgment shall be delivered and sentence shall be passed in open court if the court is of the opinion that the identity of the other person concerned would not be revealed thereby”.

behind closed doors, where the complainant so requests. But the order under section 153(3) is only made when the criminal trial commences.

15 In terms of section 105 of the CPA, a criminal trial commences when the accused pleads to the charge.¹⁰ It is only once a plea has been entered that the *lis* between the State and the accused takes effect.¹¹

16 Since the order under section 153(3) is made when criminal proceedings commence, it is necessary to regulate the publication of information *before* the commencement of proceedings. If the media is entitled to publish information that would identify the victim before the victim has had an opportunity to seek an order under section 153(3), it would defeat the purpose of section 153(3) and cause irreparable harm to the victim.

17 Section 154 thus regulates the publication of information arising from a criminal trial. In relevant part -

17.1 section 154(2)(a) provides that where a Court makes an order under section 153(3), then no person may publish any information that might reveal the identity of the complainant. The judicial officer has a discretion to order that certain information may be published if it is just and equitable to do so.

17.2 section 154(2)(b) regulates the position *before* the trial commences and prior to an order under section 153(3). It provides that –

¹⁰ Section 105 reads “*the charge shall be put to the accused by the prosecutor before the trial of the accused is commenced, and the accused shall, subject to the provisions of section 77, 85 and 105A be required by the Court forthwith to plead thereto in accordance with section 106*”.

¹¹ *Mkhize v Director of Public Prosecutions, KwaZulu Natal* 2025 (1) SACR 392 (KZD) para 14(c).

“No person shall at any stage before the appearance of an accused in court upon any charge referred to in section 153(3) or at any stage after such appearance but before the accused has pleaded to the charge, publish in any manner whatever any information relating to the charge in question.”

- 18 The purpose of section 154(2)(b) is thus to create a holding position until an order under section 153(3) can be issued. Parliament appreciated that particulars about the charge could result in the identification of the victim, which would cause irreparable harm to the victim. We deal with the historical background to section 154(2)(b) below but emphasise here that the Minister’s uncontested statistical evidence illustrates that this position remains the same, despite the passage of time since the 1977 CPA was enacted:

- 18.1 The 2000 Qualitative Research Findings on Rape in South Africa conducted by Stats SA noted that –

“rape among women was more likely to be perpetrated by men known to them. Thus, among women who said they were raped during the five years prior to the interview of March 1998, 34.6% were raped by relatives or men who were intimate with the victims”.¹²

- 18.2 Stats SA’s 2012 *Victims of Crime Survey* records that –

“Assault and sexual offences are difficult to capture in a household survey because of their sensitivity, and as a result they are normally underreported. The results show that a large proportion (44.1%) of victims

¹² Minister’s AA rec 279 para 40.

(from selected individuals) of sexual offences were attacked by a known community member (s) from the area, followed by those attacked by their relative (17%) while only 15.4% stated that perpetrators were unknown community members. Only 14.4% were victimised by known people from outside”.¹³

18.3 Stat’s SA’s 2014/15 report notes that 32.7% of sexual offences were committed by perpetrators known to the victim, while only 15.3% of sexual offences were committed by perpetrators unknown to the victim.

18.4 The same patterns are noted in the reports of 2015/16,¹⁴ 2018/19¹⁵, and 2020/21.¹⁶

19 The NGO applicants argue that section 154(2)(b) is overbroad and irrational because it prohibits the publication of “*any information relating to the charge*” whereas section 154(3) is tailored to only prohibiting the publication of information that would reveal the identity of a child victim, witness or accused. If section 154(3) is tailored to the identity of the child victim and not the charge, so the NGO applicants argue, then there can be no rational basis for prohibiting the publication of *any* information relating to the charge, where an adult victim is concerned.

20 The obvious flaw in this argument is that it overlooks the content and scope of regulation in section 154(2)(b) and 154(3).

¹³ Minister’s AA rec 279 para 42.

¹⁴ Minister’s AA rec 280 para 44.

¹⁵ Minister’s AA rec 281 paras 45 – 47.

¹⁶ Minister’s AA rec 282 para 49.

- 20.1 Section 154(3) is not offence-specific. Publishing information about an attempted murder, for example, such as the time or place thereof, or the identity of the accused, is unlikely to result in the identification of the victim.
- 20.2 The same is not true for section 154(2)(b). It is offence-specific. The choice of the Legislature's words is important: it appreciated that information about a sexual offence will likely result in the identification of the victim.
- 21 As regards section 335A, this section was inserted into the CPA in 1987. We deal with the historical events that gave rise to the amendment below. The reason for the amendment was because Parliament sought to make it clear that the prohibition under section 154(2)(b) takes effect from the moment the alleged offence is committed and not from when the accused is formally charged.
- 22 If information may be published before the accused is formally charged, but after the alleged offence took place, then it would defeat the purpose of the prohibition under section 154(2)(b). Parliament therefore inserted section 335A into the CPA, which reads in relevant part, as follows:

"No person shall, with regard to any offence referred to in section 153(3) (a) and (b), as from the date on which the offence in question was committed or allegedly committed, until the prohibition in terms of section 154(2)(b) of the publication of information relating to the charge in question commences, publish any information which might reveal the identity of the person towards or in connection with whom the offence was committed or allegedly committed, except with the authorisation of a magistrate granted on application in chambers, with due regard to the wishes of the person towards or in connection with whom the offence was committed".

III. THE LEGISLATIVE HISTORY AND BACKGROUND TO SECTIONS 154(2)(b) AND 335A OF THE 1977 CPA

The Criminal Procedure and Evidence Act 31 of 1917 as Amended by the General Law Amendment Act 31 of 1935

- 23 The Criminal Procedure and Evidence Act 31 of 1917 (**the 1917 Act**) was the first legislation to apply across the Union of South Africa regulating the publication of information concerning sexual and extortion – related offences. The prohibition on the publication of this information would not however come into effect until 1935 when parliament introduced an amendment to the 1917 CPA through section 220*bis* of the General Law Amendment Act of 1935 (**GLAA**).
- 24 The introduction of section 220*bis* was the product of considerable reform to South Africa's criminal procedure in 1935. It was influenced by the experience of judges, magistrates, practitioners, prosecutors, and the police regarding the implementation of the 1917 Act and its shortcomings.¹⁷
- 25 One of the proposals made by the Judiciary at its Conference of 1932, was that there should be a complete prohibition on the publication of *all* information arising from preparatory examinations.¹⁸ The House of Assembly's Select Committee considered the proposal of the 1932 Judge's Conference but found that it was too far – reaching in its

¹⁷ Minister's FAA rec 881 para 20.

¹⁸ Minister's FAA rec 882 para 21; Annexure SAA1 rec 919 para 33.

prohibition, particularly considering that it had become established practice in South Africa for the media to report on the content of preparatory examinations.

26 The Select Committee ultimately proposed a prohibition on publication that was narrower in scope. Its objective was to protect victims of sexual assault and extortion, and to facilitate them coming forward to report these offences by prohibiting the publication of information relating to the trial, unless the complainant consents thereto. What is notable about the Select Committee's proposal is that it recognised that complainants should be able to consent to the publication of information that would reveal their identity.¹⁹ Indeed, its proposal to the House of Assembly was that the prohibition should include an exception that would allow the complainant to freely consent to publication.

27 The then Minister of Justice, JC Smuts, did not agree with the proposal of the Select Committee. In his view, the decision about whether publication should be permitted, should lie with a presiding officer and not the complainant. He advanced the following reasons for rejecting the Select Committee's proposal at the second reading of the Bill on 18 February 1935:

"Hon Members also will see in this Bill that I have not accepted the recommendation in that form, and I have been so advised by experts, officers of the law, and I believe by members of the bench. It has been pointed out to me that these cases are of such publicity value that newspapers may be induced – that is to say by an enterprise newspaper – might be induced or would be prepared to pay a high price to that person concerned in order to get his or her consent in a case like that. It was shown to me that the ultimate decision should

¹⁹ Unfortunately, the report of the Select Committee was destroyed during the 2022 fire at the Parliamentary precinct (Minister's FAA rec 882 para 23). The proposal of the Select Committee is, however, captured by the Hansard of the Second Reading of the Bill on 18 February 1935 (Annexure SAA2 rec 934).

*rest with the magistrate. The magistrate of course will have to consult the person concerned but the ultimate discretion would be left with the magistrate”.*²⁰

28 The Minister’s proposal was ultimately accepted, and section 220*bis* was adopted by the House of Assembly. The result is that, since 1935, a complainant has not been afforded the agency to reveal their own identity. The present Minister accepts that the rationale for prohibiting complainants consenting to the publication of their particulars does not withstand constitutional scrutiny.

29 In terms of section 220*bis*, --

“(1) If an accused is tried upon a charge referred to in sub – section (5) of section sixty – nine, no person shall at any time (subject to the provisions of sub – section (3) publish by radio or in any document produced by printing or any other method of multiplication any information relating to the said trial, unless the judge or officer presiding at such trial has, after having consulted the person against or in connection with whom the offence charged is alleged to have been committed (or if he is a minor, his guardian) given his consent, conveyed in such document signed by himself or by the registrar or clerk of the court to such publication”.

30 Section 69(5), in turn, provided that –

“If a preparatory examination is held on a charge that the accused committed or attempted to commit any indecent act towards another person or committed or attempted to commit any act for the purpose of procuring or furthering the commission of an indecent act towards or in connection with any other person or that the accused committed or attempted to commit extortion or a statutory offence demanding from any person some advantage which was not due, and by inspiring fear in such person’s mind compelling him to render such advantage, no person shall at any time publish by radio or in any document produced by printing or any other method of multiplication any information relating to the said preparatory examination or any information disclosed thereat unless the magistrate holding the preparatory examination has after having consulted the person against or in

²⁰ Minister’s FAA rec 883 para 24; Annexure SAA2 rec 935.

connection with whom the offence charged is alleged to have been committed 9or if he is a minor, his guardian) consented in writing to such publication”.

31 What is clear from section 220*bis* read with section 69(5) of the 1917 Act is that the legislature’s intention was concerned with protecting victims and not complainants. It appreciated that the social stigma attached to sexual offences and extortion are such that publication of the complainant’s particulars could cause immense harm to them. This is why the then Minister of Justice supported the introduction of these sections on the basis that “*the proceedings are of such a character that it would occasion too much pain to publish them.*”²¹

32 In relation to the offence of extortion, the Appellate Division explained why it was included in section 220*bis* shortly after the section was enacted. It did so in *Ex Parte X*²² where X (the complainant) laid a charge against G for an attempt to extort money from him, accompanied by the threat of exposing his sexual relations with various women, if he refused to pay. The Appellate Division explained the purpose of section 220*bis* as follows:

*“The court below held the trial with closed doors in the interests of the administration of justice, on the principle (presumably) that a person who has been the victim of attempted extortion or blackmail should not be deterred from giving information to the authorities by fear of publicity of the subsequent proceedings. In other words, it held the trial with closed doors for the protection of the complainant”.*²³

²¹ Annexure SAA2 rec 936.

²² *Ex Parte X* 1938 AD 244

²³ *Id* at 245.

The Criminal Procedure Act 56 of 1955

- 33 The 1955 CPA retained the provisions of section 220*bis* and 69(5), as they were in the 1917 Act, under sections 386 and 64(5) of the 1955 Act. As with section 220*bis*, section 386 of the 1955 Act also prohibited the publication of “*any information relating to the said trial and any information disclosed thereat*”.

The Botha Commission Report of 1971

- 34 On 19 June 1970, the State President appointed Mr. Justice DH Botha to conduct an inquiry into Criminal Procedure and Evidence in South Africa. The Commission’s terms of reference comprised a range of matters including “*any other aspect of criminal procedure and evidence which in the opinion of the Commission requires improvement or amendment*”.²⁴
- 35 The report of the Botha Commission as well as the 1976 Viljoen Commission of Inquiry into the Penal System of the Republic of South Africa, were instrumental in shaping the provisions of the 1977 CPA, which continue to apply today.²⁵
- 36 The Commission considered whether the provisions relating to the prohibition on publication as contained in the 1955 CPA should be retained or amended. In respect of the purpose of the prohibition, the Commission specifically observed that the provision

²⁴ Minister’s FAA rec 885 para 30.

²⁵ Minister’s FAA rec 886 para 35.

did not protect the interests of accused persons, and instead was enacted to protect complainants:

“It should be pointed out that sections 64 and 386 of the Criminal Procedure Act already impose prohibitions upon the publication of certain information with reference to certain criminal proceedings. Section 64(5) and 386(1) prohibit the publication of any information with reference to the trial of an accused on a charge that he inter alia committed an indecent act towards another person or extortion or any information with reference to the charge itself, unless the judicial officer presiding at the trial or preparatory examination after having consulted the person against or in connection with whom the offence is charged is alleged to have been committed consents to such publication. This prohibition is, therefore, clearly intended to protect the interests of the complainant and not those of the accused.”

²⁶(emphasis underlined)

- 37 Before making any recommendation on whether sections 64 and 386 should be retained, abolished or amended, the Commission invited comment on whether there should be a broad prohibition on the publication of any particulars that identify an accused person in respect of any offence. The purpose of this broader prohibition would be to protect the reputation of an accused who is later found not guilty by a Court. ²⁷
- 38 The proposal of a broader prohibition was widely rejected. It was strongly opposed by the Chief Justice, Judges of Appeal, most Judges President, as well as several Judges of the divisions of the then Supreme Court. The Attorney – General also rejected the proposal.²⁸

²⁶ Minister's FAA rec 885 para 32.

²⁷ Minister's FAA rec 886 para 33.

²⁸ Minister's FAA rec 886 para 33.

- 39 In the end, the Botha Commission did not make any recommendations on the proposal for a broader prohibition. It did, however, recommend that –

*“Section 386 be amended to enable a court, where it has, in terms of section 70(b) or section 156(4) directed that a preparatory examination or a trial shall, in the interests, inter alia, of public morals, be held behind closed doors, to direct that no information with reference to the proceedings which take place with closed doors shall be published”.*²⁹

- 40 It is this recommendation that gave rise to the present version of section 153(1) of the 1977 CPA.

The 1977 Criminal Procedure Act

- 41 The reports of the Botha and Viljoen Commissions informed Parliament’s deliberations on the 1977 CPA. Two interventions resulted in the present section 153:

41.1 The first was the recommendation of the Botha Commission that if a court makes an order directing that proceedings be held *in camera*, for public interest reasons, then the law should prohibit the publication of information relating to those proceedings.

41.2 The second was a recommendation from the opposition in Parliament that even where a Court makes an order under section 153(3) at the request of a complainant in a sexual offences or extortion case, the Court would still be

²⁹ Minister’s FAA rec 886 para 34; Annexure SAA4 rec 977 para 11.18.16.

required to deliver its judgment in open Court provided that the identity of the complainant would not be revealed thereby.

- 42 Section 154(2)(b) of the CPA does not differ in substance from its predecessor sections in the 1917 Act and the 1955 Act. Indeed, Parliament did not consider the provisions that would form part of the 1977 Act, controversial. The Minister of Justice explained the purpose of these provisions as follows:

*“Clause 153 of the Bill prescribes the circumstances under which criminal proceedings shall take place in camera. I have decided to accept to a large extent the amendments to this clause proposed by the Opposition in 1973. The clause has therefore been made subject to a proviso that where a case had been heard in camera, judgment shall be delivered, and sentence shall be passed in open court if the court is of the opinion that the identity of the witness concerned would not have been revealed thereby. **The same applies to clause 154**, which deals with the prohibition of the publication of information relating to criminal trials. Subsection (1) has been subjected to the proviso that a direction by the court shall not prevent the publication of information relating to the name and personal particulars of the accused, the charge against him, the plea, the verdict, and the sentence, unless the court is of the opinion that the publication of any part of the information may defeat the object of its direction, in which event the court may direct that such part shall not be published. A proviso has been added to subsection (2)(a) that the presiding officer may authorise the publication of information if he is of the view that such publication would be just and equitable.”(emphasis added).*

- 43 Parliament’s deliberations do not evidence any intention to protect the identity of accused persons. But, it does reveal the opposite intention. It accepted the recommendation that the identity of the accused should be revealed where it would not compromise the anonymity of a complainant. Parliament accepted that judgment should be delivered in open Court where a complainant would not be harmed by this. It considered the Botha Commission report which expressly noted that the objectives of the prohibition on publication were to protect complainants and not accused persons.

44 And importantly, Parliament did not entertain an amendment to the CPA that served to protect the interests of accused persons. The Botha Commission considered whether such a recommendation should be made and noted that it was widely rejected.

45 The suggestion, therefore, that section 154(2)(b) was enacted to protect the identity of male perpetrators is factually incorrect. All of the evidence illustrates that Parliament had the opposite objective: it sought to protect complainants.

The Introduction of Section 335A of the CPA in 1987

46 Five years after the 1977 CPA was enacted, the High Court in *S v Zululand Observer*³⁰ considered the prohibition under section 154(2)(b) and interpreted it in a manner that defeated its objectives.

47 There, a local newspaper, the Zululand Observer, published information about the rape of a 17 – year old girl before the accused was formally charged. The Court held that the word “charge” in section 154(2)(b) meant that the accused must be informed of an obligation to appear in court on those charges, and the prohibition on publication accordingly did not operate from the time that the complainant laid the charge at the police station.

48 Both the legislature and the executive were concerned by the interpretation given to section 154(2)(b) by the court because it defeated the objective of protecting the identity of complainants.

³⁰ *S v Zululand Observer* 1982 (2) SA 79 (N).

49 In response to, *inter alia*, the *Zululand Observer* judgment, the Minister of Justice requested the South African Law Commission (**SALC**), chaired by Mr Justice G Viljoen to investigate the procedure relating to the reporting of rape cases and medical – forensic aspects of rape.

50 The SALC finalised its report on 25 April 1985. Chapter 4 of the report deals with the “*protection of the complainant’s identity against publication*”. It expressed the following view:

“it is generally accepted that the above – mentioned provisions do not afford sufficient protection and that the good judgment of the press cannot be relied upon solely to ensure that the identity of the complainant is not disclosed. Interested persons and bodies are unanimous that disclosure of the complainant’s identity is responsible for the worst victim trauma next to the incident itself (that is to say for second victimisation). The unenviable position in which the victim finds herself is aggravated by the attitudes of the community and myths concerning rape. Furthermore, it is pointed out that reporting on cases of a sexual nature is usually done in a sensationalist manner with no regard for the victim’s feelings or the gravity of the crime”.³¹

51 The SALC further noted that the *Zululand Observer* judgment “*frustrated*” the objectives of section 154(2)(b) because it permitted publication that reveals the complainant’s identity before the accused is formally charged.

52 As a consequence, the SALC –

“recommended that a prohibition be imposed by legislation on publication of any particulars that could lead to the identification of the rape victim. Sections 154(2)(a) and 154(2)(b) of the Criminal Procedure Act 51 of 1977 should apply, but publication should also be prohibited from the date of the commission of the

³¹ Minister’s FAA rec 890 – 891 para 49.

crime until section 154(2)(b) applies, except where a magistrate, regional magistrate or judge in chambers, taking the victim's wishes into consideration consents on application to publication".

53 The SALC's recommendation gave rise to the insertion of section 335A into the CPA in 1987.

54 On 7 October 1987, the House Assembly convened to consider the amendment to the CPA. The Minister of Justice spoke in favour of the amendment as follows:

*"section 154(2) and (3) of the Criminal Procedure Act, 1977, at present, only offers a limited degree of protection to a small number of rape victims against the publication of their identity. With the exception of this limited protection, the Press is not obliged to withhold the identity of the complainant who reports a rape. Interested parties are unanimous that the disclosure of the complainant's identity, besides the incident itself is responsible for the worst trauma. The interpretation which a provincial division of the Supreme Court has given to the provisions of section 154(2)(b) of the Criminal Procedure Act has the effect that publication of information regarding the charge in question is indeed prohibited before the appearance of an accused in court. This, however, only applies after a charge has been formulated against a specific person. From the time the rape itself occurred until a specific person is singled out for a specific charge, the complainant is unprotected against the publication of her identity. This obviously is a shortcoming. According to the commission this interpretation is not compatible with the intention that the victim be protected against the embarrassment of disclosure."*³²

55 Section 335A reads as follows:

"(1) No person shall, with regard to any offence referred to in section 153(3)(a) and (b) as from the date on which the offence in question was committed or allegedly committed, until the prohibition in terms of section 154(2)(b) of the publication of information relating to the charge in question commences, publish any information which might reveal the identity of the person towards or in connection with whom the offence was committed or allegedly committed, except

³² Minister's FAA rec 892 para 54.

with the authorisation of a magistrate, granted on application in chambers, with due regard to the wishes of the person towards or in connection with whom the offence was committed”.

56 There are three important features of section 335A:

56.1 First, it prohibits publication prior to the prohibition under section 154(2)(b) coming into effect, thereby addressing the *lacuna* created by the *Zululand Observer* judgment.

56.2 Secondly, it contemplates that the prohibition may be lifted by a magistrate who considers an application in chambers to this effect. The media and others are entitled to apply for this order if they so choose.

56.3 Third, when the Magistrate considers such an application, he or she must have regard to the wishes of the complainant.

57 But the addition of section 335A also gives rise to certain anomalies:

57.1 The first is that section 335A excludes the offence of extortion. While the section makes it clear that no publication that reveals the identity of a complainant in a sexual offence case is meant to take place from the moment of the incident, it does not do the same thing in respect of the offence of extortion. The reason for this is apparent from the history of the section – both the executive and the legislature were concerned about responding to the *Zululand Observer* judgment and its impact on victims of sexual offences. It is for this reason that the Minister of Justice appointed a Commission to deal with the impact of sexual offences on victims, and Parliament, in its consideration of the matter, confined itself to the Commission's recommendations. It appears from the deliberations of the House of

Assembly that it too did not consider the other aspect of section 153(3), namely, extortion.

57.2 The second is that section 335A uses different language to section 154(2)(b). The latter prohibits any publication about the charge. As the Minister has already explained, there was good reason for including this section – the victims of sexual offences are easily identified when particulars about the charge are published (the identity of the accused, the relation between the accused and the complainant, the place where the offence occurred, and the date when it occurred). Section 335A does not, however, use the same language. It prohibits any publication that might reveal the complainant's identity. This might include any information about the charge, but it also may not.

58 These two legislative anomalies arose from the addition of section 335A in 1987. The House of Assembly was responding to the immediate concern about the identity of complainants of sexual offences being revealed following the *Zululand Observer* judgment. It did not appear to have noticed that the offence of extortion was excluded or that the language of section 335A differed from that of 154(2)(b). The deliberations of the Assembly show that it did not consider either of these aspects when it adopted section 335A.

59 The difference in language creates a situation where it is possible to publish information about the charge relating to a sexual offence (as long as it does not reveal the identity of the complainant), *before* the accused is charged, but not to do so *after* the accused is charged because section 154(2)(b) prohibits it. The difference in approach is not a rational one.

IV. THE CONSTITUTIONAL CHALLENGE OF MS PETERS AND THE NGO APPLICANTS

60 When a Court determines that law or conduct is inconsistent with the Constitution, it is obliged to issue a declaration of constitutional invalidity to the extent of the inconsistency.³³

61 The Minister agrees that sections 154(2)(b) and 335A of the CPA are inconsistent with the Constitution to the following extent:

61.1 Both sections unjustifiably limit a complainant's right to reveal their own identity. The prohibition violates the complainant's right to freedom of expression and the right to dignity.

61.2 The disparate prohibition in sections 154(2)(b) and 335A is also arbitrary and irrational. It is arbitrary that under section 335A there may be publication that does not reveal the identity of the victim, but under section 154(2)(b), there is a prohibition on any information concerning the charge.

61.3 Section 154(2)(b) is overbroad to the extent that it prohibits the publication of any information concerning the charge in relation to the offence of extortion. It is overbroad because there is no evidence that the information about an extortion charge will result in revealing the identity of the victim. The same is, of course, not true for sexual offences.

³³ Section 172(1)(a) of the Constitution.

- 61.4 Section 154(2)(b) is also irrational to the extent that (applying the *Zululand Observer* judgment), it would be possible to publish information regarding the offence of extortion before the accused is formally charged, but not after.
- 62 The Minister does not agree that sections 154(2)(b) and 335A are unconstitutional on the basis that –
- 62.1 they prohibit the publication of an accused's identity (as contended by Ms Peters)³⁴ or because it is irrational to only prohibit publication of certain crimes such as sexual offences or extortion and not other serious crimes (as argued by the NGO applicants).³⁵
- 62.2 they unjustifiably limit the right of freedom of expression which includes the principle of open justice.
- 62.3 they violate the right to a public trial under section 35(3)(c) of the Constitution; and,
- 62.4 the sections infringe the right to equality and amount to indirect discrimination.
- 63 Before dealing with the disputed constitutional issues, it is necessary to emphasise that all parties agree that victims who do not wish to have their identities revealed, should not be compelled to suffer the hardship that results from disclosure. Indeed, even before Ms Peters was confronted with the historical and statistical evidence put up by the Minister, she accepted that it would not be just to reveal the identity of the complainant that she

³⁴ Peters' Heads of Argument p 29 para 99.

³⁵ NGO Applicants' Heads of Argument p 19 para 31.

assisted in the Wynberg Magistrates' Court. It is for this reason that Ms Peters identifies the complainant as "MN".³⁶

- 64 As Ms Peters appreciates, most victims will not wish to have their identity publicly disclosed.

The Rationality Challenge in Relation to Sexual Offences

- 65 Ms Peters and the NGO applicants advance different rationality challenges.

65.1 Ms Peters contends that section 154(2)(b) is irrational because it protects the identity of perpetrators for no legitimate reason.

65.2 The NGO applicants contend that section 154(2)(b) is irrational because there is no good reason to prohibit publication of information concerning sexual offences and extortion – related offences, but not other serious crimes.

- 66 Neither challenge has any merit.

- 67 The test for rationality is low. All that is required is a link between the scheme that is adopted and a legitimate government objective.³⁷ The Court will not consider whether a better or more desirable scheme is available.³⁸ It is only concerned with whether a connection exists between the scheme and its purpose.

³⁶ Peters' FA rec 22 para 47.

³⁷ *United Democratic Movement v President of the Republic of South Africa (No 2)* 2003 (1) SA 495 (CC) para 55.

³⁸ *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) para 51.

68 In *Democratic Alliance v Minister of Home Affairs*, the Constitutional Court explained that –

*[45] Legislation is constitutionally required to be rationally related to a legitimate government purpose – if not, it is invalid. The test imposes a relatively minimal requirement: an identification of a legitimate government purpose and a link between the adopted means and that purpose.*³⁹

69 The onus to establish irrationality is on the applicant who alleges that the scheme is irrational. In *SAMWU v Minister of Cooperative Governance and Traditional Affairs*, the Constitutional Court held that –

*In a rationality challenge, the party impugning the provision bears the onus of demonstrating that the impugned provision lacks a legitimate government purpose or a rational relationship to such purpose.*⁴⁰

70 Both Ms Peters and the NGO applicants have not discharged the onus to establish irrationality:

Ms Peters

70.1 The purpose of section 154(2)(b) and 335A is to protect complainants from psychological harm and trauma that arises from the publication of their identity. It also serves to ensure that victims are protected in coming forward with complaints

³⁹ *Democratic Alliance v Minister of Home Affairs* 2025 (4) SA 323 (CC) para 45.

⁴⁰ *SAMWU v Minister of Cooperative Governance and Traditional Affairs* 2025 (4) SA 1 (CC) para 50. See also *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 55.

about sexual offences, without fearing that their identity will be revealed in the process.

- 70.2 These objectives are entirely legitimate. In *Centre for Child Law v Media 24 Ltd*, the Constitutional Court recognised this harm (albeit in the context of child complainants):

“As the experts note, the anticipation of identification harms children. This impacts all three classes of children, but in various ways. The experts show that the risk of identification with adulthood can undermine the long – term healing process of victims, witnesses and accused and lead to retraumatisation and hinder rehabilitation... trauma has an impact on identity development.”⁴¹

- 70.3 The scheme of section 154(2)(b) is rationally connected to the purpose of protecting victims. The Minister’s undisputed evidence shows that most sexual offences occur within close relational proximity. Publishing information about “*the charge*” (which may include the identity of the accused) could result in the victim’s identity being disclosed.

- 70.4 This fact was known to Parliament. It was a matter addressed in the SALC’s report on *Women and Sexual Offences in South Africa*, which served before it. The SALC specifically noted instances in which the media published information which could result in the identity of the victims. It mentioned, as examples:

⁴¹ *Centre for Child Law v Media 24 Ltd* 2020 (1) SACR 469 (CC) para 68.

“A 15 – year – old Bonteheuwel schoolgirl spending the Easter Weekend with relatives near Atlantis (Cape Times 3 January 1981).

“A 12 – year – old girl who suffers from epilepsy was molested ... in her family’s Bellville flat (Cape Argus 14 November 1981)”⁴²

70.5 As is clearly the case, the media published information relating to the charge which could result in the identification of the victim. Ms Peters’ rationality challenge must fail because (a) there is simply no evidence to support the conclusion that section 154(2)(b) serves to protect the identity of male perpetrators and (b) to the extent that male perpetrators are protected by the prohibition on “*any information concerning the charge*”, this is not an irrational choice of the legislature. It is informed by a concern to protect complainants. There is thus a clear link between the scheme adopted and its purpose.

70.6 The fact that the prohibition may, incidentally, have the effect of protecting perpetrators, cannot transform a rational choice into an irrational one.

The NGO Applicants

70.7 There is an obvious reason why section 154(2)(b) imposes a prohibition on publication in relation to sexual and extortion – related offences. These offences carry social stigma and are less likely to be reported if the complainant’s identity is disclosed.

⁴² Annexure SAA5 rec 984 ft 2.

70.8 The same cannot be said for other offences such as attempted murder, robbery or fraud. There is no social stigma that attaches to the complainant in respect of these offences.

70.9 In the context of extortion, the nature of the offence almost invariably involves the threat to disclose information about the extortionee that would embarrass or compromise him. Were publication permitted, that eventuality might well arise.

70.10 And regrettably, sexual offences continue to carry considerable social stigma. The SALC report notes that –

“The unenviable position in which the victim finds herself is aggravated by the attitudes of the community and myths concerning rape.

...

*For example, that the victim always has some share in her rape; that she brought it upon herself; that a rape cannot be committed on an unwilling woman; etc”.*⁴³

70.11 Parliament has not made an irrational choice when imposing a temporary publication prohibition in relation to sexual offences and extortion. Unlike other serious crimes, these offences are likely to go unreported if the victim’s identity is publicly disclosed. There is manifestly a relationship between the scheme and the purpose.

⁴³ Annexure AA5 rec 985 para 4.5 and ft 5.

71 Accordingly, the rationality challenge raised by Ms Peters and the NGO applicants must fail.

The Freedom of Expression and Open Justice Challenge

72 Ms Peters and the NGO applicants raise different freedom of expression challenges. Ms Peters contends that section 154(2)(b) infringes the right to freedom of expression because “*there is no good reason to restrict publication of an accused’s identity simply because he is charged with a sexual offence*”.⁴⁴ The NGO applicants contend that publication bans are unconstitutional and that there are less restrictive means to protect the identity of complainants.⁴⁵

73 The Minister accepts that both sections 154(2)(b) and 335A limit the right of freedom to expression. But this limitation is not indefinite, and it is not without justification.

74 Our law recognises that permanent publication bans are unconstitutional.

74.1 In *Johncom Media Investments*, the Constitutional Court declared section 12 of the Divorce Act 70 of 1979 unconstitutional on the basis that it imposed a blanket prohibition on the publication of any particulars in a divorce action. There was no scope to lift the publication ban at all. The Court held that the privacy interests protected by section 12 could be achieved without the blanket prohibition.⁴⁶

⁴⁴ Peters’ Heads of Argument p 32 para 109.

⁴⁵ NGO Applicants’ Heads of Argument p 26 para 45.

⁴⁶ *Johncom Media Investments Ltd v M and Others* 2009 (4) SA 7 (CC) paras 29 – 30.

74.2 In *Mail and Guardian v Chipu*, the Constitutional Court declared section 21(5) of the Refugees Act 130 of 1998 unconstitutional because it imposed absolute confidentiality on the proceedings of the Refugee Appeal Board. The Court found that the absolute confidentiality regime violated the right of freedom to expression and held that affording the Board a discretion to lift the confidentiality, balances the right of freedom of expression on the one hand, and the right to privacy and dignity on the other hand:

*"I cannot see why the integrity of the asylum system and the safety of the asylum applicants, and their families and friends would be threatened by the publication of information in an asylum application that would not tend to disclose the identities of the asylum applicant, his family and friends. However, that is not even what the applicants seek to achieve here. The applicants only want to ensure that the Appeal Board is vested with a discretion to allow access to its hearings in appropriate cases. Obviously, in considering that request for access the Appeal Board would consider all relevant factors, including whether or not prohibiting the publication of information that does not tend to reveal the identity of the asylum applicant or his or her family and friends would not be a sufficient protection. A very important factor in that inquiry would be whether granting access would be in the public interest."*⁴⁷

74.3 In *Arena Holdings v SARS*, the Constitutional Court declared sections 67 and 69 of the Tax Administration Act 28 of 2011 unconstitutional on the basis that the provisions created an absolute prohibition against revealing taxpayer information, even where there are strong public interest reasons for disclosure. The Court held that the objectives of the section could be achieved without the absolute prohibition and by balancing freedom of expression by including a public interest override when disclosure decisions are taken.⁴⁸

⁴⁷ *Mail and Guardian v Chipu NO and Others* 2013 (6) SA 367 (CC) paras 92 – 93.

⁴⁸ *Arena Holdings v SARS* 2023 (5) SA 319 (CC).

75 The provisions in each of these cases stand on an entirely different footing to sections 154(2)(b) and 335A, for at least two reasons:

75.1 First, *Johncom*, *Mail and Guardian* and *Arena Holdings* concern permanent publication bans. The relevant provisions in each of these cases did not provide for the possibility of lifting the publication prohibition.

75.1.1 Section 154(2)(b) limits the duration of the prohibition until such time that the accused enters a plea. The reason for this is self – evident. The criminal trial only commences when the accused pleads, and the court would then be able to make an order under section 153(3) of the CPA to hold the trial behind closed doors.

75.1.2 The prohibition is not indefinite. Indeed, even if a court makes an order under section 153(3), it is still required to give judgment in open court, provided that the identity of the complainant is not revealed.

75.1.3 Quite correctly, none of the applicants take issue with the court's power to order to give judgment *in camera*, where the judgment would result in revealing the complainant's identity.

75.1.4 The prohibition only becomes "*indefinite*" if a court decides that it is necessary to protect the identity of the complainant. Otherwise, it is timebound: once a plea has been entered, the prohibition no longer applies.

75.1.5 Similarly, section 335A does not contain a permanent publication ban. It allows the media (or any interested party) to apply to the presiding officer for an order that would allow publication of the complainant's

identity. The presiding officer will weigh up the media's interest together with the wishes of the complainant before making an order.

75.2 Second, and relatedly, the provisions at issue in *Mail and Guardian* and *Arena Holdings* did not leave the (or any) decision – making body with any discretion to lift the prohibition. In *Mail and Guardian*, the Court noted that the purpose of the section could be achieved by giving the Refugee Appeal Board a discretion to permit publication. In *Arena Holdings*, the Court noted that the objectives behind taxpayer confidentiality could still be achieved by giving SARS a discretion on whether to lift the prohibition where there are public interest reasons to do so.

75.3 Sections 154(2)(b) and 335A are not blanket prohibitions. Both sections vest the courts with the authority to lift the prohibition on publication. The judicial oversight serves an important function. It recognises that the courts are the appropriate authority to balance competing interests (the privacy and dignity of the complainant on the one hand; and the media's right to impart information on the other).

75.4 The Constitutional Court has already recognised that there is nothing unconstitutional about default protections that may be lifted by a judicial officer in the context of publication prohibitions. In *Centre for Child Law*, the Court held that

—

*“The rights at play in respect of child victims demand default protection, with the possibility of such protection **being lifted by courts upon application on a case – by – case basis**”.*⁴⁹ (emphasis added).

75.5 Although the Court was concerned with child victims in that case, it is submitted that the reasoning regarding statutory default protection, applies equally to all victims. The interests of the media are protected through the judicial supervision built into sections 154(2)(b) read with section 153(3) and section 335A.

76 The Minister submits that, to the extent that sections 154(2)(b) and 335A limit the right to freedom of expression, that limitation is reasonable and justifiable:

76.1 The Minister accepts that the right of the media to impart information is fundamental to South Africa’s democratic order. The Constitutional Court has repeatedly affirmed the importance of the right to freedom of expression and the principle of open justice.⁵⁰

76.2 But the right to freedom of expression and the principle of open justice is not unbounded. The Constitutional Court has also recognised that it may be limited where *“the right to dignity and privacy outweigh the subtle impediment to the principle of open justice. The serious harms caused to child participants outweigh the minimal harm to open justice”*.⁵¹

⁴⁹ Centre for Child Law above para 59.

⁵⁰ See for example *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: in re Masetlha v President of the Republic of South Africa and Another* 2008 (5) SA 31 (CC) para 39; *Shinga v the State and Another* 2007 (1) SACR 408 (CC) para 26.

⁵¹ Centre for Child Law above para 112.

- 76.3 The nature and extent of the limitation is not indefinite. It applies until such time that an application is made under section 335A or until such time that an accused pleads. Unlike permanent publication bans – which the Constitutional Court has found to be unconstitutional – sections 154(2)(b) and 335A are limited in their duration.
- 76.4 The NGO applicants contend that the prohibition is indefinite where the accused dies before he pleads. This is incorrect. The media are entitled to apply to the court under section 335A to lift the publication ban, and the court may grant this order after considering the wishes of the complainant.
- 76.5 The limitation is also rationally connected to its purpose. As already demonstrated above, both sections 154(2)(b) and 335A are tailored to protecting complainants from the trauma of publication of their identity. They are also rationally connected to the objective of facilitating victims coming forward to report these offences.
- 76.6 There are no less restrictive means to achieve the objective of protecting complainants. The means chosen by Parliament carefully balances all of the competing interests at stake. The NGO applicants argue that they should be trusted with decisions about the kind of information that would result in the identification of complainants.
- 76.7 Parliament has already considered this. The SALC report on *Women and Sexual Offences in South Africa* noted instances where the media did not name the victim, but their identity could be determined from the information relating to the charge, which was publicly disclosed.

- 76.8 The NGO applicants argue that the media should be trusted in making decisions about whether information published would reveal the identity of the victim. It contends that it regularly protects confidential sources, and that it is equipped with the skills to make judgment calls about information that is likely to reveal a source. There are several flaws with this approach.
- 76.9 First, the media has no inherent interest in protecting complainants. But it does have an inherent interest in protecting a source. The interests of the media stand on the other end of the spectrum to the interests of most complainants (which is to be anonymous). Unlike a court, the media is not impartial in balancing competing interests (free speech on the one hand, and the privacy of the complainant on the other hand).
- 76.10 Secondly, the media is not the custodian of what is in the public interest. Its reporting largely concerns what is interesting to the public, as opposed to what is in the public interest. This distinction was explained by the Constitutional Court as follows:

[96] There is an interrelated aspect of this principle that requires further interrogation, the distinction between what is in the public interest and what is merely interesting to the public.

...

[100] I do not wish to deny the importance of public interest in respect of open justice, but I underscore the distinction between public interest and what is interesting to the public. There is indeed a difference between the two; the former is attached to a legitimate and genuine interest, one founded on fact and one that contributes towards the public's constitutional right to be informed. Public interest can still be served and protected without revealing the names and identities of child participants in criminal proceedings.

76.11 Thirdly, the Constitutional Court has already recognised that it is not inappropriate to allow decisions about publication to be left with the courts and not the media.

“[42] Further to this, it is neither reasonable nor practical for child victims to bear the onus of approaching courts for an interdict against publication. This is particularly so where media companies have the financial resources and the capacity to bear that onus, and are, in any event, in most instances, the instigating parties of the publication”.

...

[52] ... A less restrictive means to achieve the purpose of the limitations would be to protect the anonymity of child victims by default and allow the courts to lift the protection where that would be in the public interest”.⁵²

77 For all of these reasons, the Minister respectfully submits that the freedom of expression challenge raised by Ms Peters and the NGO applicants must fail.

The Right to a Public Hearing and Section 35(3)(c) of the Constitution

78 The NGO applicants contend that publication bans contravene section 35(3)(c) of the Constitution which enshrines the principle of justice.⁵³ There is an obvious flaw in this challenge: the rights under section 35(3) of the Constitution vest in accused persons. Section 35(3)(c) reads as follows:

“Every accused person has a right to a fair trial, which includes the right to a public trial before an ordinary court”.

⁵² *Centre for Child Law* above paras 42 and 52.

⁵³ NGO Applicants Heads of Argument p 28 para 50.3.

79 The NGO applicants are not accused persons. They do not enjoy the rights under section 35(3)(c) of the Constitution, and the reliance thereon is misplaced. The challenge is also entirely abstract. There is no accused before this Court who contends that their rights under section 35(3)(c) of the Constitution have been infringed by sections 154(2)(b) or 335A of the Constitution.

80 Courts do not generally entertain abstract constitutional challenges, and this court should not do so in this case. In *Savoi*, the Constitutional Court held that:

[9] The respondents characterise this application as an abstract challenge because the applicants elected not to place a particular set of facts before the Court...

*[13] So, the applicants plainly have standing to bring this challenge. This does not, however, make it irrelevant that this challenge is brought in the abstract. Courts generally treat abstract challenges with disfavour. And rightly so. Will hearsay, similar facts or evidence of previous convictions be led at the applicants' trial? At this stage we simply do not know. Abstract challenges ask courts to peer into the future, and in doing so they stretch the limits of judicial competence. For that reason, the applicants in this case bear a heavy burden – that of showing that the provisions they seek to impugn are constitutionally unsound merely on their face. The analysis that follows demonstrates just how heavy that burden is.*⁵⁴ (emphasis supplied)

81 The section 35(3)(c) challenge is manifestly without merit and must fail.

⁵⁴ *Savoi and Others v National Director of Public Prosecutions and Another* 2014 (1) SACR 545 (CC) paras 9 and 13.

The Equality Challenge

- 82 Both Ms Peters and the NGO applicants contend that sections 154(2)(b) and 335A are inconsistent with section 9(3) of the Constitution. The basis for this challenge is that most perpetrators are men, and that the impugned sections give rise to indirect discrimination.
- 83 Section 9(1) of the Constitution protects the right of equal benefit and equal protection of the law. There is simply no challenge that the impugned law affords men *greater* protections or benefits under the law, compared to women.
- 84 Both sections 154(2)(b) and 335A are framed in gender - neutral language. It does not differentiate between male accused persons and female accused persons nor between male complainants and female complainants. The fact that most complainants are women, and most accused persons are men does not establish indirect discrimination.
- 85 In *Jordan*, a majority of the Constitutional Court explained that –

“[18] In my view, a gender – neutral provision which differentiates between the dealer and the customer, a distinction that is commonly made by statutes and which is justifiable, having regard to the qualitative difference between the conduct of the dealer and that of the customer, and which operates in the legal framework that punishes both the customer and the dealer and makes them liable to the same punishment, cannot be said to be discriminating on the basis of gender simply because the majority of those who violate such a statute happen to be women”.⁵⁵

- 86 Neither Ms Peters or the NGO applicants have shown how the impugned law provides male accused persons greater benefits compared to female accused persons or male

⁵⁵ *S v Jordan and Others* 2002 (6) SA 642 (CC) para 18.

complainants' greater benefits compared to female complainants. The fact that men are overwhelmingly perpetrators and women are overwhelmingly victims is an unfortunate fact relating to crime, both in South Africa and globally, but it does not point to a differentiating between two similarly - situated persons.

87 For there to be discrimination, there must first be differentiation. If that differentiation is on a listed ground, then it is presumed unfair. But here, there is no differentiation at all between two similarly - situated persons or ground.

88 The challenge thus fails at the first hurdle of the *Harksen v Lane* test, where the Constitutional Court set the following test for unfair discrimination under the interim Constitution, but which continues to apply under the final Constitution⁵⁶:

“(a) **Does the provision differentiate between people or categories of people?** If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of s 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:

(i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

⁵⁶ *Mahlangu and Another v Minister of Labour and Others* 2021 (2) SA 54 (CC) para 71.

(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 8(2).

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (s 33 of the interim Constitution)⁵⁷

89 The first question in any equality challenge is “*does the law differentiate between people or categories of people*”. Neither Ms Peters nor the NGO applicants are able to identify any differentiation other than to state that most victims of sexual offences are women. But this, of course, does not indicate:

89.1 differentiation between male and female accused persons; or,

89.2 differentiation between male and female complainants.

90 Comparing the position of accused persons with complainants does not give rise to an equality challenge at all. Indeed, this case is further apart than *Jordan's* in relation to equality. There, the issue was whether discrimination arises in the context of criminal conduct on the part of those who provide sex in exchange for reward (the seller), and those who pay for it (the customer). The law criminalises the conduct of both the seller and the customer. The two categories of people in that case were the same: those who act unlawfully.

⁵⁷ *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) para 53.

- 91 But complainants and accused persons are not similarly situated people, and the law does not afford greater benefits to an accused compared to a complainant in relation to the publication prohibition under section 154(2)(b) and 335A. As Ms Peters herself recognises, most complainants seek to have their anonymity protected.
- 92 The equality challenge does not get out of the starting blocks. There is no differentiation between similarly - situated persons, and the challenge accordingly fails at the first step of the inquiry.

V. CONCLUSION AND REMEDY

- 93 The Minister's further answering affidavit provides detailed reasons as to why Ms Peters and the NGO applicants are not entitled to their proposed orders.⁵⁸
- 94 In the case of Ms Peters, she seeks orders for which no case has been made out.⁵⁹ She asks this court to act as the legislature by deleting words from section 154(2)(b) and replacing it with different words. Both severance and reading – in are exceptional remedies, that the courts do not generally grant because they interfere with the separation of powers, and more particularly, the functions of the legislature. In this case, Ms Peters unusually asks for this court to grant an order of *both* severance and reading – in.

⁵⁸ Minister's FAA rec 900 – 907 paras 72 – 86.

⁵⁹ Minister's FAA rec 904 para 78.3.1.

- 95 What is more, Ms Peters' approach to remedy is not straightforward. Her suggestion is not that this court should simply delete one offending word and replace it with another. In paragraph 4 of her amended notice of motion she seeks the severance of the sentence "*until the prohibition in terms of section 154(2)(b) of the publication of information relating to the charge in question commences*" in relation to section 335A.
- 96 And in paragraph 5 of her amended notice of motion, Ms Peters seeks a complete re – writing of section 335A, which includes the addition of three new subsections.
- 97 All of this is manifestly inappropriate. As the Constitutional Court held in *Dawood*:

"[63] It would be inappropriate for this Court to seek to remedy the inconsistency in the legislation under review. The task of determining what guidance should be given to the decision-makers and, in particular, the circumstances in which a permit may justifiably be refused is primarily a task for the Legislature and should be undertaken by it. There is a range of possibilities that the Legislature may adopt to cure the unconstitutionality.

*[64] Where, as in the present case, a range of possibilities exists and the Court is able to afford appropriate interim relief to affected persons, it will ordinarily be appropriate to leave the Legislature to determine in the first instance how the unconstitutionality should be cured. This Court should be slow to make those choices which are primarily choices suitable for the Legislature."*⁶⁰

- 98 As regards the NGO applicants, they too seek relief that the Constitutional Court has made clear, the High Courts are not entitled to grant. The NGO applicants seek orders –
- 98.1 suspending the declaration of invalidity for a period of 18 months.

⁶⁰ *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) paras 63 – 64.

98.2 remedies that will apply during the suspension period (as set out in paragraphs 4.1. to 4.2. of their notice of motion.⁶¹; and,

98.3 an order that the proposed remedies shall continue to apply in the event that Parliament does not cure the legislative defects.

99 In *Prince III*, the Constitutional Court held that this court is not entitled to determine the suspension period, or the remedy that should apply during that period. In terms of section 172(2)(a), a declaration of invalidity has no effect until such time that it is confirmed by the Constitutional Court:

*[2] The High Court suspended the order of invalidity for a period of 24 months from 31 March 2017. It said that that was to allow Parliament to correct the constitutional defects in the Drugs Act and Medicines Act set out in the judgment. **It is neither necessary nor competent for a High Court to suspend an order of constitutional invalidity that relates to a statutory provision or an Act of Parliament when it grants such an order of constitutional invalidity. It is unnecessary because section 172(2) of the Constitution provides that “an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court”.** That means that any order of constitutional invalidity of an Act of Parliament or a provision of an Act of Parliament made by a court other than this Court does not take effect for as long as it has not been confirmed by this Court. **Such a suspension order is incompetent because it purports to suspend the operation of an order that is not in operation in any event. That order of invalidity is not in operation because in terms of section 172(2) of the Constitution which I have just quoted above.**⁶² (emphasis added).*

100 Accordingly, the relief sought by the NGO applicants in paragraphs 3 to 5 of their notice of motion falls to be rejected.

⁶¹ NGO Applicant's NoM rec 610 paras 4.1 to 4.2.

⁶² *Minister of Justice and Constitutional Development and Others v Prince* 2018 (6) SA 393 (CC) para 2.

101 The Minister submits that it would be appropriate for this court to issue the following orders:

- 1. The first respondent is granted condonation for the late filing of its further answering affidavit.**
- 2. The Trustees for the Time Being of the Media Monitoring Africa Benefit Trust and the Campaign for Free Expression NPC are granted leave to intervene in application 20427/22 and are joined thereto as the second and third applicants respectively.**
- 3. Sections 154(2)(b) and 335A of the Criminal Procedure Act 51 of 1977 are declared to be inconsistent with the Constitution and invalid to the extent that:**
 - 3.1. They infringe the rights of a complainant to reveal their own identity.**
 - 3.2. They arbitrarily impose different publication prohibitions in sections 154(2)(b) and 335A.**
 - 3.3. In the case of section 154(2)(b), it prohibits the publication of any information concerning the charge in relation to the offence of extortion.**

4. The declaration of invalidity in paragraph 3 above is referred to the Constitutional Court for confirmation in terms of section 172(2)(a) of the Constitution.

5. Pending confirmation by the Constitutional Court in terms of section 172(2)(a), the following temporary relief is granted in terms of section 172(2)(b) of the Constitution–

‘The prohibitions contained in sections 154(2)(b) and 335A(1) of the Criminal Procedure Act 51 of 1977 will not apply to a complainant who elects to reveal their own identity, or consents to a third party doing so.’

6. The first respondent shall pay the first, second and third applicants’ costs, including counsels’ costs on scale B, such costs to include the costs of two counsel, where so employed.

102 The Minister submits that paragraph 5 above is an appropriate order because it ensures that complainants who wish to reveal their own identity will not face the risk of prosecution pending confirmation by the Constitutional Court.

ISMAIL JAMIE SC

KESSLER PERUMALSAMY

Counsel for the Minister of Justice

Chambers, Cape Town

12 February 2026

VI. AUTHORITIES

1. Centre for Child Law v Media 24 Ltd 2020 (1) SACR 469 (CC).
2. SAMWU v Minister of Cooperative Governance and Traditional Affairs and Another 2025 (4) SA 1 (CC).
3. Dawood v Minister of Home Affairs 2000 (3) SA 936 (CC).
4. Van Breda v Media 24 Limited and Others; NDPP v Media 24 Limited and Others 2017 (2) SACR 491 (SCA).
5. Mkhize v Director of Public Prosecutions, KwaZulu Natal 2025 (1) SACR 392 (KZD).
6. Ex Parte X 1938 AD 244.
7. S v Zululand Observer 1982 (2) SA 79 (N).
8. United Democratic Movement v President of the Republic of South Africa (No 2) 2003 (1) SA 495 (CC).
9. Albutt v Centre for the Study of Violence and Reconciliation and Others 2010 (3) SA 293 (CC).
10. Democratic Alliance v Minister of Home Affairs 2025 (4) SA 323 (CC).
11. SAMWU v Minister of Cooperative Governance and Traditional Affairs 2025 (4) SA 1 (CC).
12. Glenister v President of the Republic of South Africa 2011 (3) SA 347 (CC).
13. Johncom Media Investments Ltd v M and Others 2009 (4) SA 7 (CC).
14. Mail and Guardian v Chipu NO and Others 2013 (6) SA 367 (CC).
15. Arena Holdings v SARS 2023 (5) SA 319 (CC).
16. Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: in re Masetlha v President of the Republic of South Africa and Another 2008 (5) SA 31 (CC).
17. Shinga v the State and Another 2007 (1) SACR 408 (CC).

18. Savoi and Others v National Director of Public Prosecutions and Another 2014 (1) SACR 545 (CC).
19. Minister of Justice and Constitutional Development and Others v Prince 2018 (6) SA 393 (CC).
20. Harksen v Lane NO and Others 1998 (1) SA 300 (CC).
21. Mahlangu and Another v Minister of Labour and Others 2021 (2) SA 54 (CC).
22. S v Jordan and Others 2002 (6) SA 642 (CC).