IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case No: 261/2018
SCA Case No: 871/2017
HC Case No: 23871/2015

In the matter between:

CENTRE FOR CHILD LAW	1st Applicant
KL	2nd Applicant
CHILDLINE SOUTH AFRICA	3rd Applicant
NATIONAL INSTITUTE FOR CRIME PREVENTION AND THE REINTEGRATION OF OFFENDERS	4th Applicant
MEDIA MONITORING AFRICA TRUST	5th Applicant
and	
MEDIA 24 LIMITED	1st Respondent
INDEPENDENT NEWSPAPERS (PTY) LTD	2nd Respondent
TIMES MEDIA GROUP LIMITED	3rd Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	4th Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	5th Respondent

APPLICANTS' HEADS OF ARGUMENT

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INTRODUCTION

1 Children who are victims, witnesses, or accused of crimes are in an acutely vulnerable position. If their identities are revealed in the media or in other public forums, they face severe and life-long harms.

2 For this reason, section 154(3) of the Criminal Procedure Act[1] protects the anonymity of children in the criminal justice system. It provides that:

> *"No person shall publish in any manner whatever any information which reveals or may reveal the identity of an accused under the age of eighteen years or of a witness at criminal proceedings who is under the age of eighteen years: Provided that the presiding judge or judicial officer may authorize the publication of so much of such information as he may deem fit if the publication thereof would in his opinion be just and equitable and in the interest of any particular person."*

3 Section 154(3) of the CPA makes anonymity the default position for children. Its protections may only be lifted with the permission of a court on a case-by-case basis, where the court concludes that it is "*just and equitable*" to do so.

4 This application involves two questions concerning the provision:

4.1 First, does section 154(3) permit the media to publish the identity of children who are <u>victims</u> of crimes, but have not yet testified or are not called to testify at trial? If so, is this consistent with the Constitution? This is the question of "<u>victim protection</u>".

4.2 Second, does the protection afforded by section 154(3) of the CPA automatically terminate as soon as a child victim, witness, child accused <u>turns 18</u>? If so, is this consistent with the Constitution? This is the question of "<u>ongoing protection</u>".

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[1] Act 51 of 1977 (the CPA).

5 The ordeal of the second applicant – KL – demonstrates the need for both forms of protection. KL is known to the public as "Zephany Nurse", although that is not her real name.[2]

5.1 KL was abducted from hospital on 30 April 1997, when she was just two days old. She was "found" in February 2015, when she was 17 years old.[3] The woman that KL knew to be her mother was promptly arrested and tried for kidnapping.[4] Her case and the ensuing criminal trial have been the subject of intense media scrutiny, both in South Africa and abroad.

5.2 As a child victim of crime who had, at that stage, not yet testified at trial, there was uncertainty whether section 154(3) protected KL's anonymity. This was at a time when the news media was camped outside KL's school and home.[5]

5.3 In addition, some members of the media took the position that any protection afforded to KL under section 154(3) of the CPA would automatically terminate on her 18th birthday in April 2015.[6]

5.4 The applicants wrote to all major media houses seeking an undertaking that they would not reveal KL's identity.[7] When that undertaking was not forthcoming, the applicants were forced to obtain urgent interim relief to protect KL, pending the final determination of this application.

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[2] This is the name given to KL at birth. KL has grown up with and is known by a different name.
[3] FA para 53, Record vol 1 p 34.
[4] FA para 54, Record vol 1 p 34; KL's affidavit para 3, Record vol 1 p 59.
[5] KL's affidavit para 17, Record vol 1 p 62.
[6] FA para 74, Record vol 1 p 41. See in particular Annexure AMS 17, Record vol 2 p 142.
[7] Annexure AMS 15 Record vol 2 p 131.

6 KL's case is not unique. As the evidence makes clear, many other vulnerable children have been identified in the media or face the risk of identification because of the limited scope of section 154(3) of the CPA.

7 The challenge to the constitutional validity of section 154(3) is now before this Court as a combined application for confirmation, leave to appeal, and leave to cross-appeal in respect of the Supreme Court of Appeal's judgment and order.

8 On the question of victim protection, the SCA was unanimous in its order:

8.1 The SCA declared section 154(3) invalid to the extent that it does not protect the anonymity of children as victims of crimes at criminal proceedings. It suspended the declaration of invalidity for 24 months and granted an interim reading-in to apply during this period.

8.2 The SCA referred the order to this Court for confirmation. The applicants now seek confirmation of the order of the SCA by this Court, in terms Rule 16(4) of the Rules of this Court. The media respondents seek leave to cross-appeal against this order.

9 In respect of ongoing protection, the SCA was sharply divided, three to two:

9.1 The majority judgment held that section 154(3) could not be construed as giving ongoing protection to child accused, victims and witnesses when they turn 18. It also held that this was not unconstitutional and consequently dismissed the applicants' appeal on this issue.

9.2 By contrast, the minority judgment agreed that section 154(3) did not presently confer ongoing protection to child accused, victims and witnesses when they turn 18, but held that this was unconstitutional. It would have

declared the section invalid on this basis and granted an interim reading-in order.

9.3 The applicants now seek leave to appeal against the order of the SCA on this issue.

10 The applicants accept that section 154(3) cannot easily be interpreted to provide victim protection and ongoing protection. But this then means that section 154(3) is unconstitutional to the extent that it fails to provide victim protection and ongoing protection.

11 Section 154(3) should therefore be declared invalid to that extent, with a suitable interim order, leaving it to Parliament to correct the defects. Accordingly, this Court is not asked to legislate, but is merely asked "*to articulate the unfulfilled obligation in broad terms, but with sufficient clarity to give Parliament a fair sense of what is required of it.*"[8]

12 Notably, the Minister of Justice does not dispute that the Constitution requires both victim protection and ongoing protection. The Minister therefore abides the decision of this Court on whether section 154(3) is unconstitutional.[9]

13 However, the media respondents continue to vigorously oppose this application. The media respondents contend that it is constitutionally permissible to deny anonymity protections to child victims and it is also constitutionally permissible for these protections to terminate automatically when a child turns 18.

14 In what follows, we deal with the following issues in turn:

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[8] *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* [2018] ZACC 17; 2018 (5) SA 380 (CC); 2018 (8) BCLR 893 (CC) at para 80.
[9] Minister's Answering Affidavit ("Minister's AA") paras 3 – 6, Record vol 8 pp 728 – 732.

14.1 The relevant factual background;

14.2 The constitutional rights at stake;

14.3 Why section 154(3) of the CPA is unconstitutional to the extent that it fails to protect child victims;

14.4 Why section 154(3) of the CPA is unconstitutional to the extent that it fails to protect child victims, witnesses, accused and offenders after they turn 18; and

14.5 The appropriate remedy.

15 Before doing so, we make four over-arching points.

16 First, the question whether section 154(3) is unconstitutional must be answered prior to and separately from the question of an appropriate remedy.

16.1 The majority judgment in the SCA mistakenly inverted that analysis by focusing on the applicants' proposed remedies, to the exclusion of a proper two-stage limitations analysis.[10] The media respondents repeat the same error in their application to this Court.

16.2 In any event, the media respondents' attacks on the remedy are now redundant. The applicants only seek a declaration of constitutional invalidity, with an appropriate interim order, leaving it to Parliament to fix the unconstitutional deficiencies in section 154(3). The media respondents' quibbles over the precise scope and extent of the amendments to section 154(3) are best left for debate in Parliament.

[10] See in particular SCA judgment paras 14 – 19.

17 Second, the applicants do not seek an absolute ban on the identification of the children concerned. The only question is what default position should be in place until a court makes a case-by-case determination on the best interests of the child.

17.1 The applicants contend that the default position should be the protection of anonymity. This would be so until the media or other interested persons approached a court and it directed, after considering each child's best interests and the interests of justice, that the child could be identified.

17.2 The media respondents contend, quite remarkably in our submission, that the default should be no protection, placing the burden and risk on individual vulnerable children to approach the courts for protection.

18 Third, the papers are replete with extensive evidence of the harms that are caused by identifying child victims, witnesses and accused persons, both before and after they turn 18, and that would flow if anonymity were not the default position. This evidence includes expert evidence and testimonies of individuals. This evidence is essentially unanswered by the media respondents. The media respondents' reliance on hypotheticals are not an adequate a response to real-life examples and expert evidence.

19 Finally, the approach urged by the media respondents is out of step with the protection afforded by a number of comparable open and democratic societies to their children.

19.1 Canada, New Zealand, Australia, England and Wales, and Scotland all provide some form of statutory protection for child victims, irrespective of whether they testify at trial.[11]

19.2 Moreover, Canada, New Zealand and Australia have all embraced the need for indefinite anonymity protections for children, that extend into adulthood.[12]

19.3 Yet the media respondents would have it that our Constitution, despite its unprecedented constitutional entrenchment of children's rights, does not demand at least a similar level of protection. That is a most surprising conclusion.

FACTUAL BACKGROUND

KL's case

20 After she was "found" in February 2017, KL attracted substantial national and international media attention. She faced the constant threat of being identified in the media.

21 In March 2015, the Centre for Child Law addressed correspondence to the various media houses requesting an undertaking that they would not reveal KL's identity.[13] None of the media houses provided the undertaking.[14] Instead, some expressly stated that the protection afforded by section 154(3) of the CPA would lapse when KL turned 18 and the media would be permitted to reveal KL's identity.[15]

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[11] See Appendix 1 to these heads of argument.
[12] See Appendix 2 to these heads of argument.
[13] Annexure AMS 9, Record vol 2, pp 122 – 124.
[14] FA para 60 - 65, Record vol 1 pp 35 – 38.
[15] Annexure AMS 10, Record vol 2 pp 125 – 126.

22 On 21 April 2015, the High Court granted an urgent interim interdict to protect KL's anonymity pending the finalisation of the present proceedings.[16] Despite this, KL has faced constant threats of being identified in the media:

22.1 In July 2015, KL's legal representative discovered by chance that a book on KL was due to be published, with a picture of KL on its front cover. The publishers were eventually persuaded to change the cover only after the threat of legal action.[17]

22.2 In March 2016, the *Daily Voice* (owned by the second respondent) published a series of articles including photographs of KL in which her face was partially obscured by pixellation. KL's legal representatives brought a complaint to the Press Ombudsman, who held that the articles breached the court order and the Press Code. While KL succeeded, the ruling brought her no direct relief, apart from an apology.[18]

22.3 In June 2016, *YOU* Magazine (published by the first respondent) carried a story in which it included pictures of KL's biological sister, despite the fact that it had been reported that KL and her sister look very similar, a fact that was repeated in the *YOU* article concerned.[19]

22.4 In August 2016, the *New Age* newspaper carried a story on its website reporting that KL was pregnant. The article referred to her aunt by name.[20] A number of other publications picked up and reported on the New Age

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[16] Annexure AMS 24, Record vol 3 pp 222 – 224.
[17] Reply, para 34.5, Record vol 8 pp 748 – 752; Annexure AMS 40 – 41, Record vol 9 pp 868 – 871.
[18] Reply, para 43.2, Record vol 8 pp 755 – 756; Annexure AMS 46, Record vol 9 pp 877 – 880.
[19] Reply, para 43.1, Record vol 8 p 755.
[20] Supplementary affidavit, para 8, Record vol 10 pp 914 - 915; Annexure SA3, Record vol 10 pp 925 - 927.

story[21] and at least two also included the name of KL's aunt in their articles.[22]

23 On the media respondents' interpretation, KL obtained no protection from section 154(3) of the CPA at all.

23.1 The media contends that it was free to identify her until she was formally called as a witness at the criminal trial, because she was at that stage merely a child victim of crime, not yet a witness.

23.2 The media contends also that by the time she testified, in August 2016, it was too late for her to benefit from section 154(3) as she had turned 18 and had lost any protection under the section, because she was no longer a child.

23.3 This means that, on the media's interpretation, despite being an acutely vulnerable child victim of crime, KL obtains no protection at all from section 154(3) of the CPA. Indeed, even if the High Court ultimately directed that her evidence be heard in camera (as it did),[23] this would not have helped her. This is because during the period March 2015 (when the story broke) to August 2016 (when she testified), the media would have been free to reveal her name and photograph at will.

23.4 Thus, it was only the interim interdict granted in this case – and obtained with the assistance of an extensive team of child law experts, attorneys and

[21] Annexure SA8, Record vol 10 pp 936-937.
[22] Annexure SA9, Record vol 10 p 938 and Annexure SA12, Record vol 10 p 944-945.
[23] Annexure SA 2, Record vol 10 pp 923 – 924.

counsel – that protected KL's identity. Without this, her identity would have been widely published.

Other affected children and young adults

24 KL has been relatively fortunate, in that her anonymity has been largely protected. This is in contrast to MVB, another child victim of crime.

24.1 MVB's family was murdered by an axe-wielding assailant in their home and MVB was left with severe injuries. Her brother was later tried and convicted for these crimes.[24]

24.2 The media proceeded to publish MVB's name, photographs, details of the institutions where she was receiving treatment, and the name of her school.[25] This was without her consent, as she was in a coma at the time.[26]

24.3 On her release from hospital, the media continued to follow her and to publish intimate details about her life. This included paparazzi style photographs of MVB's first public outings after she left hospital.[27]

24.4 Quite remarkably, the media respondents sought in their papers to use MVB as an example of how identification in the media can be beneficial for the victims of crime.[28]

24.5 But this argument proved self-defeating. MVB's curator, Louise Buikman SC, explains that MVB in fact endured great stress and potential danger due

[24] *S v Van Breda* (SS17/16) [2018] ZAWCHC 87 (7 June 2018).
[25] Adv Buikman SC's affidavit para 7, Record vol 9 p 813.
[26] Adv Buikman SC's affidavit para 9.1, Record vol 9 p 814.
[27] Annexure LB 2, Record vol 9 pp 839 – 840.
[28] AA para 53.3, Record vol 5 p 429.

to the media's continued interference in her life.[29] Despite a court order and complaints to the Press Council, the media have also continued to publish MVB's name, photograph and intimate details of her life.[30]

25 The need for ongoing protection after a child turns 18 is highlighted by the examples of PN, DS and MO. These children were initially protected by section 154(3), but the media proceeded to reveal their identities as soon as they turned 18.

25.1 PN was 15 at the time he was charged with murdering Eugene Terre'blanche. His trial was held *in camera* and great efforts were made to protect his anonymity. PN turned 18 the day before judgment. He was acquitted of murder, but the media proceeded to publish his name and photograph. This occurred in a context of racially charged protests in PN's home town of Ventersdorp and exposed PN to great danger. PN left Ventersdorp and could not be traced.[31]

25.2 DS was also 15 when he was arrested on charges of murder and rape. His case attracted substantial media attention, but his identity was largely protected throughout the trial. He turned 18 two days after sentencing. The day before his 18th birthday, posters announced that his identity would be revealed the next day. On his birthday, the media published his name and photographs, under headlines such as "*Meet [DS], the Griekwastad Killer*".[32]

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[29] Adv Buikman SC's Affidavit paras 31 – 34, Record vol 9 pp 822 – 824.
[30] Adv Buikman SC's affidavit paras 16 – 30, Record vol 9 pp 817 – 822.
[31] SFA paras 33 – 44, Record vol 2 pp 169 – 172; William Bird's affidavit paras 19 – 28, Record vol 4 pp 359 – 362.
[32] SFA paras 45 – 52, Record vol 2 pp 171 – 175; DS's affidavit, Record vol 3 pp 269 – 274.

25.3 MO was 17 years old when he first appeared on charges of culpable homicide. He turned 18 during the trial and the magistrate ordered that his identity should not be revealed. Despite this order, local newspapers proceeded to publish his name and other identifying information.[33]

26 These experiences stand in contrast with two young women, P and X.[34] They were both child offenders, convicted of very serious offences. Despite widespread media coverage of both cases, neither P nor X were named by the media. This appears to have been largely fortuitous — P and X turned 18 long after their court proceedings had concluded, when media interest had subsided. As a result, they were spared the ordeal of being identified in the media when they reached adulthood.

26.1 Their experiences show that anonymity can allow child victims, witnesses and offenders the opportunity to overcome trauma and live productive lives.

26.2 However, their examples also indicate that this anonymity remains precarious so long as the media believes that section 154(3) does not protect child victims, witnesses, accused and offenders into adulthood.

27 These examples are consistent with the extensive evidence of four leading experts:

27.1 Professor Ann Skelton, director of the Centre for Child Law, member of the UN Committee on the Rights of the Child, and an expert on child justice;[35]

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[33] SFA paras 53 – 60, Record vol 2 pp 175 – 178; MO's affidavit, Record vol 4 pp 394 – 398.
[34] SFA paras 61 – 75, Record vol 2 pp 178 – 182; P's affidavit, Record vol 3 pp 290 – 295; X's affidavit, Record vol 4 pp 310 – 316.
[35] FA, SFA and Replying Affidavit.

27.2 Dr Giada Del Fabbro, a psychologist with considerable clinical, assessment and therapeutic experience in the field of child and adolescent psychology;[36]

27.3 Ms Joan van Niekerk, former director of Childline and a social worker who has worked with thousands of child victims and many child offenders;[37] and

27.4 Ms Arina Smit, manager of NICRO's clinical unit, who has worked with over a thousand child offenders over the past 17 years.[38]

28 We deal with their evidence below. For now, we emphasise only that their extensive evidence of the harms that are caused by identification, and that would flow if anonymity were not the default position, is effectively unanswered by the media respondents.

THE BALANCE BETWEEN COMPETING RIGHTS

29 Protecting the anonymity of child victims, witnesses and offenders involves the balancing of two sets of rights and interests. On the one side of the scales are the constitutional rights of children. On the other, the right to freedom of expression and the principle of open justice.

Children's rights

30 The starting point is section 28(2) of the Constitution which provides that the best interests of the child are of "*paramount importance in every matter concerning the child."*

[36] Dr Del Fabbro's report, Record vol 4 pp 331 – 349; Annexure AMS 50, Record vol 9 pp 893 – 897.
[37] Ms Van Niekerk's affidavit, Record vol 3 - 4 pp 296 – 309.
[38] Ms Smit's affidavit, Record vol 4 pp 317 – 330.

31 This provision is both a constitutional principle and a self-standing right.[39] It requires that children's interests are to be afforded the "*highest value*",[40] meaning that their interests are "*more important than anything else"* albeit that "*everything else is [not] unimportant.*"[41]

32 A key element of this right is that the protection afforded by the section 28(2) does not terminate when a child turns 18. We will refer to this as the **"***principle of ongoing protection***"**. This principle entails that the life-long consequences of a child's actions or experiences are also the proper concern of section 28(2), even if those consequences are only felt in adulthood. The minority judgment in the SCA embraced this principle.[42] We return to this in the section of the heads of argument that deals with the ongoing protection issue.

33 The section 14 right to privacy is also implicated when a child victim, witness or accused is stripped of their anonymity. Where a child has been a victim, witness or perpetrator of a crime, that child's identity will be a deeply private fact, the disclosure of which would cause mental distress and injury to any reasonable person in their position.[43]

34 A child's right to privacy is closely intertwined with the section 10 right to human dignity. As this Court has explained, "*[a]n individual's human dignity comprises not only how he or she values himself or herself, but also includes how others*

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[39] *J v National Director of Public Prosecutions and Another* [2014] ZACC 13; 2014 (2) SACR 1 (CC); 2014 (7) BCLR 764 (CC) at para 35 ("*J v NDPP*"). See also *Minister of Welfare and Population Development v Fitzpatrick and Others* [2000] ZACC 6; 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC) at para 17;
[40] *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) at para 42.
[41] *Centre for Child Law v Minister of Justice and Constitutional Development and Others* [2009] ZACC 18; 2009 (6) SA 632 (CC); 2009 (11) BCLR 1105 (CC) at para 29 ("Centre for Child Law").
[42] SCA judgment at paras 77 – 84, Record vol 12 pp 1130 – 1133.
[43] *National Media Ltd and Another v Jooste* 1996 (3) SA 262 (A) at 270I-J.

value him or her."[44] The Court has consistently held that public shaming, stigma and humiliation of children are antithetical to the right to human dignity.[45]

35 The anonymity protections afforded by section 154(3) of the CPA also implicate other constitutional rights, including the section 9 right to equality and the section 35(3) fair trial rights. We return to discuss these rights in greater detail below.

36 We emphasise that the state has a constitutional duty to take effective legislative and other measures to protect these constitutional rights:

36.1 In ***Glenister II***, this Court held that "*Implicit in section 7(2) [of the Constitution] is the requirement that the steps the state takes to respect, protect, promote and fulfil constitutional rights must be reasonable and effective*.[46]

36.2 In ***S v M***,[47] this Court explained that section 28(2) of the Constitution requires the law to make the "*best efforts*" to minimise harms to children and maximise their opportunities for a good life;

> *"No constitutional injunction can in and of itself isolate children from the shocks and perils of harsh family and neighbourhood environments. What the law can do is create conditions to protect children from abuse and maximise opportunities for them to lead productive and happy lives. … [S]ection 28 requires the law to make best efforts to avoid, where possible, any breakdown of family life or parental care that may threaten to put children at increased risk…"*

37 Thus, in considering whether section 154(3) meets the constitutional standard, this Court will consider whether this provision and other legal mechanisms provide

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[44] *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development* [2013] ZACC 35; 2014 (2) SA 168 (CC); 2013 (12) BCLR 1429 (CC) at para 56.
[45] *J v NDDP* [2014] ZACC 13; 2014 (2) SACR 1 (CC); 2014 (7) BCLR 764 (CC) at para 44.
[46] *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) at para 189 (emphasis added)
[47] *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) at paras 19 – 20.

"*effective*" protection of the children concerned and make the "*best efforts*" to minimise harms to them.

Freedom of expression and open justice

38 The importance of freedom of expression and open justice in our constitutional scheme cannot be doubted. But this Court has consistently recognised that anonymity protections are not a significant incursion into either principle. Instead, anonymity enables these rights to be balanced against the rights of vulnerable people.[48]

39 Indeed, in dealing directly with the need to balance freedom of expression, open justice, and the rights of vulnerable groups, this Court has held that anonymity protections strike the right balance. It did so in ***Johncom Media v M.***

39.1 ***Johncom*** concerned a challenge to section 12 of the Divorce Act, which prohibited the publication of any information arising from divorce proceedings, but allowed for publication of the names of parties to the proceedings, including affected children.

39.2 This Court held that this blanket prohibition on any information arising from these proceedings was an unjustified limitation of the right to media freedom, a component of freedom of expression.

39.3 This Court therefore struck down section 12, but substituted it with an order in the following terms, closely resembling section 154(3) of the CPA:

> *"Subject to authorisation granted by a court in exceptional circumstances, the publication of the identity of, and any information*

[48] For example: *NM v Smith* [2007] ZACC 6; 2007 (5) SA 250 (CC); 2007 (7) BCLR 751 (CC) at paras 45-46; *Johncom Media Investments Limited v M* [2009] ZACC 5; 2009 (4) SA 7 (CC); 2009 (8) BCLR 751 (CC).

> *that may reveal the identity of, any party or child in any divorce proceeding before any court is prohibited."*[49]

39.4 This Court held that this anonymity protection struck the best possible balance between freedom of expression, on the one hand, and the rights to privacy and best interests of the child on the other.[50]

39.5 Furthermore, this Court stressed that by allowing courts to have the final say on whether to lift these anonymity protections, this was in keeping with the court's role as upper guardian of the child.[51]

40 As was alluded to in ***Johncom***, the use of anonymisation has become a standard practice in judgments where children are involved.[52] This allows the courts to protect the rights of children while still allowing the media to report fully on the facts and circumstances of the case, insofar as they do not identify the child.

41 Anonymisation is also a requirement of Children's Court proceedings. Section 74 of the Children's Act 38 of 2005 establishes automatic and indefinite anonymity protections which may only be lifted with the permission of the court:

> *"No person may, without the permission of a court, in any manner publish any information relating to the proceedings of a children's court which reveals or may reveal the name or identity of a child who is a party or a witness in the proceedings."*

42 This demonstrates that anonymity protections are already a common feature of our law and are the preferred means to protect vulnerable individuals without unduly interfering with media freedom and open justice.

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[49] Ibid at para 45.
[50] Ibid at paras 41 - 42.
[51] Ibid at para 43.
[52] See, for example, *J v National Director of Public Prosecutions and Another* [2014] ZACC 13; 2014 (2) SACR 1 (CC); 2014 (7) BCLR 764 (CC) at fn 3; *AD and Another v DW and Others (Centre for Child Law as Amicus Curiae; Department of Social Development as Intervening Party)* [2007] ZACC 27; 2008 (3) SA 183 (CC); 2008 (4) BCLR 359 (CC); *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC).

FIRST CHALLENGE – FAILURE TO PROTECT CHILD VICTIMS

43 In its present form, section 154(3) of the CPA offers no protection to child victims of crime who are not called to testify at trial or have not yet testified. A child could be denied protection for any number of arbitrary reasons: the child may be too young to testify, the accused may plead guilty, the trial may be postponed, the child may be too traumatised to take the stand, and so on. This lacuna is constitutionally impermissible for the reasons we will now explain in greater detail.

44 It should be noted these confirmation proceedings are not concerned with victims of crimes where no criminal proceedings are ever initiated. The SCA declared section 154(3) invalid to the extent that it does not provide protection for child victims of crimes which are the subject of criminal proceedings.[53]

The need to protect child victims

45 The expert evidence shows that children who are victims of crime suffer a range of psychological harms by being identified in the media and through the threat of identification, including further trauma, stigma, shame, and fear.[54]

46 These psychological harms affect child victims' ability to recover and return to normal life. Dr Del Fabbro, an expert in child psychology, explains that identification can re-traumatise children and undo the long-term healing process.[55]

47 The threat of being identified in the media can also discourage the reporting of crimes against children and discourage child victims from cooperating with

[53] See SCA judgment at para 98, Record vol 12 pp 1136-1137, explaining the limits of the majority's order.
[54] SFA paras 83 – 107, Record vol 2 pp 185 – 194.
[55] Dr Del Fabbro's Report paras 27 – 38, Record vol 4 pp 340 – 341.

investigators. In ***AB v Bragg***,[56] the Supreme Court of Canada reviewed the literature on anonymity protections for child victims and concluded as follows:

> *"Studies have confirmed that allowing the names of child victims and other identifying information to appear in the media can exacerbate trauma, complicate recovery, discourage future disclosures, and inhibit cooperation with authorities."*[57]

48 This observation is confirmed by Ms Joan Van Niekerk, a former director of Childline with 27 years' experience working with child victims.[58]

49 The media respondents concede the vast majority of this expert evidence on the harms of identification:

49.1 They do not dispute the evidence on the different forms of psychological harm arising from identification.[59]

49.2 They also admit that victims of sexual offences and child abuse would generally suffer severe harms if identified by the media.[60]

50 However, the media respondents deny that child victims suffer harm as a result of having their identities revealed in the media or other public forums. They contend that "*it is not generally true that it is harmful to be known as a victim of a crime*".[61]

50.1 The respondents put up no expert evidence of their own to support these sweeping claims and denials. Instead, these claims are made by a deponent with no expertise in this area – she is a legal editor[62] – who merely relies on a collection of press clippings and hypothetical examples.

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[56] *AB v Bragg* [2012] 2 SCR 567.
[57] Ibid at para 26.
[58] Ms Van Niekerk's affidavit para 12, Record vol 3 p 299.
[59] AA para 149.1, Record vol 5 pp 484 – 485.
[60] AA para 49, Record vol 5 pp 425 – 426.
[61] AA para 45, Record vol 5 p 424.
[62] AA para 2, Record vol 5 p 405.

50.2 This is plainly unsustainable. As this Court held in ***Teddy Bear Clinic***:[63]

> *"[W]here one party has put forward cogent expert documentary evidence indicating that the impugned provisions do not pass constitutional muster, the party seeking to uphold the validity of those provisions must advance evidence of a similar nature if he or she is to have any hope of success…."*

50.3 Sweeping statements by an unqualified deponent, hypothetical examples and press clippings are not "*evidence of a similar nature*" in response to expert evidence. The appellants' expert evidence is therefore unchallenged.

51 The applicants' expert evidence demonstrates that the identification of child victims is particularly harmful where the victims have been traumatised.[64] The media respondents now attempt to claim that traumatic crimes are somehow "*exceptional*".[65] There is no basis in evidence or reality for that claim. Children in South Africa are all too often the victims of severely traumatic crimes, including attempted murder, hijacking, kidnapping, child abuse, domestic violence, armed robbery, assault and the like. Yet on the media respondents' version, none of these child victims are deserving of automatic protection under section 154(3) of the CPA.

52 Finally, we note that the media respondents seek to establish a false onus. They contend that a limitation of section 28(2) of the Constitution requires proof of general harm to all children.[66] The media respondents misquote *Teddy Bear Clinic* in support of that proposition. On the contrary, *Teddy Bear Clinic* stands for the proposition that a limitation may be established either through evidence of harm

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[63] *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* [2013] ZACC 35; 2014 (2) SA 168 (CC); 2013 (12) BCLR 1429 (CC) at para 96.
[64] Dr Del Fabbro's Further Report paras 7 – 8, Record vol 9 p 895.
[65] Media Respondents' FA para 30, Record vol 12, p 1154.
[66] Media Respondents' FA, paras 27, 30, Record vol 12 pp 1153-1154.

to individual children or by means of expert evidence showing general risks of harm.[67] In this case, the applicants have provided both forms of evidence.

The absence of effective alternative protection

53 There is no adequate or effective alternative to section 154(3) of the CPA to protect the anonymity of child victims.

54 The common law remedy of an interdict against publication is an extraordinarily difficult and unrealistic prospect in the vast majority of cases.

54.1 First, as KL's case further demonstrates, the time, effort, and resources necessary to launch an application for interdictory relief against large media organisations are substantial, putting this remedy beyond the reach of all but the rich or the fortunate few who have access to free and sufficiently skilled legal assistance.[68] This is especially the case given that there is no general system of legal aid for civil litigation in this country.[69]

54.2 Second, there is no way for a child to know in advance that a particular media house or set of media houses may be considering identifying her. KL and MVB were never given advance notice of the publication of identifying information. KL did not know that a book on her life was being prepared for publication, including identifying information. It was only by chance that this was discovered before publication.[70]

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[67] *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* [2013] ZACC 35; 2014 (2) SA 168 (CC); 2013 (12) BCLR 1429 (CC) at para 71. The issue in *Teddy Bear Clinic* was whether a limitation of rights could be established without evidence that the impugned statutory provisions caused harm to specific children (see para 66). This Court held that evidence of individual harm was not required in circumstances where expert evidence established a general risk of harm to children.

[68] SFA para 150, Record vol 2 pp 209 – 211.

[69] SFA para 150.6, Record vol 2 p 210.

[70] Reply para 34.5, Record vol 4 pp 750 – 751; Annexure AMS 40, Record vol 5 pp 864.

54.3 Third, in bringing litigation to prevent publication, litigants often expose themselves to greater publicity and media attention.

55 It is therefore unrealistic and inconsistent with the Constitution to place the onus and the risk on some of the most vulnerable members of society to bring an application to court to obtain protection. Indeed, in ***Johncom***, this Court rejected this very approach:

> *"[It] would require, in many cases, the party to be prejudiced to place the relevant arguments before the High Court so that a decision can be made. The applicant's position would thus unduly favour the publisher and place no responsibility on those intending to publish. It would not accord appropriate protection to the indigent litigant."*[71]

56 If a child victim does not obtain an interdict and publication of the identifying information occurs, all that is then left is a common law damages claim.[72] But a damages award, long after the event, can never undo the harm that is done to a child victim by identification in the media.

57 The other provisions of the CPA and the Child Justice Act[73] also fail to offer adequate protection for the anonymity of child victims.[74] The anonymity protections they confer are either restricted to a narrow category of child victims, or they make anonymity protection contingent on the proceedings being held behind closed doors. In brief:

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[71] *Johncom Media Investments Limited v M* [2009] ZACC 5; 2009 (4) SA 7 (CC); 2009 (8) BCLR 751 (CC) at para 38. See also *C v Department of Health and Social Development, Gauteng* [2012] ZACC 1; 2012 (2) SA 208 (CC); 2012 (4) BCLR 329 (CC) at para 37:

> "*It might be argued that this remedy is already available, since no provision precludes the family from approaching a court with an urgent application… Although this may be true in a formal sense, it is not true in a functional sense. It is unfair for the law to empower the state to initiate the removal of a child from her or his family, but to place the onus on the affected family to initiate the review of that removal. By requiring the family to bear, at least initially, the cost of pursuing review proceedings, the impugned provisions are too restrictive of children's rights protected under section 28(1)(b) and (2), as well as the right of access to courts in section 34".*

[72] SFA paras 150.7 – 150.9, Record vol 2 p 211.

[73] Act 75 of 2008.

[74] For a more detailed analysis of these provisions, see Reply paras 59 – 64, Record vol 4 p 766 – 770.

57.1 The Child Justice Act offers no anonymity protections for child victims of crime. Section 63(5) merely requires proceedings in the child justice courts to be held in camera. But that alone self-evidently does not prevent the media from revealing the identity of the child victim.

57.2 Sections 154(1) of the CPA, read with section 153(1), permits a court to order that "*no information relating to the proceedings or any part thereof held behind closed doors shall be published in any manner whatever*". But this power is contingent on a prior order directing that the proceedings take place behind closed doors. That is a far more serious incursion into open justice and media freedom than merely protecting the anonymity of child victims. Any anonymity protections are also entirely discretionary, unlike the automatic anonymity protections conferred by section 154(3).

57.3 Section 153(2) of the CPA allows for an order protecting the identity of <u>witnesses</u> where a prior order has been made to hear testimony behind closed doors. This provision provides no protection to child victims, such as KL, before they are called to testify and no protection at all if the child victim does not take the stand. Again, any anonymity protection is made contingent on a prior order to bar the public and the media from court.

57.4 Section 154(2)(a) of the CPA, read with sections 153(3), 153(3A) and 335A, only provides narrow anonymity protections for victims of sexual offences and extortion. This excludes child victims of other serious crimes, such as KL and MVB.

58 Finally, self-regulation under the voluntary Press Code offers limited protection to child victims,[75] as was accepted by Willis JA and Mocumie JA in the SCA.[76] The media respondents' own expert, Mr Krüger, concedes that self-regulation is no substitute for adequate statutory protection.[77]

59 The only conclusion that can be drawn is that if section 154(3) does not protect the rights of child victims, there is no effective mechanism that does so.

The limitation of rights

60 The applicants accept that section 154(3) cannot easily be interpreted to extend protection to child victims who do not testify or have not yet testified at trial. This lacuna limits the constitutional rights of children who are the victims of crime.

61 In the SCA, the majority judgment relied on section 9(1) of the Constitution in holding that:

> *"Although the section grants anonymity to an accused and a witness at criminal proceedings who are under the age of 18 years, it offers no protection at all to the victim at criminal proceedings, who is also under the age of 18 years. The exclusion of child victims from the provisions of s 154(3) of the CPA, is irrational and in breach of s 9(1) of the Constitution, which guarantees the right to equal protection and benefit of the law to everyone. The denial of equal protection to child victims, who are equally vulnerable, cannot be justified."*[78]

62 The applicants support this reasoning. The irrational denial of equal protection to individuals who are equally vulnerable limits section 9(1) of the Constitution.[79] This irrationality is highlighted by the following example:

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[75] Reply paras 66 – 73, Record vol 4 pp 770 – 774.
[76] SCA judgment at para 69, Record vol 12 p 1127.
[77] Affidavit of Franz Krüger, para 29, Record vol 4 pp 713 – 714.
[78] SCA judgment para 29, Record vol 12 p 1112.
[79] *Sarrahwitz v Maritz NO and Another* [2015] ZACC 14; 2015 (4) SA 491 (CC); 2015 (8) BCLR 925 (CC) at para 49.

62.1 A 16-year-old boy who viciously beats his 16-year-old girlfriend and is charged with assault could not be identified in the media. But the 16-year-old girl who is the victim can be freely named and photographed unless and until she is called to testify.

62.2 The 16-year-old girl may wish to testify, but she may not have that opportunity for any number of reasons: the accused may plead guilty, the prosecutor may decide not to call her as a witness, the trial may be delayed and so on. Any protection afforded to her under section 154(3) is therefore contingent on a host of arbitrary variables.

63 The failure to protect child victims also limits other rights in the Constitution.

64 First, this exclusion breaches section 28(2) of the Constitution.

64.1 Given the potential harms of public identification, it is not in the best interests of child victims to exclude them from section 154(3) of the CPA while affording full, automatic protection to accused and witnesses.

64.2 It is also not in the best interests of child victims to place the full burden and onus on these children to approach a court to obtain legal protection. Their best interests are properly protected by making protection of anonymity the default, unless the media approaches a court to lift this protection.

65 Second, this exclusion breaches the rights to human dignity and privacy in sections 10 and 14 of the Constitution. Children who are victims of crimes should not be forced to carry the public stigma and shame of victimhood throughout their lives. Nor should they be required to have their private concerns and matters rendered generally accessible to the public. The law must protect the dignity and

privacy of child victims of crime, just as it protects the dignity and privacy of other child witnesses and children accused of committing crimes.

66 The media respondents contend that it is permissible to deny protection to child victims in these circumstances, as they contend that section 154(3) is only concerned with protecting the anonymity of children who participate in criminal proceedings.[80]

66.1 That contention is incorrect, as section 154(3) protects the anonymity of child offenders irrespective of whether they testify. The other provisions of chapter 20 also have broader application. For example, section 154(2) of the CPA extends protection to victims of sexual offences and extortion even if they not participate in criminal proceedings.

66.2 In any event, making anonymity protections conditional on participation in criminal proceedings compounds the limitation of child victims' rights. It is inconsistent with section 28(2) of the Constitution to coerce a child victim into testifying in exchange for anonymity. It also makes any protection afforded to child victims subject to the full range of arbitrary variables identified above. Furthermore, there is no purpose in withholding anonymity protections until a child victim testifies. By the time they take the stand, anonymity protections may have been rendered redundant by repeated and extensive publication of their identity.

[80] Media Respondents' FA para 8, Record vol 12 p 1146.

No justification under section 36

67 Section 36(1) of the Constitution calls for a proportionality analysis.[81] The onus is on the respondents to prove that the limitation of rights is reasonable and justifiable.[82]

68 For all the reasons set out above, the limitation of child victims' rights is severe and requires a compelling justification for their exclusion from the protection of section 154(3).

69 There is no discernible purpose for this exclusion, as protection is granted automatically and unconditionally to all children accused of crimes and all child witnesses. Indeed, the Minister has effectively conceded this point, as he supported the applicants' interpretation of section 154(3) and abides the decision of this Court on the constitutional challenge.

70 It is only the media respondents that seek to justify the limitation. They contend that it is permissible to limit child victims' rights in order to promote media freedom and open justice.

71 But denying child victims the protection of section 154(3) has little role in promoting media freedom or open justice. The media is capable of attending criminal trials and reporting fully and accurately on events without using the names of child victims. As the minority held in the SCA:

> *"The appellants do not seek a blanket ban on reporting on the victims of crime. What they ask for is protection of their identity. It is this*

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[81] *Mlungwana and Others v S and Another* [2018] ZACC 45; 2019 (1) BCLR 88 (CC); *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (CC) at para 35; *S v Bhulwana; S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388; 1995 (12) BCLR 1579 (CC) at para 18.

[82] *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)* [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC) at para 34.

> *protection of identity – rather than a total ban on news reporting – that is so important and which strikes the balance between the freedom of expression, on the one hand and the aggregate of the rights to dignity, privacy and the best interests of the child, on the other. Anonymisation has, for example, become the standard practice in judgments where children are involved. This principle is also apparent in s 74 of the Children's Act 38 of 2005."*

72 The media is fully capable of reporting on crimes involving children by using pseudonyms or other devices to protect their anonymity. KL's case is a good example. For the most part, journalists have avoided revealing her identity, yet her case has been covered in extensive detail in the media and has attracted enormous public interest.

73 This Court has noted that pseudonyms are an appropriate means to protect vulnerable persons. In ***NM v Smith***, the Court addressed a breach of privacy claim brought following the naming of three HIV-positive women in a book. This Court held that the respondents could have used pseudonyms instead of real names as the *"use of pseudonyms would not have rendered the book less authentic*".[83]

74 The media asserts that the names and photographs of victims give stories "*human interest value*".[84] But, what the public finds interesting cannot be conflated with the public interest.[85] As the minority judgment in the SCA put it: "*When it comes to children who are victims of crime, information and education are critically relevant. There is, however, to be no 'entertainment' in such matters.*"[86]

75 There is also a less restrictive means available to advance media freedom and open justice. That less restrictive means is already contained in section 154(3):

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[83] *NM v Smith* [2007] ZACC 6; 2007 (5) SA 250 (CC); 2007 (7) BCLR 751 (CC) at paras 45-46
[84] AA paras 79 – 90, Record vol 5 pp 444 - 456. Reply paras 74 - 80, Record vol 8 pp 774 – 778.
[85] *Independent Newspapers Holdings Ltd and Others v Suliman* [2004] 3 All SA 137 (SCA) at paras 42–43: "*Prurient or morbid public curiosity, no matter how widespread, about things which are ordinarily regarded as private or do not really concern the public cannot be the test [for public interest].*"
[86] SCA Judgment at para 71, Record vol 12 p 1127 – 1128.

the anonymity of child victims should be protected by default, while allowing the courts to lift this protection where reporting on a child's identity is found to be in the public interest. The Constitutional Court reached this conclusion in ***Johncom*** when it held that anonymity protections in divorce proceedings struck the best possible balance between the competing rights.[87]

76 In the same vein, the Supreme Court of Canada has repeatedly held that anonymity protections do not impose any significant constraint on media freedom or open justice.

76.1 In ***Canadian Newspapers Co v Canada***[88] the Court upheld a ban on the publication of the identities of victims of sexual offences, holding that:

> *"While freedom of the press is nonetheless an important value in our democratic society which should not be hampered lightly, it must be recognized that the limits imposed by [prohibiting identity disclosure] on the media's rights are minimal. . . . Nothing prevents the media from being present at the hearing and reporting the facts of the case and the conduct of the trial. Only information likely to reveal the complainant's identity is concealed from the public."*[89]

76.2 In ***FN (RE)***[90] the Court acknowledged that anonymity protections for children are among the permissible exceptions to the open justice principle, adding that the identity of a child is a mere *"sliver of information"* that does not significantly advance reporting.

76.3 In ***AB v Bragg***,[91] the Court held that anonymity protections for children are a "*minimal*" incursion on freedom of expression and open justice.

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[87] *Johncom Media Investments Limited v M* [2009] ZACC 5; 2009 (4) SA 7 (CC); 2009 (8) BCLR 751 (CC) at paras 30, 42.
[88] *Canadian Newspapers Co v Canada (Attorney General)* [1988] 2 SCR 122.
[89] Ibid at 133 (emphasis added).
[90] *FN (RE)* [2000] 1 SCR 880 at para 12.
[91] *AB v Bragg* [2012] 2 SCR 567 at para 28.

77 Even in the United Kingdom, which has historically placed greater emphasis on open justice,[92] the Courts have endorsed anonymity protections for children:

77.1 In the Supreme Court decision in ***R (on the application of C)***[93] Lady Hale acknowledged that protections for children are a generally recognised exception to the principle of open justice.

77.2 In ***JXMX v Dartford and Gravesham***[94] the Court of Appeal held that open justice generally does not require the identification of children.

78 The denial of protection to child victims must also be assessed in light of the statutory protections adopted in other open and democratic societies. Canada, New Zealand, Australia, the United Kingdom and Scotland all provide some form of statutory protection for child victims, irrespective of whether they testify at trial. The relevant statutory provisions are described in **Appendix 1**.

78.1 In all of these countries, the 16-year-old girl who is beaten by her 16-year-old boyfriend and who does not testify at trial would receive automatic anonymity protection. But under section 154(3) of the CPA she would receive no protection at all.

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[92] See *In re Guardian News Media Ltd* [2010] UKSC 1. The extreme nature of the UK position is demonstrated by the House of Lords decision in *S (FC) (A Child)* [2004] UKHL 47. The House of Lords refused to protect the anonymity of an eight-year-old child during the murder trial of his mother, who was charged with poisoning the child's brother. In a single paragraph, Lord Hoffmann dismissed the interests of the child, stating that any impact on the child would be "essentially indirect" (para 25). That approach would be entirely out of step with section 28(2) of our Constitution.

[93] *R (on the application of C) v Secretary of State* [2016] UKSC 2 para 17: "*It has been held acceptable to provide that a whole class of hearings, such as those relating to children, should normally be held in private*".

[94] *JXMX v Dartford and Gravesham NHS Trust* [2015] EWCA Civ 96 at para 29: *"The public undoubtedly has an interest in knowing how that function [of approving settlement agreements involving children] is performed and the principle of open justice has an important part to play in ensuring that it is performed properly, but its nature is such that the public interest may usually be served without the need for disclosure of the claimant's identity."*

78.2 None of these other countries have an entrenched constitutional right like section 28(2) of our Constitution. Given this right, the obligation to create similar protections for child victims in South Africa is much greater.

79 For these reasons, the exclusion of child victims from section 154(3) is disproportionate to the purported aims of promoting open justice and media freedom. Section 154(3) is accordingly unconstitutional and invalid to that extent.

SECOND CHALLENGE – NO ONGOING PROTECTION AFTER TURNING 18

80 A child's need for protection from public identification does not stop when they turn 18. Ongoing protection is needed under section 154(3) in order to ensure that their rights are secured into adulthood.

81 In rejecting the ongoing protection challenge, the SCA held that:

81.1 The relief sought was overbroad and did not strike a balance between the rights and interests involved;[95] and

81.2 Notwithstanding the finding that section 153(4) did not provide for on-going protection and the expert findings that the applicants put before the court, the section was not unconstitutional.[96]

82 We respectfully submit that the SCA's findings on ongoing protection are irreconcilable with its finding that child victims must be protected under section 154(3). It is not consistent with the best interests of a child to protect their anonymity, thus protecting them from harm, only to strip them of that very protection as soon as they turn 18.

83 We submit moreover that the majority judgment of the SCA failed to give effect to the line of cases in this Court that have affirmed the principle of ongoing protection under section 28(2) of the Constitution.[97]

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[95] SCA judgment para 27, Record vol 12 p 1112.
[96] Ibid.
[97] *Centre for Child Law v Minister of Justice and Constitutional Development and others (National Institute for Crime Prevention and Re-Integration of Offenders as Amicus Curiae)* [2009] ZACC 18; 2009 (6) SA 632 (CC); See also *J v National Director of Public Prosecutions and another* 2014 (2) SACR 1 CC at paras 43 - 44.

The constitutional principle of ongoing protection

84 A key element of the section 28(2) right is that that the protection afforded by it does not terminate when a child turns 18. This principle entails that the life-long consequences of a child's actions or experiences are also the proper concern of section 28(2), even if those consequences are only felt in adulthood. The minority judgment in the SCA embraced this principle.[98]

85 This Court has consistently adopted this principle of ongoing protection:

85.1 In ***J v NDPP***,[99] this Court struck down a statutory provision which required the compulsory inclusion of children who committed sexual offences on the Sexual Offences Register.

85.2 This Court held that, while the consequences of registration would largely be experienced in adulthood, those consequences were the proper concern of section 28(2):

> *"[T]his Court has held that consequences for the criminal conduct of a child that extend into adulthood (such as minimum sentences) do implicate children's rights. So, in the case of J, the fact that he was a child when the offence was committed means that his rights as a child are implicated, albeit that the consequences of registration will, for the most part, only be felt as an adult."*[100]

85.3 ***J*** affirmed and made explicit the principle of ongoing protection that was implicit in this Court's previous judgment in ***Centre for Child Law***.

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[98] SCA judgment at paras 77 – 84, Record vol 12 pp 1130 – 1133.
[99] *J v National Director of Public Prosecutions* [2014] ZACC 13; 2014 (2) SACR 1 (CC); 2014 (7) BCLR 764 (CC).
[100] Ibid at para 43 (emphasis added)

85.4 In ***Centre for Child Law***[101] this Court held that the application of minimum sentencing laws to offenders who were 16 and 17 years old at the time of the offence was unconstitutional, even though those offenders were over the age of 18 at the time of sentencing.

85.5 In ***MEC for Health v DZ*****,** this Court ordered anonymity protections for a minor child involved in litigation given the potential lifelong consequences:

> *"[T]he minor victim in this case ought to be anonymous. This is in the best interests of the child, not merely in light of the child's right to privacy, but because when the child 'becomes an adult the many physical disabilities suffered by the [child] will result in vulnerability."*[102]

85.6 The effect of these decisions is that, for the purposes of section 28(2), what matters is not when the consequences are felt, but whether those consequences flow from actions or events occurring during childhood.

86 The underlying reasons for this principle have equal application to all children, including victims and witnesses of crime.

86.1 As this Court has recognised, the consequences of childhood experiences and conduct that are felt in adulthood tend to be more severe, because of the greater physical and psychological vulnerability of the child.[103]

86.2 A child also has lesser moral responsibility for what they do or what happens to them in childhood. For this reason, it is impermissible to unduly punish an offender for actions in their childhood. There is equally a need to protect child victims and witnesses from the consequences of crimes committed

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[101] *Centre for Child Law v Minister of Justice and Constitutional Development and Others* 2009 (6) SA 632 (CC).
[102] *Member of the Executive Council for Health and Social Development, Gauteng v DZ obo WZ* [2017] ZACC 37; 2017 (12) BCLR 1528 (CC); 2018 (1) SA 335 (CC) at fn 1.
[103] Ibid at paras 26 – 27.

against them or in their presence, for which they are blameless. These victims and witnesses must be given the same prospect of "*hope and possibility"* that is afforded to child offenders.[104]

The practical need for ongoing protection

87 The expert evidence outlines three important reasons for protecting the anonymity of all child victims, witnesses and offenders into adulthood:

87.1 First, the vulnerabilities of childhood persist after 18, particularly where a child's psychological development has been disrupted by the combined traumas of crime and participation in the criminal process.[105]

87.2 Second, childhood traumas leave deep and lasting psychological wounds that may be reopened in adulthood.[106] As a result, a child victim, witness or offender who is publicly identified in adulthood will generally experience greater psychological harm than an adult victim, witness or offender who is publicly identified.[107]

87.3 Third, the threat of identification after turning 18 directly harms children. A child who fears being identified in the media when they turn 18 may experience added stress and trauma, as is clearly expressed in KL's affidavit. As a result, ongoing protection into adulthood is needed in order to reassure and protect children while they are still under the age of 18.[108]

88 The risk of identification in adulthood threatens to undermine the lifelong healing process for victims and witnesses who have suffered childhood trauma. It also

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[104] Ibid at para 27.
[105] Dr Del Fabbro's report para 25, Record vol 4 p 340.
[106] Dr Del Fabbro's report paras 27 – 33, Record vol 4 pp 340 – 341.
[107] Dr Del Fabbro's report paras 26, Record vol 4 pp 340.
[108] SFA para 84.2, Record vol 2 p 186.

creates a further obstacle to child victims or witnesses coming forward to report crimes or to cooperate with the authorities.[109]

89 Child offenders are also at risk of substantial harm if they are identified after turning 18. The media respondents concede all of the expert evidence on this issue.[110]

90 Child offenders face the problem of the "ticking clock", as they are at risk of being identified when they turn 18, as happened to PN, DS, and MO.[111]

90.1 This creates great pressure on the child's legal practitioner to seek to conclude the trial as quickly as possible, before the child turns 18.[112]

90.2 This can compromise the right to a fair trial because speed, rather than the full exploration of the facts and legal defences, may seem to be of the essence to bring proceedings to an end before the child turns 18.[113]

90.3 The threat of being identified in the media at 18 also creates a difficult environment for a child accused who must attend court during the trial. This can significantly hinder a child's ability to participate in criminal proceedings.[114]

91 The long-term rehabilitation and reintegration of child offenders is also directly harmed by identification in the media in adulthood.[115]

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[109] Ms Van Niekerk's affidavit para 12, Record vol 3 p 299.
[110] AA paras 102, 151; Record vol 5 pp 456, 487 – 488.
[111] SFA paras 117 – 124, Record vol 2 pp 197 – 200.
[112] SFA para 119, Record vol 2 p 198.
[113] SFA para 120, Record vol 2 p 198.
[114] SFA paras 122 – 123, Record vol 2 pp 199 – 200.
[115] SFA paras 125 – 139, Record vol 3 pp 201 – 205.

91.1 As this Court held in ***Centre for Child Law***,[116] the law treats child offenders differently to adult offenders because it recognises that children have a greater capacity for rehabilitation. In ***J v NDPP***,[117] this Court further recognised that a child offenders' rehabilitation and reintegration is undermined when a child is publicly branded as an offender in adulthood.

91.2 The expert evidence indicates that stigmatisation and shame are among the most significant barriers to a child's successful rehabilitation.[118] Publication of a child's identity brands them as a criminal in the eyes of the public.[119] Publicity can also cause an offender to internalise their portrayal as a criminal, adding a further obstacle to the rehabilitation process.[120]

91.3 Identification in the media can also impede the therapy process that is necessary for rehabilitation. This process will often continue well into adulthood:[121]

91.4 The long-term prospects of reintegration into the community are also severely threatened if the child offender's anonymity is removed in adulthood.[122]

92 As the cases of P and X demonstrate, continued anonymity into adulthood can make rehabilitation and reintegration possible. Both children remained anonymous and were able to finish their schooling. Both are now married and have their own

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[116] *Centre for Child Law v Minister of Justice and Constitutional Development and Others* [2009] ZACC 18; 2009 (6) SA 632 (CC); 2009 (11) BCLR 1105 (CC) at para 27.
[117] *J v NDPP* [2014] ZACC 13; 2014 (2) SACR 1 (CC); 2014 (7) BCLR 764 (CC) at para 44.
[118] SFA paras 127 – 131, Record vol 3 pp 201 – 202.
[119] Ms Smit's affidavit para 13, Record vol 4 pp 321 – 322.
[120] Dr Del Fabbro's report paras 17 – 18, Record vol 4 p 337.
[121] SFA paras 129 – 130, Record vol 3 pp 201 – 202.
[122] SFA paras 133 – 139, Record vol 3 pp 203 - 205; Ms Smit's affidavit para 25, Record vol 4 p 326.

children. This was made possible because they were able to control who knew about their past, allowing them to maintain positive relationships and trust.[123]

93 The SCA, in dismissing the appeal, ignored all these fundamentally important considerations. It did so, in part, because it failed to conduct an assessment of the limitation of rights resulting from the inadequate protections afforded by section 154(3) of the CPA. Instead, the majority placed greater emphasis on the right to freedom of expression over the individual rights of traumatised and scarred children.[124]

The absence of effective alternative protection

94 The inadequacies of alternative protections have been addressed in detail in considering the need for protection for child victims. Again, it is clear that there is no adequate or effective alternative to section 154(3) of the CPA to protect the child victims, witnesses, accused and offenders after they turn 18.

95 There are three deficiencies in the protections afforded by the other provisions of the CPA to child victims, witnesses, accused and offenders after they turn 18.

96 First, the provisions of section 153 and section 154 do not provide tools to protect the anonymity of child victims, witnesses and offenders after they turn 18 and while the trial is ongoing.

96.1 For child offenders, the only available protection is an order under sections 153(1) and 154(1) of the CPA, declaring the proceedings in camera and making a specific order that the accused's identity should not be revealed.

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[123] P's affidavit para 19, Record vol 3 p 293. See also the observations of Ms Van Niekerk on P's case, para 20, Record vol 4 p 305. Affidavit of X paras 13 – 15, Record vol 4 p 314.
[124] SCA judgment at para 25, Record vol 12 p 1111.

But section 154(1) makes clear that an accused's identity should ordinarily be revealed, requiring the child to demonstrate special circumstances for ongoing anonymity.

96.2 In the case of child victims who do not testify at the trial, sections 153 and 154 offer no specific anonymity protections at all, except in cases of sexual offences and extortion.[125] The only possibility available is to declare the proceedings in camera in their entirety. But even then, only information arising from the proceedings would be restricted.

96.3 Finally, in the case of witnesses, the Court may use section 153(2) to prevent publication of the witness's identity either indefinitely or "*for a particular period*" if it appears that there is a likelihood of harm. However, this protection is dependent on the court and the parties being alive to the need for this protection.

97 Second, these other CPA provisions only provide protection for so long as the criminal proceedings are ongoing. They do not provide protection once the proceedings have closed. As a result, adults such as P and X would not receive any protection under these provisions.

98 Third, these other CPA anonymity protections are blunt instruments that require the proceedings to be declared in camera before a person's anonymity can be protected. That is a more severe restriction of the rights to media freedom and open courts than the far more limited section 154(3).

[125] Section 153(3) read with section 154(2)

99 The limitations of interdictory relief and other common law remedies have already been addressed in extensive detail above.[126]

100 Similarly, the Press Code is insufficient by itself to provide adequate protection. After a child has turned 18, the various protections afforded to children are no longer available.[127] When this is combined with the backward-looking nature of the complaints mechanism, the inadequacy of the remedies available, and the fact that the Press Code only covers some members of the print and online media, it is clear that the Press Code is no adequate safeguard.

The limitation of rights

101 Section 154(3) does not easily admit of an interpretation that continues to protect child victims, witnesses and offenders after they turn 18. However, to the extent section 154(3) does not provide this ongoing protection, this amounts to a limitation of constitutional rights.

102 First, the failure to provide ongoing protection breaches section 28(2) of the Constitution.

102.1 In light of the principle of ongoing protection, discussed in detail above, the harms of identification that may occur in adulthood are also the concern of the section 28(2) right.

102.2 In addition, a child's fear of being identified after turning 18 is a concrete harm that affects children here and now and is also protected by section 28(2).

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[126] See paragraphs 54 - 56 above, at pages 23 - 25.
[127] See paragraph 8 of the Press Code, quoted in AA para 71, Record vol 5 p 441.

102.3 Stripping a child of all protection on turning 18 also makes the protections afforded by section154(3) entirely arbitrary. Comparing the experiences of PN and DS with those of P and X, it is clear that a child's anonymity is made dependent on factors beyond their control. If a child is lucky and has a speedy trial that concludes before they turn 18, their anonymity may remain intact. However, if the trial is delayed by circumstances beyond their control and they turn 18 during the trial, then they will be exposed to heightened risks of being identified. Such arbitrariness is at odds with the best interests of the child.

103 Second, stripping children of all protection under section 154(3) of the CPA when they turn 18 limits their right to dignity, in terms of section 10 of the Constitution.

103.1 Children who are victims or witnesses of crimes should not be stigmatised and re-traumatised throughout their adult lives. Similarly, children accused or convicted of crimes should be spared the lifelong brand of criminality.

103.2 Identification in the media is one of the surest ways in which this stigma and shame is caused and aggravated. Section 154(3) serves to protect children against this stigma and the need for this protection does not fall away when a child reaches 18.

104 Third, stripping children of all protection under section 154(3) of the CPA when they turn 18 limits their right to privacy, in terms of section 14 of the Constitution.

104.1 The fact that a person was a victim, witness, accused, or offender during childhood is a deeply personal fact, the publication of which threatens an intimate core of a person's private life.

104.2 It should be left to the individual to decide to whom and when they reveal this fact as part of the long-term process of healing and rehabilitation.

105 Finally, stripping children of all protection under section 154(3) of the CPA when they turn 18 limits the right to a fair trial of the accused and offenders, in terms of section 35(3) of the Constitution. The "ticking clock" created by the threat of identification on turning 18 may cause children to plead guilty or to curtail the trial in other ways, thus denying the child the benefit of a full and fair trial. This threat may also inhibit a child's participation in the trial. This undermines the procedural and substantive fairness of the trial process.

No justification under section 36

106 The importance of the rights at stake and the severity of the harms provide compelling reasons for declaring these limitations to be unjustified under 36 of the Constitution. Yet, the Minister again implicitly concedes that there is no justification for these limitations of children's rights.

107 The media respondents continue to assert that the denial of ongoing protection is somehow necessitated by open justice and media freedom. This justification rings hollow for all the reasons stated above:[128]

107.1 First, the identification of child victims, witnesses, and offenders in adulthood does not substantially advance media freedom or open justice. In the vast majority of cases, a person's identity is a mere "*sliver of information*" that does little to add to the story.

[128] See paragraphs 70 - 78.2 above.

107.2 Second, there is a less restrictive means available to advance media freedom and open justice: children's anonymity should be protected by default, while allowing the courts to lift this protection in appropriate cases.

107.3 Third, other countries, including Canada, New Zealand and the Australian state of New South Wales, have embraced the need for indefinite anonymity protections for children extending into adulthood, as is set out **Appendix 2** to these heads.

108 The majority judgment in the SCA impermissibly inverted the section 36 analysis by focussing on the proposed remedy, rather than engaging in a proper limitations and justification exercise. As emphasised above, the constitutionality of section 154(3) of the CPA must first be determined separately and independently. Only thereafter does the determination of a just and equitable remedy arise.

109 As this Court held in ***My Vote Counts***[129] courts should not be overawed by the practical challenges of filling legislative gaps. Courts need only outline the "*unfulfilled obligation*" in "*broad terms*", leaving the specifics to Parliament.

109.1 The constitutional invalidity of section 154(3) arises from the fact that it unjustifiably strips all child victims, witnesses and accused of protection as soon as they turn 18, leaving children such as KL without protection. It does so without any proper justification.

109.2 That is the unfulfilled obligation and renders section 154(3) invalid.

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[129] *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* [2018] ZACC 17; 2018 (8) BCLR 893 (CC) at para 80

109.3 Parliament may decide to address this unfulfilled obligation in a number of ways. The media respondents will have ample opportunity to make submissions to Parliament about precisely how to frame this protection. The section 36 analysis is not the place for debates over statutory drafting.

110 Stripping all children of the protection that they enjoy under section 154(3) merely because they have reached the age of 18 is unreasonable and unjustifiable and therefore constitutionally impermissible. Section 154(3) should therefore be declared unconstitutional and invalid to that extent.

REMEDY AND CONCLUSION

111 For the reasons set out above, the applicants seek confirmation of the SCA's order declaring section 154(3) of the CPA to be unconstitutional to the extent that it does not provide protection to children who are victims of crime concerned in criminal proceedings. The applicants also seek a further declaration that section 154(3) is unconstitutional to the extent that it does not provide ongoing protection.

112 The appellants accept that any order of invalidity should be suspended for a period of 24 months to allow Parliament to remedy the defects.

113 During the period of suspension, an interim reading-in order is necessary to protect vulnerable people such as KL, MVB, P and X. This Court has repeatedly granted interim reading-in orders.[130] We submit that the order should be fashioned along the lines proposed by the two judgments in the SCA.

114 We therefore submit that the order to be granted by this Court should be as follows:

> *"1. It is declared that the provisions of s 154 (3) of the Criminal Procedure Act 51 of 1977 are constitutionally invalid to the extent that they do not protect the anonymity of children as victims of crimes at criminal proceedings.*
>
> *2. It is declared that the provisions of s 154(3) of the CPA are constitutionally invalid to the extent to the extent that children subject to the section forfeit the protections afforded by it upon reaching the age of 18 years.*
>
> *3. The declarations of invalidity are suspended for twenty-four months to allow Parliament to remedy the defects.*
>
> *4. Pending Parliament's remedying of the defects:*
>
> *4.1 Section 154(3) of the CPA is deemed to read as follows:*
>
> *'(3) No person shall publish in any manner whatever any information which reveals or may reveal the identity of an accused under the age of eighteen years a witness at*

[130] *Johncom Media Investments Limited v M and Others* [2009] ZACC 5; 2009 (4) SA 7 (CC); 2009 (8) BCLR 751 (CC) at para 40; *C and Others v Department of Health and Social Development, Gauteng and Others* [2012] ZACC 1; 2012 (2) SA 208 (CC); 2012 (4) BCLR 329 (CC) (C); *Gaertner Others v Minister of Finance and Others* [2013] ZACC 38; 2014 (1) SA 442 (CC); 2014 (1) BCLR 38 (CC) at paras 83 – 84.

criminal proceedings who is under the age of eighteen years or of a victim of a crime under the age of eighteen years who is concerned in criminal proceedings: Provided that the presiding judge or judicial officer may authorize the publication of so much of such information as he may deem fit if the publication thereof would in his opinion be just and equitable and in the interest of any particular person'; and

4.2 Section 154 of the CPA is deemed to contain an additional section 154(3A) which provides:

'(3A) Children subject to subsection (3) above do not forfeit the protections afforded by the section upon reaching the age of 18 years, but may, upon reaching adulthood, consent to publication of their identity.'"

115 The first to third respondents should be ordered to pay the costs of this matter in all three courts, including the costs of two counsel. In the event that any part of this appeal is unsuccessful, the applicants should not be ordered to pay costs, in accordance with the ***Biowatch*** principle.[131]

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[131] *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 18; 2009 (6) SA 632 (CC); 2009 (11) BCLR 1105 (CC).

APPENDIX 1: COMPARATIVE LAW ON THE PROTECTION OF CHILD VICTIMS[1]

Canada

1 In Canada, the Youth Criminal Justice Act 2002 protects the anonymity of all child victims and witnesses where the offender is a youth offender. Section 111 provides:

> ***"Identity of victim or witness not to be published****. — (1) Subject to this section, no person shall publish the name of a child or young person, or any other information related to a child or a young person, if it would identify the child or young person as having been a victim of, or as having appeared as a witness in connection with, an offence committed or alleged to have been committed by a young person."*

2 This provision applies to child victims and witnesses where the offender is a youth offender,[2] and provides a blanket and mandatory ban on the publication of identifying details of victims and witnesses in such cases.[3]

New Zealand

3 In New Zealand, all children involved in criminal proceedings in the Youth Courts – as victims, witnesses or offenders – receive automatic and indefinite anonymity protection.[4] This is in terms of section 438 of the Children, Young Persons and Their Families Act 1989.

4 In general courts, child victims and witnesses now have extensive anonymity protections as a result of reforms introduced in 2011. Section 204 of the Criminal Procedure Act 2011 provides that in criminal proceedings outside of the youth courts, the identifying information of a complainant or witness under 18 years of age must not be published.

> *"(1) Unless the court, by order, permits publication, no person may publish the name, address, or occupation of a person who is under the age of 18 years who—*
> *(a) is the complainant; or*
> *(b) is called as a witness in any proceeding in respect of an offence.*
> *(2) Despite subsection (1), the name, address, or occupation of a child who dies as a result of the offence may be published.*

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[1] We are grateful to Oxford Pro Bono Publico for assistance with the comparative law research summarised in these appendices. Any errors or omissions are our own.

[2] In cases involving adult offenders, these automatic protections do not apply. This lacuna was partially filled by the Victims Bill of Rights Act, 2015 which came into effect in July 2015. Courts are required to make an order protecting the anonymity of child victims, on application (see section 486.4(1) -(2) of the amended Criminal Code). However, this still leaves a disparity in the treatment of the victims of child offenders and the victims of adult offenders.

[3] This protection is only lifted if the victim or witness publishes that information themselves after they turn 18 (or before they turn 18, with the consent of their parents), or applies to court to allow publication and the court is satisfied that publication would be in the public interest (section 111(2) -(3)).

[4] The Youth Court deals with offences committed by children between 12 and 16 years of age, excluding certain serious offences.

> *(3) Nothing in subsection (1) prevents publication of the name of the defendant or the nature of the charge.*
> *(4) The court must make an order permitting any person to publish the name, address, or occupation of a complainant or witness, if—*
> *(a) the complainant or witness, having reached the age of 18 years, applies to the court for such an order; and*
> *(b) the court is satisfied that the complainant or witness understands the nature and effect of his or her decision to apply to the court for the order; and*

Australia

5 In Australia, the bulk of criminal law and procedure is legislated at state level. Australia's most populous state, New South Wales, has its most progressive regime for the protection of the anonymity of child victims.

6 Section 15A (1) of the New South Wales Children's' Criminal Procedure Act 1987 provides express protection for all children involved in criminal proceedings, including child victims. Section 15A (1) provides:

> *"(1) The name of a person must not be published or broadcast in a way that connects the person with criminal proceedings if:*
>
> *(a) the proceedings relate to the person and the person was a child when the offence to which the proceedings relate was committed, or*
>
> *(b) the person appears as a witness in the proceedings and was a child when the offence to which the proceedings relate was committed (whether or not the person was a child when appearing as a witness), or*
>
> *(c) the person is mentioned in the proceedings in relation to something that occurred when the person was a child, or*
>
> *(d) the person is otherwise involved in the proceedings and was a child when so involved, or*
>
> *(e) the person is a brother or sister of a victim of the offence to which the proceedings relate, and that person and the victim were both children when the offence was committed."*

7 It is clear that subsection (1)(a) covers both child offenders[5] and child victims.[6] Subsection (1)(c) covers witnesses.

8 The protection in section 15A is automatic and applies unless reporting is authorised under one of the exceptions provided for in the following sections.

9 Section 15D allows the publication of the name of a person otherwise protected with his or her consent if they are over 16 years old, or with the consent of the

[5] See, for example, *R v DH; R v AH* [2014] NSWCCA 326.
[6] See, for example, *Lindon v R* [2014] NSWCCA 112.

court if they are under 16 years of age. The court is not to give such consent unless it is satisfied that it is in the public interest that consent be given.

England and Wales

10 In England and Wales, section 49 of the Children and Young Persons Act 1933 prohibits the publication of the name, address, school or any other matter that is likely to identify a person under 18 as being "*concerned in the proceedings*" before the Youth Courts.[7] A child or young person is "*if concerned in the proceedings*" they are a victim, witness or defendant.[8]

Scotland

11 Section 182(1) of the Children's Hearing Act 2011, governing hearings for child offenders, prohibits the publication of information that is intended to, or is likely to, identify a child concerned in the proceedings, which includes child victims and complainants.[9]

12 With respect to criminal proceedings involving adult offenders, a similar scheme exists under the Criminal Procedure (Scotland) Act (1995). Section 47 prohibits the publication of the name or any other particulars which could be used to identify a person concerned in the proceedings who is under 18 years of age.

[7] Children and Young Persons Act 1933, s 49

[8] In the general courts, the courts have a discretion to impose anonymity protections under section 45 of the Youth Justice and Criminal Evidence Act, 1999.

[9] This restriction on publishing can be lifted under Section 182(4)-(6), by the Scottish Ministers, a Sheriff, or the Court Session under specific circumstances listed in the sub-section.

APPENDIX 2: COMPARATIVE LAW ON ONGOING PROTECTION

Canada

1 In Canada, the anonymity protections afforded to child victims, witnesses and offenders in the youth courts are indefinite and may only be lifted in prescribed circumstances.

1.1 Section 110(1) of the Youth Criminal Justice Act 2002 provides for automatic anonymity protections for child offenders.[1]

1.2 Section 111(1) prevents the publication of the identity of child victims and witnesses. This restriction on publication also continues after the child turns 18 years of age.

1.3 This protection may only be lifted if a child publishes that information themselves after turning 18 (or before, with the consent of their parents) or by order of court.[2]

New Zealand

2 In criminal matters heard in the Youth Court in New Zealand, child victims, witnesses and offenders receive automatic and indefinite anonymity protections. The anonymity protections provided by section 438 of the Children, Young Persons and Their Families Act 1989 do not terminate when a child turns 18.

3 With respect to victims and witnesses outside of the Youth Court, section 204 of the Criminal Procedure Act 2011 also provides ongoing protection after these children turn 18. Section 204(4) requires that in order for the automatic name suppression to be lifted, the victim or witness must apply to the court after they have reached the age of 18. By implication, the automatic suppression must otherwise remain in place.

Australia

4 As outlined in Appendix 1, the Australian state of New South Wales affords extensive anonymity protections for child victims, witnesses and offenders under section 15A (1) of the New South Wales Children's' Criminal Procedure Act 1987. These protections are indefinite and continue in force after a child turns 18.

[1] This is subject to exceptions in 110(2), where a child is sentenced to an adult offence, where a child has been convicted of a violent offence and a court orders the lifting of the anonymity protection, and where publication occurs in the course of the administration of justice.
[2] Section 110(3) – (4) (offenders) and Sections 111(2) – (3) (victims and witnesses).