COPY

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT32/18

In the matter between:

PHUMEZA MLUNGWANA	First Applicant
XOLISWA MBADISA	Second Applicant
LUVO MANKQO	Third Applicant
NOMHLE MACI	Fourth Applicant
ZINGISA MRWEBI	Fifth Applicant
MLONDOLOZI SINUKU	Sixth Applicant
VUYOLWETHU SINUKU	Seventh Applicant
EZETHU SEBEZO	Eighth Applicant
NOLULAMA JARA	Ninth Applicant
ABDURRAZACK ACHMAT	Tenth Appellant

REGISTRAR OF THE CONSTITUTIONAL COURT
PRIVATE BAG X1
CONSTITUTION HILL
06 JUL 2018
BRAAMFONTEIN 2017
GRIFFIER VAN DIE KONSTITUSIONELE HOF

and

STAATSPROKUREUR
PRIVATE BAG X9, JHB 2000
RECEPTION
2018 -07- 06
Signature
Time
STATE ATTORNEY

THE STATE	First Respondent
THE MINISTER OF POLICE	Second Respondent

and

EQUAL EDUCATION	First *Amicus Curiae*
RIGHT2KNOW CAMPAIGN	Second *Amicus Curiae*
UN SPECIAL RAPPORTEUR ON THE RIGHTS TO FREEDOM OF PEACEFUL ASSEMBLY AND OF ASSOCIATION	Third *Amicus Curiae*

NOTICE OF FILING

BE PLEASED TO TAKE NOTICE that Equal Education ("EE"), the First Amicus Curiae, hereby files the following documents: -

1. EE's Heads of Argument in these proceedings.

2. EE's List of Authorities.

3. EE's Practice note.

DATED at Braamfontein on this the 6th day of **JULY 2018.**

PP

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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

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THE RIGHTS TO FREEDOM OF PEACEFUL ASSEMBLY AND OF ASSOCIATION Third *Amicus Curiae*

EQUAL EDUCATION'S PRACTICE NOTE

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1. **Names of the parties legal representatives**

   a. Applicants: Michael Bishop, 079 341 5616

   b. Respondents: Karrisha Pillay, 083 411 0385

      Maria Mokhoaetsi, 083 411 0385

   c. Equal Education: Ndumiso Luthuli, 082 748 5996, ndumiso@thulamelachambers.co.za

   d. Right2Know: Unknown at the time of filing

   e. UN Special Rapporteur: Unknown at the time of filing

2. **Nature of the matter**

   a. This matter concerns the constitutionality of section 12(1)(a) of the Regulation of Gatherings Act 205 of 1993 ("the Gatherings Act"). The impugned provision criminalises the convening of a protest of more than

15 people, including peaceful and unarmed protest, merely for the failure to have provided notice of the protest.

b. The applicants seek confirmation of the order handed down by the Western Cape High Court on 24 January 2018, which declared section 12(1)(a) of the Gatherings Act unconstitutional.

c. The respondents oppose the confirmation of the declaration of constitutional invalidity and seek to appeal against the whole judgment and the Western Cape High Court.

d. Equal Education supports the declaration of constitutional invalidity, and has been admitted as a friend of the court to make submissions on the likely impact of the impugned provision on children.

3. Issues to be determined

a. Whether section 12(1)(a) of the Gatherings Act limits the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions under section 17 of the Constitution.

b. If it does, whether such limitation is reasonable and justifiable under section 36(1) of the Constitution.

4. Estimated Duration

a. Half a day

5. **Part of the record that need to be read**

a. Equal Education places limited reliance on the record, and accordingly defers to the parties to guide the Court on the parts of the record to read.

6. **Summary of Equal Educations Submissions**

a. Section 17 of the Constitution extends the right to assemble, demonstrate, picket and present petitions to everyone, including children.

b. Equal Education submits by creating a criminal offence for failure to give notice to convene a protest of more than 15 persons, section 12(1)(a) of the Gatherings Act infringes the right to protest of children, thus imperilling one of the few platforms through which children may mobilise to make their voices heard.

c. In assessing whether the limitation on the right to protest is reasonable and justifiable the Court should take into account the importance of the right to children, particularly in relation to their rights to participation, expression and dignity.

d. In addition, Equal Education submits that the nature and extent of the

limitation - criminalisation for the mere failure to provide notice of a protest - is onerous and severe particularly for children. In particular, the nature and extent of the limitation is inconsistent with the best interests of the child.

e. In conclusion, Equal Education submits that the order of invalidity by the High Court in respect of section 12(1)(a) of the Gatherings Act should be confirmed, particularly taking into account the nature of the right to protest for children and the impact of the impugned provision on their rights and best interests.

NDUMISO LUTHULI

Counsel for Equal Education

Chambers, Sandton

6 July 2018

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

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EQUAL EDUCATION'S HEADS OF ARGUMENT

Contents

INTRODUCTION

"Brothers and Sisters, I appeal to you-keep calm and cool. We have just received a report that the police are coming. Don't taunt them, don't do anything to them. Be cool and calm. We are not fighting."

1. These were the words of the young Mr Tietsi Mashinini from atop a tractor where he had been helped to climb so that everyone could see him when he addressed the crowd in the morning of 16 June 1976 after the students had left Morris Isaacson High School marching to Orlando Stadium in Soweto.[1]

2. The marchers did as the young Mr Mashinini had appealed to them, however that did not help.

> *"Despite the tense atmosphere the students remained calm and well ordered.*
>
> *Suddenly a white policeman lobbed a teargas canister into the front of the crowd. People ran out of the smoke dazed and coughing. The crowd retreated slightly but remained facing the police, waving placards and singing. A white policeman drew his revolver. Black journalists standing by the police heard a shot: "Look at him. He's going to shoot at the kids". A single shot rang out. There was a split*

[1] South African History Online, The June 16 Soweto Youth Uprising

second's silence and pandemonium broke out. Children screamed. More shots were fired. At least four students fell and others ran screaming in all directions."[2]

3. This should never happen again.[3]

4. In recognising the injustices of our past and honouring those who suffered for justice and freedom in our land,[4] we have determined to make a decisive break from our abhorrent past. In the words of Mahomed J:

> *"All constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people, and which discipline its government and its national institutions; the basic premises upon which judicial, legislative and executive power is to be wielded; the constitutional limits and the conditions upon which that power is to be exercised; the national ethos which defines and regulates that exercise; and the moral and ethical direction which that nation has identified for its future. In some countries. the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally*

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2 Brooks & Brickhill *Whirlwind before the storm: The Origins and Development of the Uprising in Soweto and the Rest of South Africa from June to December 1976*, 1980

3 *South African Transport and Allied Workers Union and another v Garvas and others (City of Cape Town as Intervening Party and Freedom of Expression Institute as Amicus Curiae)* 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC); [2012] 10 BLLR 959 (CC); [2012] JOL 28986 (CC); [2012] ZACC 13 (CC) *(SATAWU v Garvas)* para 63

4 Preamble to the Constitution

from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution."[5]

5. Equal Education has joined these proceedings as a friend of the Court to ask that the rights and best interests of children in general, and of learners at our schools, and its young activist members – the Equalisers – in particular, are taken into account and protected in the Court's determination whether section 12(1)(a) of the Regulation of Gatherings Act 205 of 1993 ("the Gatherings Act") is constitutionally defensible. This Court has recognised that:

> *"Courts are now obliged to give consideration to the effect that their decisions will have on the rights and interests of the child. The legal and judicial process must always be child sensitive. As we held in S v M, statutes "must be interpreted . . . in a manner which favours protecting and advancing the interests of children; and that courts*

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[5] *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC); 1995 (2) SACR 1 (CC); [1995] ZACC 3 (CC) para 262

must function in a manner which at all times shows due respect for children's rights". Courts are bound to give effect to the provisions of section 28(2) in matters that come before them and which involve children. Indeed, section 8(1) of the Constitution makes it plain that the Bill of Rights "binds the legislature, the executive, the judiciary and all organs of state".[6]

6. Section 12(1)(a) of the Gatherings Act which provides that *"any person who convenes a gathering in respect of which no notice or no adequate notice was given ... shall be guilty of an offence and on conviction liable to a fine not exceeding R20 000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment"* is a shortcut through the Bill of Rights. Once it is so, the Court must be satisfied that there is a constitutionally justifiable cause why the State should be allowed to continue using this shortcut. We respectfully submit that convenience does not pass constitutional muster.

7. These heads of argument are structured as follows:

7.1. We start of by setting out EE's interest and the principles that are relevant to the understanding of the right that is sought to be limited from the perspective of children;

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6 *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others* 2009 (4) SA 222 (CC); 2009 (7) BCLR 637 (CC); 2009 (2) SACR 130 (CC); [2009] ZACC 8 (CC); [2010] JOL 26189 (CC) para 74

7.2. We then discuss the nature of the right to protest for children;

7.3. Thereafter, we discuss the nature and extent of the limitation of the right to protest in relation to children;

7.4. Fourthly, we highlight the best interests of a child and how they are negatively impacted by the limitation;

7.5. We follow this with a brief review of the respondents' justification of the limitation; and

7.6. Conclude by summarising EE submissions as set out herein.

EQUAL EDUCATION'S INTEREST AND PRINCIPLES RELEVANT TO CHILDREN

8. Equal Education ("**EE**") is a member-based democratic movement of learners[7], parents, teachers and community members, all of whom make up the essential body of stakeholders in South African schools. It is a registered non-profit organisation operating throughout South Africa.

9. The primary focus of EE lies in the general social imbalances that prevail in South African society particularly as pertaining to the country's education

[7] Section 1 of the South African Schools Act 84 of 1996 defines 'learner' as any person receiving education or obliged to receive education in terms of that Act.

system. Recognising these social imbalances as a remnant and legacy of the apartheid system, one of EE's primary objectives is overcoming that legacy by agitating for equal and quality education for all in South Africa.

10. EE aims to hold government accountable to its citizenry. Among other things, EE looks generally at government policy as a whole as well as government's obligation to deliver basic services (particularly to under-privileged communities) in line with that policy, and examines how these impact on the citizen's access to education. To this end, since inception in 2008, EE has led campaigns and activities aimed at improving the overall efficacy of South Africa's education system.

11. EE's core membership base which consists of high school learners, known as 'Equalisers', often engage in advocacy programmes to advance their right to education. These activities take the form of research work, campaigns, litigation and protest action. EE's activities always seek to promote the values of the Constitution. EE's focus and attention are directed by the interests of its members, who are largely from working-class and poor communities.

12. The ability to picket, demonstrate and engage in a wide variety of protest actions, is crucial to the work of EE's membership and maintaining a robust space for civil society engagement with the state. This is vital to the democratic project and to the work of EE's members in furthering democratic rights and principles, including the right to basic education. The centrality of the rights

under section 17 of the Constitution is trite, as it *"gives a voice to the powerless,"* including *"groups that do not have political or economic power, and other vulnerable persons."*[8]

13. We submit that the Equalisers and learners in general fall squarely within the category of the powerless, without political and economic power and generally vulnerable. As a movement mandated to promote and defend democratic rights such as the right to assemble, EE has a vested interest in ensuring that the space for democratic engagement is protected and widened, especially for Equalisers (inclusive of minor children).

14. Children[9] in general and Equalisers in particular who, in the process of exercising their constitutional right to protest, may often find themselves falling foul of the provisions of section 12(1)(a) read with section 3 of the Gatherings Act. When this happens, these children are immediately vulnerable to arrest; they possibly face the prospect of being dragged through the spectrum of the criminal justice system and potentially having to stand trial; and ultimately, if convicted, they end up with a criminal record.

15. In this case, 15 activists participated in a peaceful protest without notice by

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8 *South African Transport and Allied Workers Union and another v Garvas and others (City of Cape Town as Intervening Party and Freedom of Expression Institute as Amicus Curiae)* 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC); [2012] 10 BLLR 959 (CC); [2012] JOL 28986 (CC); [2012] ZACC 13 (CC) para 61

9 Section 1 of the Children's Act 38 of 2005 defines 'child' as a person under the age of 18 years; so does section 28(3) of the Constitution.

chaining themselves to a staircase outside the entrance of the Cape Town Civic Centre.[10] This was in response to growing frustration around empty promises for better sanitation in Khayelitsha, by the Western Cape Government.[11]

16. As the day progressed, other people joined the protest, where they were chanting and holding placards in support of 15 participants that were chained to the Civic Centre entrance.[12] At all times, the protest was both respectful and peaceful, and it did not prohibit people from accessing the Civic Centre.[13]

17. Although there were initially 15 participants chained to the staircase, the accused admitted that the number of chained participants grew to more than 15 when the police were arrived at the Civic Centre.[14] The police instructed the police the protesters to disperse. After politely refusing to disperse,[15] 21 participants were arrested, including participants that were chained and others that were not chained to the staircase.[16] The applicants were then convicted for contravening section 12(1)(a) of the Gatherings Act.

18. This could have been the Equalisers, who often find themselves in similar situations – demanding of the lethargic and sometimes non-responsive administration to give effect to their right to education within the available

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10 Record Vol 2, p 176 line 24 – p 177 line 11- 13.
11 Record Vol 2, p 170 lines 4-8.
12 Record Vol 1, p 89, lines 7-11; Record Vol 2, p 181 line 23- 25. P 182 line 4-7
13 Record Vol 2, p 119, lines 8-14
14 Record Vol 2, p 187, lines 11-16
15 Record Vol 2, p 188, lines 12-15
16 Record Vol 2 p 189, lines 20-25. Record Vol 2 p 190, lines 6-11.

means. This may have subsequently resulted in the criminal conviction of a child for participating in a peaceful protest.

19. Section 12(1)(a) of the Gatherings Act creates an impermissible short-cut through the Bill of Rights and provides a setting for the repeat of the inhumane events such as those that that took place on 16 June 1976 referred to above. It creates an avenue for law enforcement authorities to overreach the citizenry. It is unnecessary and cannot be justified in an open and democratic society based on human dignity, equality and freedom.

20. *"This Court has held that the "best-interests" or "paramountcy" principle creates a right that is independent and extends beyond the recognition of other children's rights in the Constitution."*[17] The "*ambit of the [best-interests provision] is undoubtedly wide."*[18]

21. Even more importantly, this Court has held that:

> *"The contemporary foundations of children's rights and the best-interests principle encapsulate the idea that the child is a developing being, capable of change and in need of appropriate nurturing to enable her to determine herself to the fullest extent and to develop her moral compass.*

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17 *Minister of Welfare and Population Development v Fitzpatrick and others* 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC); [2000] ZACC 6 *(Fitzpatrick)* para 17. See also *Fraser v Naude and others* 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC); [1998] ZACC 13 para 9.

18 *S v M (Centre for Child Law as amicus curiae)* 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC); [2007] ZACC 18 *(S v M)* para 15

This Court has emphasised the developmental impetus of the best-interests principle in securing children's right to "learn as they grow how they should conduct themselves and make choices in the wide and moral world of adulthood."[19]

22. We submit that the principles set out above underscore the need for a sound justification if a provision like section 12(1)(a) of the Gatherings Act, which creates a direct possibility of arrest, prosecution and potentially incarceration of children, can be countenanced. This is because:

> *"Child offenders who have served their sentences will remain tarred with the sanction of exclusion from areas of life and livelihood that may be formative of their personal dignity, family life, and abilities to pursue a living."*[20]

23. Respectfully, the real risk of destroying children before they are even out of the starting blocks towards becoming productive members of society posed by section 12(1)(a) of the Gatherings Act far exceeds any gains (whether real or imagined) that society may derive from criminalising failure by an Equaliser to give notice of a gathering.

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19 *J v National Director of Public Prosecutions and another (Childline South Africa and others as amici curiae)* 2014 (7) BCLR 764 (CC); 2014 (2) SACR 1 (CC); [2014] ZACC 13 (CC) para 36

20 Ibid at para 44

NATURE OF THE RIGHT TO PROTEST FOR CHILDREN

24. Section 17 of the Constitution protects peaceful and unarmed assembly, demonstration and protest as follows:

> *"Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions."*

25. The right has been understood to mean that everyone who is unarmed has the right to go out and assemble with others, to demonstrate, picket and present petitions to others for any lawful purpose.[21]

26. Section 36(1)(a) of the Constitution requires this Court to consider the nature of the right to protest in its assessment of whether the limitation is reasonable and justifiable in an open and democratic society.

27. EE submits that when this Honourable Court considers whether the impugned provision imposes a reasonable and justifiable limitation on the right to protest, it is essential for the Court to take into account the nature and importance of

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21 *South African Transport and Allied Workers Union and Another v Garvas and Others (City of Cape Town as Intervening Party and Freedom of Expression Institute as Amicus Curiae)* 2013 (1) SA 83 (CC) (*SATAWU v Garvas)* para 52

the right to protest *for children*.

28. As a starting point, it is important to recognise the historical role of protest as a vehicle of expression for youth in South Africa, particularly in relation to the right to education.

Historical role of protest in advancing the right to education

29. By engaging in protest action as a mechanism of drawing attention to problems that affect public education, Equalisers (and other learners) continue on a long history in the South African context of marginalised children and students using protest action as a means of struggle and political self-actualisation.

30. The earliest recognisable forms of organised and peaceful student protests can be traced as far back as the 1920s, under the banner of *Amafelandawonye* (the Die-hards/ we will die fighting together), where learners and parents protested and boycotted mission schools in the former Transkei.[22] The Soweto Uprising, and its catalytic student protests that took place during June 1976, was a critical moment where learners, many of whom were minor children, brought the attention of the international community to an unjust system of education and an unjust society at large.

31. In the wake of the Soweto uprising, student organising continued across the

22 "The American School Movement" by Robert Edgar, in *Apartheid and Education: The Education of Black South Africans,* Peter Kallaway (ed), 1984, pp184-191.

country and, tragically, state repression was used to quell the power of student mobilisation. Mass arrests and police sweeps targeted at children were regularly used by the Apartheid government to restrict freedom of expression and protest.[23]

32. Whilst apartheid and colonial rule created a particular vacuum for political expression, protest remains a critical element of political and communal expression for learners.

33. Mindful of this history and recognising the protection of peaceful protest in the Constitution, Equalisers regularly hold peaceful gatherings, demonstrations, pickets and marches. Equalisers have participated in gatherings in, amongst others, Cape Town, Johannesburg, Tshwane, Polokwane North and Bhisho.

34. The ability of Equalisers and learners in general to gather, picket, demonstrate and engage in a wide variety of protest action, without an unnecessary or unreasonable bureaucratic hindrance, is a distinct break from the past and an element of their right to freedom of political expression and their right to participate in political life.

Importance of the right to protest to realising children's right to political expression and participation

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23 Ibid.

35. Protection of the right to protest has special significance for children, undoubtedly one of the most vulnerable groups in our society. Section 19(3) of the Constitution confers the right to vote only on adult citizens. As a result of their inability to vote, children lack a critical aspect of political power.[24] Protest is therefore an important way in which Equalisers can get involved in a political process, in a similar way in which the Applicants in this case were able to achieve a development in policy and resolution on sanitation in Khayelitsha.[25] If deprived of a voice at the ballot box and in protest, children will have limited meaningful ability to self-advocate when their rights are infringed.

36. As for child participation in matters concerning a child, Section 10 of the Children's Act lends specific weight to the child's right to meaningful participation in matters affecting them:

> *"every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration."*

37. In *SATAWU v Garvas*, the Constitutional Court powerfully explained the importance of the right to protest in ensuring that the most vulnerable are afforded a space for political participation:

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24 *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1998 (1) SA 745 (CC) para 19.

25 Record Vol 2, p 195, lines 12-22

"[T]he right to freedom of assembly is central to our constitutional democracy. It exists primarily to give a voice to the powerless. This includes groups that do not have political or economic power, and other vulnerable persons. It provides an outlet for their frustrations.

This right will, in many cases, be the only mechanism available to them to express their legitimate concerns."[26] (Emphasis added).

38. The right of children, as individuals and as a collective, to be heard and participate in all matters affecting them has also been firmly entrenched in international law. Section 39 of the Constitution requires that such international law be considered when interpreting rights in the Bill of Rights.

39. The *UN Convention on the Rights of the Child* (the UNCRC),[27] recognise children's right to freedom of association and to freedom of peaceful assembly.

"1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly. 2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (order public), the protection of public

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26 *SATAWU v Garvas* at para 61

27 Article 15. The UN *Convention on the Rights of the Child* (UNCRC). Accessible at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx. South Africa ratified the Convention on the Rights of the Child in 1995. See http://indicators.ohchr.org/.

health or morals or the protection of the rights and freedoms of others."

40. Article 12 of the *UN Convention on the Rights of the Child*, as ratified by South Africa, places an obligation on states to ensure that children's right to be heard is respected, protected and fulfilled:

> *"States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."* (Emphasis added).

41. General Comment 12[28] on Article 12 published by the UN Committee on the Rights of the Child explains:

> *'[T]he right of all children to be heard and taken seriously constitutes one of the fundamental values of the Convention.'*[29]
>
> ...
>
> *"These processes are usually called participation. The exercise of the child's or children's right to be heard is a crucial element of such processes. The concept of participation emphasizes that including*

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28 UNCRC *General Comment no. 12 (2009) The right of the child to be heard.* Accessible at http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf

29 UNCRC *General Comment 12*, above note 25 at para 2.

children should not only be a momentary act, but the starting point for an intense exchange between children and adults on the development of policies, programmes and measures in all relevant contexts of children's lives."[30]

...

"States parties must assure that the child is able to express her or his views "in all matters affecting" her or him....the child must be heard if the matter under discussion affects the child..."[31]

42. South Africa therefore has binding international law obligations to ensure that children's participation and freedom of expression is protected to the fullest extent possible.

43. The protection afforded to children's expression and participation in international law informs an understanding of the nature and importance of the Constitution's protection of the right to protest for children.

The right to protest is inextricably linked to freedom of expression and dignity of the child

44. Constitutional protection of the child's right to peaceful and unarmed protest is

30 UNCRC *General Comment*, above note 25 at para 13.
31 UNCRC *General Comment*, above note 25 at para 26.

inextricably linked to protection of their rights not only to freedom of expression, but also to dignity.[32]

45. In *South African National Defence Union v Minister of Defence and Another*, this Court recognised the relationship between various rights and their importance to our democracy. O'Regan J, writing for the Court, stated:

> "*[Freedom of speech] is closely related to freedom of religion, belief and opinion (s 15), the right to dignity (s 10), as well as the right to freedom of association (s 18), the right to vote and to stand for public office (s 19) and the right to assembly (s 17). These rights taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of likeminded people to foster and propagate such opinions.*"[33] (Emphasis added).

46. Ensuring children the broadest space for free expression of ideas is crucial to their development. Individually and collectively, children are "*independent social beings… and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood.*"[34] It is in recognising the inherent worth of individual children, and

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32 Section 10 of the Constitution provides: *"Everyone has inherent dignity and the right to have their dignity respected and protected."*

33 *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 para 8

34 *S v M* paras 18 -19.

the value of the choices that they make, that we realise their right to dignity.[35]

47. The right of children to free expression is also recognised in international law. The UNCRC in article 13 provides that children have the right to freedom of expression.

> *"(1) The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.*
>
> *(2) The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; or (b) For the protection of national security or of public order (ordre public), or of public health or morals."* (Emphasis added).

48. Article 7 of the African Charter on the Rights and Welfare of the Child (ACRWC)[36] on freedom of expression, states:

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35 *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2014 (2) SA 168 (CC) (*Teddy Bear Clinic)* para 52.

36 African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990) (available on http://www.achpr.org/instruments/child/)

"Every child who is capable of communicating his or her own views shall be assured the rights to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws." (Emphasis added).

49. In summary, the right to protest is a crucial mechanism for realising children's right to participation, freedom of expression, and dignity, and limitations thereon must be restricted.

50. As explained above, the impugned provision is exceptionally broad in scope and the effect on children is harsh. In the next section, EE submits that the impugned provision – which criminalises peaceful protest - violates the best interests of the child principle and renders the limitation unreasonable and unjustifiable.

NATURE AND EXTENT OF THE LIMITATION IN RELATION TO CHILDREN

The Gatherings Act and the scope of the impugned provision

51. The impugned provision has application to the "*convener*" of a "*gathering*", which terms are defined in the Gatherings Act.[37]

52. The criminal offence envisaged by the impugned provision is triggered by the

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37 EE affidavit paras 64 and 65

mere failure of a convenor of a gathering to have provided notice of the gathering.[38]

53. It bears emphasis that the impugned provision criminalises the failure to give notice even where the gathering is necessary and peaceful and regardless of whether the participants are children or adults as long more than 15 persons assemble.

54. Understandably, children, such as the Equaliser members of EE, are unlikely to – by themselves - have access to resources and practical means to fulfil the written notice requirement. It is not unsurprising then for gatherings organised by or amongst children to fail to meet the notice requirement. These children face the threat of their conduct being criminalised under the impugned provision and could be subjected to the criminal justice system.

55. This is unduly restrictive and an unconstitutional limitation on a child's right to peaceful protest and assembly, suffocating the potential for children to participate freely in political life and expression.

56. The irony of the criminalisation of organising a gathering without giving notice is that it completely ignores the conditions that drive children, or any other social groupings for that matter, to take to the streets to hold the government

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[38] EE affidavit para 66

accountable. The Equalisers do not protest about lack of books, safe toilets or basic necessities for what may be called a school because they are looking for trouble. They do so in order to protect their future and that of our country, and to hold government accountable to deliver on constitutionally guaranteed rights and on the constitutional principles to be accountable, responsive and open in managing the national affairs[39] so as to ensure the human dignity of all, as well as the achievement of equality and the advancement of human rights and freedoms.[40] All of this is necessary in order to "heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.

57. Sanity would dictate that those who hold our constitution in contempt should be ones visited with criminal prosecution and sanctions, not the powerless who seek to protect it.

58. To underscore the repugnance of the scheme, it is important to set out the criminal processes that a child would be subjected to in circumstances where the impugned provision is applied.

The application of the Child Justice Act in relation to the impugned provision

59. A child who convenes a gathering, even a peaceful gathering, is in terms of

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39 Constitution section 1(d)
40 Constitution section 1(a)

the impugned provision committing an offence. This has serious consequences for the child –making the arrest of the child possible, and initiating entry into the traumatising criminal justice system.

60. The Child Justice Act 75 of 2008 ("Child Justice Act") establishes a criminal justice system for children, who are in conflict with the law and are accused of committing offences.[41]

61. The Child Justice Act categorises offences committed by children in relation to their seriousness. The offences considered to be the least serious are listed in Schedule 1 of the Act (including theft of property valued under R2500, trespass, malicious injury to property valued at R1500, common assault and blasphemy, among other petty offences). Schedule 2 lists more serious offences, which include public violence, arson, housebreaking and assault with grievous bodily harm, among other offences. The most serious offences are listed in Schedule 3 and include rape, terrorism, and murder, among other serious offences.

62. In addition to specifically listed offences, the Child Justice Act also categorises statutory offences according to the maximum penalty imposed by another statute.

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41 The Act applies to children under the age of 18 and, in certain circumstances, may apply to a person under the age of 21 (Section 1 of the Child Justice Act).

63. In terms of the impugned provision, the failure to give notice of a peaceful gathering or assembly is an offence that carries penalty of a fine or maximum of one year's imprisonment.

64. Statutory offences which carry a penalty of imprisonment of more than three months but less than 1 year are categorised as Schedule 2 offences under the Child Justice Act. Peaceful protest without notice is thus categorised as an offence falling within the scope of Schedule 2 of the Child Justice Act – alongside serious offences such as arson, housebreaking and assault with grievous bodily harm.

65. It is striking that in our constitutional democracy, political expression of children in the form of a peaceful gathering can, for mere failure of meeting a procedural requirement, be considered as a criminal offence at all, let alone an offence within the same category of seriousness as arson and housebreaking.

66. The Child Justice Act sets out the procedures that apply to children alleged to have committed a Schedule 2 offence.

Arrest and detention

67. Children alleged to have committed Schedule 2 offences are susceptible to

being arrested.

68. A child who has convened a gathering, but has failed to provide notice, may therefore be arrested by a police officer. This prospect alone is traumatising. Following from there, even under the Child Justice Act, the child must be subject to various taxing and strenuous processes.

69. Within 24 hours, a probation officer will be informed of the child's arrest. The child must then be subject to an assessment by the probation officer which includes, among other things, estimating the child's age if it is uncertain and gathering information about any previous conflicts with the law the child may have had.

70. The probation officer will formulate recommendations regarding the release or detention and placement of the child and establish the prospects for diversion of the matter. Upon completion of the assessment, the probation officer compiles a report that will be submitted to a presiding officer in a preliminary inquiry.

71. It should be noted that a child arrested for a Schedule 2 offence will be detained throughout the assessment processes, and will need to be granted bail before release. A child seeking bail will have to be subjected to a determination by a prosecutor in terms of section 25 of the Child Justice Act read with section 59A of the Criminal Procedure Act.

Diversion

72. The Child Justice Act does envision the possibility of "diversion" for a child charged with contravening the impugned provision. There are two levels of diversion, which include a variety of measures, such as, community service, an apology, referral to intensive therapy, and placement under supervision of a probation officer, with conditions restricting the movement of the child.[42]

73. Significantly, a child suspected of having committed a Schedule 2 offence may only be diverted by a prosecutor after being subjected to a process of investigation at a preliminary enquiry.[43]

74. A prosecutor must obtain authorisation of the Senior Public Prosecutor in order to grant a diversion order.[44] Alternatively the presiding officer may refer the matter to the child justice court, where a diversion order may be granted by the presiding officer there prior to the close of the prosecution's case.[45]

75. It bears emphasis that whilst diversion is aimed at minimising the traumatising effects of the criminal justice system for children, it is entirely discretionary. Furthermore, it is the very fact of criminalisation – as imposed by the impugned

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42 Child Justice Act, section 53(3).
43 Child Justice Act, section 52.
44 Child Justice Act, section52(2) read with National Director of Public Prosecutions' Directives, Government Gazette No. 33067 Notice No. 252 (31 March 2010) ("NDPP Directives"), paras F(9) and H(10).
45 Child Justice Act, section 67.

provision – which leads to a position where children engaged in otherwise necessary and peaceful protest and assembly are vulnerable to entering the child justice process.

Record of offence

76. A child who has contravened the Gatherings Act under the impugned provision will have the offence placed on their official records – as a Schedule 2 offence.

77. In cases where a child who is found guilty of contravening the Gatherings Act is not diverted, they will obtain a criminal record with long-term consequences. This record may only be expunged after a period of 10 years has elapsed.[46]

78. Whilst diversion of a child does not lead to a criminal record, there is still a record of the order. The Director General of the Department of Social Development[47] must establish and maintain a register of children in respect of whom a diversion order has been made in terms of the Child Justice Act. A record of the child's offence and diversion order is therefore maintained and will be taken into account should the child again be alleged to have committed an offence.

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46 Child Justice Act, section 87.

47 In consultation with the Director General of the Department of Justice and Constitutional Development and the National Commissioner of the South African Police Service.

Summation

79. The scope and effect of the impugned provision on children can be summarised as follows:

79.1. The impugned provision applies to anyone who contravenes the formal notice requirement of the Gatherings Act, including minor children who have convened a peaceful protest.

79.2. The mere failure to give notice of a gathering is criminalised.

79.3. A child who convenes a gathering is - merely for having failed to provide adequate notice of the gathering - vulnerable to arrest, regardless of whether the gathering was peaceful or not.

79.4. When arrested, the child will be required to interact with an array of officials within the criminal justice system, including police officers and prosecutors.

79.5. After facing questioning or discussions with a police officer, diversion of the child may be considered but this is entirely within the discretion of relevant officials.

79.6. Where diversion is not granted, a child may face conviction and a criminal record.

79.7. Even where diversion is granted, a record of the offence and the diversion order will be maintained.

80. For a child, the implications of criminalisation and being processed through the criminal justice system are drastic.

81. EE thus submits that the mere fact of criminalising failure to give notice of a peaceful protest limits the right to freedom of assembly in terms of section 17 of the Constitution.

82. In what follows we demonstrate and submit that the limitation imposed on the right to protest by the impugned provision does not pass muster as reasonable and justifiable when the nature and importance of the right to protest and the best interests of the child is properly considered.

CRIMINALISATION IS NOT IN THE BEST INTERESTS OF THE CHILD

The Best Interest of the Child Principle

83. The exercise of the right to protest and any limitations thereon must, in respect of children, be viewed through the prism of section 28(2) of the Constitution, which requires that:

> *"[a] child's best interests are of paramount importance in every matter concerning the child."*

84. The best interests of the child principle has been firmly entrenched in international law. Article 3 of the United Nations Convention on the Rights of the Child (UNCRC) states that:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." (Emphasis added).

85. Article 4(1) of the African Charter on the Rights and Welfare of the Child (ACRWC) places the best interests of the child as the primary consideration in all matters concerning the child as follows:

"In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration." (Emphasis added).

86. Interpreting section 28 of the Constitution in light of international law, the Constitutional Court has repeatedly emphasised the need to take a child-centred approach when determining the best interest of the child.[48]

87. In *S v M*[49] the Court held that law enforcement must always be child-sensitive and that courts and administrative authorities are constitutionally bound to

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48 Ibid para 15.

49 *S v M (Centre for Child Law as amicus curiae)* 2008 (3) SA 232 (CC).

consider the effects of their decisions on children's lives.[50]

88. Section 28(2) is both a self-standing right and a guiding principle in all matters affecting children. [51] Section 28 "protects children against the undue exercise of authority".[52]

89. The Constitutional Court has also affirmed that the best interests of the child is a standard of review against which the constitutional validity of statutory provisions must be tested.[53] In *The Teddy Bear Clinic*[54], the Court held that section 28(2) plays at least two separate roles as a guiding principle and as a "*standard against which to test provisions or conduct which affect children in general.*"[55]

90. The Court held further that the best-interests principle can be employed not only in circumstances where legislation is inflexible in a particular case but also where the statutory provision is against the best interest of children in general.

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50 *S v M* para 15.

51 See *Minister for Welfare v Fitzpatrick* para 17; *Fraser v Naude* para 9

52 *Centre for Child Law v Minister of Justice and Constitutional Development and Others* 2009 (6) SA 632 (CC) at para 25

53 *Centre for Child Law v Minister of Justice and Constitutional Development and Others* 2009 (6) SA 632 (CC); 2009 (2) SACR 477 (CC); 2009 (11) BCLR 1105 (CC); *C and Others v Department of Health and Social Development, Gauteng and Others* 2012 (2) SA 208 (CC); 2012 (4) BCLR 329 (CC); [2012] ZACC 1

54 *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2014 (1) SACR 327 (CC)

55 para 69.

"The best-interests principle also applies in circumstances where a statutory provision is shown to be against the best interests of children in general, for whatever reason. As a matter of logic what is bad for all children will be bad for one child in a particular case."[56] (Emphasis added).

91. EE submits that the impugned provision – in criminalising peaceful protest and political expression of children – is inconsistent with the guarantee that children's best interests are of paramount importance in all matters concerning children.

Criminalisation and Best Interests of the Child

92. It is established law that subjecting children to the criminal justice system, whether by arrest or detention, must be a measure of last resort and in instances where they have committed serious offences.

93. The impugned provision, through criminalisation, makes children vulnerable to arrest and prosecution merely for having failed to meet a notice requirement. This means that a child who has participated in an otherwise peaceful and orderly protest may be threatened with arrest and subjected to the trauma of the criminal justice system.

94. It is established in international law that measures relating to criminalisation

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56 *Teddy Bear Clinic* para 71.

should be a last resort in the case of children. Article 37(b) of the UNCRC states -

> *"No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;"* (Emphasis added).

95. These principles have been firmly supported by our courts. In *S v M*, the Court emphasised the need to protect children from avoidable trauma in the context of a criminal process:

> *"[F]oundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma."*[57]

96. It stands to reason that the criminalisation of children for exercising their right to peaceful and unarmed protest is extremely harmful to children. For this reason, subjecting children to the criminal justice system must always be a measure of last resort.

97. This was echoed by the Constitutional Court in *Mpofu v The Minister of Justice*

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57 *S v M* para 19; see also *J v National Director of Public Prosecutions* paras 35 and 36; *Fitzpatrick* para 17; *Fraser v Naude and Others* 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC); [1998] ZACC 13 para 9.

57 *S v M* para 15

and Constitutional Development,[58] where the Court held that detention of a child offender must be a measure of last resort and for the shortest period of time. [59]

98. Whilst the Child Justice Act seeks to ameliorate the trauma of the criminal justice process for children through mechanisms such as diversion, this does not save the overly broad scope of the impugned provision. As the Court has stated in the *Teddy Bear Clinic*:

> *"In principle, and as this Court has made plain, the existence of prosecutorial discretion cannot save otherwise unconstitutional provisions. If the discretion to prosecute exists, the prospect of an adolescent being arraigned under the impugned provisions is ever-present. For the reasons set out above, any such prosecution will invariably infringe the best-interests principle, as well as the affected adolescent's rights to privacy and human dignity. In other words, the mere existence of a prosecutorial discretion creates the spectre of prosecution, which undermines adolescents' rights. Furthermore, the discretion cited by the respondents only occurs at the stage of deciding whether to prosecute, by which time the adolescent involved may already have been investigated, arrested and questioned by the police. In any event, while*

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58 2013 (2) SACR 407 (CC) para 1

59 *Mpofu v The Minister of Justice and Constitutional Development* 2013 (2) SACR 407 (CC) para 1.

the arguments in relation to prosecutorial discretion may be relevant when considering the extent of the limitation of section 28(2) of the Constitution, they are irrelevant when considering whether the right has been limited at all."[60] (Emphasis added).

99. Compounding the negative effects of criminalisation on children, as described above, a child convicted of an offence under the impugned provision will potentially have a criminal record for an offence considered to be in the same category as offences such as housebreaking and arson. This will have long-term and serious effects on the child's access to opportunities, in addition to the stigmatisation.

100. In the case of diversion, a record of the child's offence and diversion order is maintained and taken into account should the child again be alleged to have committed an offence. This again is a harsh consequence for a child exercising their right to protest.

101. Criminalisation creates social stigma for the individual, and a criminal record makes it harder to find work, travel or study. The Constitutional Court has recognised the seriousness of criminalisation.

102. In *Democratic Alliance v African National Congress* the Constitutional Court held that criminalisation provisions are tough on, and with 'calamitous effect'

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60 *Teddy Bear Clinic* para 76.

on the person who falls foul of them.[61] This echoes Skweyiya, J's statement in the *Teddy Bear Clinic,* that, *"[a]n individual's human dignity comprises not only how he or she values himself or herself, but also includes how others value him or her. When that individual is publicly exposed to criminal investigation and prosecution, it is almost invariable that doubt will be thrown upon the good opinion his or her peers may have of him or her."*[62] (Emphasis added).

103. In the recent Free State High Court decision, *Tsoaeli v S,*[63] the court dealt with the interpretation of s 12(1)(e), and held that gatherings where no notice is given should not be criminalised. The court held that, *"[T]he right to freedom of assembly is central to our constitutional democracy and exists primarily to give a voice to the powerless. Given the constitutionally protected right to peaceful assembly, a provision which allows for unarmed and peaceful attendees of protest gatherings to run the risk of losing their liberty for up to a period of one year and to be slapped with criminal records that will, in the case of the appellants, further reduce their chances of gaining new employment for merely participating in peaceful protest action, undermines the spirit of the Constitution."*[64] (Emphasis added).

104. The effect of criminalisation - including stigmatisation and trauma – is not in

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61 *Democratic Alliance v African National Congress* 2015 (2) SA 232 (CC) at para 129
62 *Teddy Bear Clinic* para 56.
63 *Tsoaeli and Others v S* (A222/2015) [2016] ZAFSHC 217 (17 November 2016) *('Tsoaeli')*
64 *Tsoaeli* at para 41.

the best interests of the child in circumstances where the conduct that is the subject of the offence is simply the convening of a peaceful gathering without notice.

105. For the reasons set out above, it is evident that the criminalisation of peaceful gatherings under the impugned provisions is in violation of the "best interest of the child" principle. The impugned provision therefore cannot withstand scrutiny as a reasonable and justifiable limitation on the child's right to protest.

THE PURPORTED JUSTIFICATION

106. To justify the impugned provisions the Minister *"contends that section 12(1)(a) of the Gatherings Act is constitutional because: (a) the giving of notice serves a legitimate government objective of ensuring that proper planning may occur so as to ultimately facilitate the exercise of the right protected by section 17 of the Constitution; (b) the giving of notice imposes modest requirements on the person(s) convening a gathering; and (c) the law provides as a defence to such a charge, that the gathering concerned took place spontaneously."*[65]

107. The justifications do not stand up to scrutiny.

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65 Respondents' written submissions para 3

108. EE aligns itself with the applicants' submissions that the limitation to the rights under section 17 of the Constitution imposed by section 12(1)(a) of the Gatherings Act is not justifiable under section 36(1) of the Constitution, and we therefore do not repeat those submissions, save to emphasise that when the rights and best interests of children are taken into account the potential negative impact of section 12(1)(a) of the Gatherings Act is amplified.

109. Furthermore, the Minister's purported justifications do not stand up to scrutiny for the reasons that follow.

110. The Minister further develops his first justification in paragraph 23 of the Respondents' written submissions by saying *"[t]he Minister has explained that the purpose of giving notice in terms of section 3 of the Gatherings Act is primarily to ensure that proper planning may occur so as to ultimately ensure that the rights to freedom of expression and freedom of assembly may be exercised; it seeks to ensure that such gatherings are managed so as to ensure that they occur in an orderly manner, with minimal disruption and that any risk of violence and/or unruly behaviour is mitigated to the greatest extent possible."*

111. This justification totally misses the point, and does not, in any event, help the respondents' case.

111.1. It is not the requirement that a notice should be given, but the

criminalisation of the failure to do so that is under attack. Therefore the justification is of no moment.

111.2. The right is constitutionally guaranteed and does not require government facilitation for it to be exercised.

111.3. The Minister presumes that assemblies or demonstrations protected under section 17 of the Constitution are:

111.3.1. disorderly, thus the police have to "*ensure that they occur in an orderly manner*";

111.3.2. disruptive, that the police intervention is necessary to ensure that they take place "*with minimal disruption*";

111.3.3. violent and/or unruly, hence the need for police intervention to ensure that "*any risk of violence and/or unruly behaviour is mitigated*"

111.4. the respondents do not set out any basis for these assumptions.

111.5. Secondly, the right that is constitutionally guaranteed is to assembly, demonstrate or picket peacefully and unarmed. Therefore there is nothing to stop the law enforcement authorities from dealing with violence or other forms of conduct that are against the law.

112. As for the second justification, - *the giving of notice imposes modest requirements on the person(s) convening a gathering* – once again, this misses the point as it is not the requirement to give notice that is under attack, but the criminalisation of the failure to give notice. However, this justification goes further and undermines the respondents' justification. It begs the obvious question – if the requirement to give notice imposes a modest requirement, why is the failure to do so visited with harsh criminal consequences? From the Minister's justification it follows that the criminalisation of the failure to give notice is disproportionately harsh, especially if the next point is taken into account.

113. As for the third justification, (the defence of spontaneity) it once again misses the point. It is no justification for criminalising the failure to give notice that a defence may be raised when one faces criminal prosecution.

114. But more importantly, the third justification further underscores the absurdity of criminalising failure to give notice. There is no suggestion that the law enforcement agencies are somehow handicapped by having to deal with spontaneous or unnotified assemblies or demonstrations. This demonstrates that all that a notice does is to make life a little easier for the law enforcement agencies, but its absence does not imperil their operations in any shape or form. They are able to mobilise and deal with situations as they arise.

115. Criminalisation of the failure to give notice has a chilling effect. It is the

prospect of being dragged through the criminal justice system that has that effect, as much as the outcome at the end. The prospect of raising a spontaneity defence is therefore cold comfort.

116. Furthermore, it is the criminalisation of failure to give notice that creates an avenue for the law enforcement agencies to harass and overreach the citizenry.

117. The criminalisation of the failure to give notice is therefore absurd, and disproportionate to any legitimate outcomes that the government may be seeking to achieve.

CONCLUSION

118. In conclusion, EE's submissions are the following:

118.1. Section 17 of the Constitution extends the right to assemble, demonstrate, picket and present petitions to *everyone*, including children.

118.2. EE submits by creating a criminal offence for failure to give notice to convene a protest of more than 15 persons, section 12(1)(a) of the Gatherings Act infringes the right to protest of children, thus imperilling

one of the few platforms through which children may mobilise to make their voices heard.

118.3. In assessing whether the limitation on the right to protest is reasonable and justifiable, EE has made submissions on the importance of the right to children, particularly in relation to their rights to participation, expression and dignity.

118.4. In addition, EE submits that the nature and extent of the limitation - criminalisation for the mere failure to provide notice of a protest - is onerous and severe particularly for children. In particular, the nature and extent of the limitation is inconsistent with the best interests of the child.

118.5. In conclusion, EE submits that the order of invalidity by the High Court in respect of section 12(1)(a) of the Gatherings Act should be confirmed, particularly taking into account the nature of the right to protest for children and the impact of the impugned provision on their rights and best interests.

119. EE does not seek costs against any of the parties. Equally, if the Court finds in favour of the respondents we submit that EE should not be saddled with a costs order.[66]

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66 *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014

NDUMISO LUTHULI

Counsel for Equal Education

Chambers, Sandton

2 July 2018

(CC); [2009] JOL 23693 (CC); [2009] ZACC 14 (CC) paras 21 to 23

EQUAL EDUCATION'S LIST OF AUTHORITIES

Statutes

1. Constitution of the Republic of South Africa, 1996
2. South African Schools Act 84 of 1996
3. Children's Act 38 of 2005
4. Child Justice Act 75 of 2008

South African Case Law

1. *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC)

2. *C and Others v Department of Health and Social Development, Gauteng and Others* 2012 (2) SA 208 (CC)

3. *Centre for Child Law v Minister of Justice and Constitutional Development and Others* 2009 (6) SA 632 (CC)

4. *Democratic Alliance v African National Congress* 2015 (2) SA 232 (CC)

5. *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others* 2009 (4) SA 222 (CC)

6. *Fraser v Naude and Another* (CCT14/98) [1998] ZACC 13; 1999 (1) SA 1; 1998 (11) BCLR 1357 (23 September 1998)

7. *In Re: Certain Amicus Curiae Applications; Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 713 (CC)

8. *J v National Director of Public Prosecutions and another (Childline South Africa and others as amici curiae)* 2014 (7) BCLR 764 (CC)

9. *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1998 (1) SA 745 (CC)

10. *Minister for Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC)

11. *Mpofu v The Minister of Justice and Constitutional Development and Others* 2013 (2) SACR 407 (CC)

12. *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC)

13. *S v Makwanyane and Another* 1995 (3) SA 391 (CC)

14. *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469

15. *South African Transport and Allied Workers Union and Another v Garvas and Others (City of Cape Town as Intervening Party and Freedom of Expression Institute as Amicus Curiae)* 2012 (8) BCLR 840 (CC)

16. *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2014 (2) SA 168 (CC) (*Teddy Bear Clinic)*

17. *Tsoaeli and Others v S* (A222/2015) [2016] ZAFSHC 217 (17 November 2016)

<u>International Conventions and Treaties</u>

18. United Nations Convention on the Rights of the Child (20 November 2005)

19. UN Committee on the Rights of the Child (CRC), *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009

20. African Charter on the Rights and Welfare of the Child (11 July 1990)

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21. Peter Kallaway (ed) *Apartheid and Education: The Education of Black South Africans* (1984) Ravan Press, Johannesburg

22. Brooks & Brickhill *Whirlwind before the storm: The Origins and Development of the Uprising in Soweto and the Rest of South Africa from June to December 1976*, 1980

Other

23. National Director of Public Prosecutions' Directives, Government Gazette No. 33067 Notice No. 252 (31 March 2010) ("NDPP Directives")

24. South African History Online, The June 16 Soweto Youth Uprising.