IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case: CCT 314/24

In the matter between:

EMBRACE PROJECT NPC	First Applicant
INGE HOLZTRÄGER	Second Applicant
CENTRE FOR APPLIED LEGAL STUDIES	Third Applicant
and	
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	First Respondent
MINISTER IN THE PRESIDENCY FOR WOMEN, YOUTH AND PERSONS WITH DISABILITIES	Second Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent
and	
CENTRE FOR HUMAN RIGHTS, UNIVERSITY OF PRETORIA	First *Amicus Curiae*
PSYCHOLOGICAL SOCIETY OF SOUTH AFRICA	Second *Amicus Curiae*
WOMEN'S LEGAL CENTRE TRUST	Third *Amicus Curiae*

Case: CCT 315/24

In the matter between:

CENTRE FOR APPLIED LEGAL STUDIES	Applicant
and	
EMBRACE PROJECT NPC	First Respondent
INGE HOLZTRÄGER	Second Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent

MINISTER IN THE PRESIDENCY FOR WOMEN, YOUTH AND PERSONS WITH DISABILITIES Fourth Respondent

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA Fifth Respondent

and

CENTRE FOR HUMAN RIGHTS, UNIVERSITY OF PRETORIA First *Amicus Curiae*

PSYCHOLOGICAL SOCIETY OF SOUTH AFRICA Second *Amicus Curiae*

WOMEN'S LEGAL CENTRE TRUST Third *Amicus Curiae*

EMBRACE PROJECT AND INGE HOLZTRÄGER'S WRITTEN SUBMISSIONS IN RESPONSE TO THE THIRD *AMICUS CURIAE*

INTRODUCTION

1 These submissions are prepared in response to the Directions of this Court dated 17 June 2025 and provide a response to the written submissions of the the Third *Amicus Curiae*, the Women's Legal Centre Trust ("WLC"). The WLC effectively opposes the relief sought by the First and Second Applicants ("the Embrace Applicants").

2 At the outset, the Embrace Applicants recognise and deeply respect the contributions WLC has made – both at grassroots and policy levels – in defending and advancing women's rights in South Africa. However, this Court is now confronted by three public interest organisations, each dedicated to safeguarding women's rights, yet unable to agree on the constitutionally appropriate way to do that in this case.

3 While CALS' urge for radical judicial intervention may be understandable given the urgency and magnitude of the scourge of sexual violence, WLC's resistance to confirmation of the High Court's order is not as readily understood – unless it is viewed through the lens of its SCA intervention in *Coko*.[1] WLC contends that it already secured an interpretational solution to the issues the Embrace Applicants raise. However, as we will demonstrate below, this is simply not the case.

4 WLC opposes confirmation of the High Court's declaration of constitutional invalidity of the impugned sections of the Criminal Law (Sexual Offences and Related Matters) Act, 2007 ("**the Act**"), as well as the *interim* reading-in. The grounds of WLC's opposition may be summarised as follows:

4.1 First, WLC contends that the Supreme Court of Appeal's judgment in *Coko* has now set the record straight in terms of determining intention in sexual violence cases.[2] A truly unreasonable belief in consent, in the absence of outward signs of voluntary agreement, necessarily gives rise to an inference that the accused foresaw the possibility of non-consent and proceeded, nonetheless. This satisfies the *mens rea* element in the form of *dolus eventualis*.[3]

4.2 Second, WLC contends that the decisions referred to by the Embrace Applicants, including that of Ms Holzträger's own case, were a result

[1] *Director of Public Prosecutions, Eastern Cape, Makhanda v Coko* [2024] All SA 674 (SCA) 24; 2024 (2) SACR 113 (SCA).
[2] WLC's Founding Affidavit at para 31; WLC's Written Submissions at paras 66-68.
[3] WLC's Written Submissions at para 88.

of the courts repeatedly failing to apply the proper *dolus* test.[4] The issue, then, is that courts too readily accept exculpatory explanations by accused persons rather than properly testing their versions against objective evidence.[5]

4.3 Third, requiring an accused to take "objectively reasonable steps" in ascertaining consent may invite evidential uncertainty, prosecutorial overreach and judicial inconsistency. Moreover, it may burden complainants, incentivise retaliatory counterclaims, and open the door to coercive conduct being reframed as consent-seeking behaviour.[6]

4.4 Lastly, WLC contends that the *interim* relief subject to confirmation is either redundant or the "reasonable steps" requirement may otherwise lead to complexity and judicial confusion.[7] In support of this proposition, WLC places sole reliance on a 2018 academic article by L Vandervort, which critiques the legislative introduction of the "reasonable steps" requirement in Canada.[8]

5 Many of the issues that WLC raises are not novel and have already been canvassed in our written submissions before the High Court as well as this Court. For example, WLC's first ground largely mirrors the Minister's *dolus eventualis* contention in the High Court – to which a comprehensive

[4] WLC's Written Submissions at paras 66-68
[5] WLC's Written Submissions at paras 85-89.
[6] WLC's Written Submissions at paras 101-108.
[7] WLC's Written Submissions at paras 101-102.
[8] Vandervort *The Prejudicial Effects of Reasonable Steps in Analysis of Mens Rea and Sexual Consent: Two Solutions* (2017) *Alberta Law Review* 55(4), p933.

response has already been provided. For this reason, and to avoid repetition, we will only cross-refer to the relevant portions of our previous submissions where appropriate.

6 In what follows, we address the following:

6.1 The nature of WLC's opposition to these confirmation proceedings and why it was inappropriate for it to seek admission as an *amicus* rather than intervention as a party.

6.2 Why WLC's approach to *dolus eventualis* as a silver bullet misses the point of the Embrace Applicants' case.

6.3 Why WLC's claim that courts keep getting it wrong serves to support, rather than undermine, the Embrace Applicants' case.

6.4 WLC's failure to deal with the rights violation complaint.

6.5 Why WLC's concerns, in relation to the reading-in of a "reasonable steps" requirement, are both speculative and unfounded.

THE NATURE OF WLC'S OPPOSITION

7 We accept that *amici* may elect to vigorously support one side of the case and offer a different perspective,[9] but the circumstances of WLC's

[9] *S v Molimi* 2008 (3) SA 608 (CC) at para 22.

intervention in these proceedings are highly unusual. In this case, the Minister – despite opposition in the High Court – has not participated in the confirmation proceedings. The Embrace Applicants and CALS all agree that declaratory relief is necessary but differ with respect to the nature of just and equitable relief.

8 WLC itself admits that it considers its role in these proceedings to be stepping into the shoes of the Minister.[10] In its view, it had expected that the Minister would rely on the SCA's decision in *Coko* to defend the impugned provisions.[11] But there is a difference between what the WLC believes the Minister ought to have done and what the Minister actually did.

9 More importantly, this is not simply a question of form versus substance.[12] It fundamentally alters the manner in which parties are empowered to participate in the proceedings before this Court in a way which treats its rules with the requisite degree of reverence.

10 For one, WLC boldly states that "*the SCA's judgment in Coko was handed down before the High Court's judgment in this matter, [but] it is apparent from the latter that the SCA's judgment was not brought to the High Court's attention*".[13] Further, it says that "*the High Court might have found differently if the SCA's judgment in Coko was brought to its attention*".[14]

[10] WLC's Founding Affidavit at para 49.
[11] WLC's Founding Affidavit at para 47.
[12] *City of Tshwane Metropolitan Municipality v Afriforum and Another* 2016 (6) SA 279 (CC) at para 18.
[13] WLC's Founding Affidavit at para 38.
[14] WLC's Founding Affidavit at para 39.

10.1 That is simply not true. *Coko* (which was handed down before the hearing but after heads of argument had been filed) was not only brought to the High Court's attention, but relied on by the Minister, and fully ventilated by the Court and Counsel during the hearing. The Minister knows this, because the Minister was represented in court and actively, opposed the relief sought by the Embrace Applicants.

10.2 Despite a Rule 16A notice and wide publicity over two years, WLC elected neither to intervene as a respondent nor to seek admission as an *amicus* in the proceedings before the High Court. If it had, it would have known that *Coko* had been debated there.

10.3 It is, in our submission, not open to WLC to come in at the eleventh hour to oppose the High Court application retrospectively, let alone to cast aspersions, which are factually incorrect, on the way those proceedings were conducted.

11 This Court has explained the role of an *amici* as follows:

> "*The role of an amicus is to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an amicus has a special duty to the court. That duty is to provide cogent and helpful submissions that assist the court. The amicus must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the court. Ordinarily it is inappropriate for an amicus to try to introduce new contentions based on fresh evidence*."[15] (Our emphasis)

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

12 In the High Court, the Minister sought to advance the very same submission as the WLC does now:[16] that *dolus eventualis* is sufficient for purposes of establishing intention in cases such as Ms Holzträger's.[17]

13 By reiterating the same contention without truly engaging with the Embrace Applicants' case, WLC has not fulfilled its special duty to provide cogent submissions that illuminate issues not previously canvassed. Instead, the WLC's contributions fail to offer much beyond what was already dealt with previously.

WLC'S APPROACH TO *DOLUS EVENTUALIS* AS A SILVER BULLET

14 WLC argues that objective evidence can negate an accused's claim of subjective belief in consent, permitting courts to draw inferences from surrounding circumstances to determine if the accused foresaw the absence of consent.[18] WLC further contends that our courts incorrectly conflate an objectively unreasonable yet genuine belief (*dolus directus*) with subjective foresight of the risk of non-consent (*dolus eventualis*).[19] Consequently, WLC posits that a genuinely held but objectively unreasonable belief should not automatically exclude the presence of *dolus eventualis*.[20]

15 But this approach completely misses the point.

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[16] WLC's Founding Affidavit at para 31.
[17] Minister's Answering Affidavit (High Court) at paras 123-125 (CC Record Vol 3, pp 294); Embrace Applicants' Written Submission at paras 15.2 and 16.3.
[18] WLC's Written Submission at para 32.
[19] WLC's Written Submission at para 36.
[20] WLC's Written Submission at paras 50-51.

16 WLC incorrectly suggests that the law on *dolus eventualis* – particularly after the SCA's judgment in *Coko* – is capable of providing sufficient vindication for survivors and protection for potential targets. The proposition fails to grasp the Embrace Applicants' primary contention: that the nature of intention, which remains subjective even under the *dolus eventualis* construction, enables perpetrators to escape accountability under the *Amos* defence. The latter depends on an unreasonable belief in consent, even if that belief is genuinely held by the accused.[21]

17 We accept that the authorities WLC seeks to draw upon clarify that objective factors can be used to disprove the accused's assertion of belief in consent. However, none directly addresses the scenario where an accused genuinely holds a belief in consent, thereby lacking subjective foreseeability entirely.

18 *Dolus eventualis* requires proof of subjective foresight, and even objectively unreasonable belief does not constitute subjective foresight if the accused genuinely does not foresee a possibility of non-consent. If there are objective factors which are contradictory, then it cannot be said that the accused's belief is genuine.

19 Where the belief is genuine, a survivor's peri-traumatic responses, though crucially relevant to understanding the survivor's subjective state, become immaterial in disproving the accused's subjective belief in the absence of consent. This then lends itself to what we have already submitted are

[21] Embrace Applicants' Written Submissions at para 10.

outmoded and problematic models of thinking which perpetuate rape myths and ignore peri-traumatic responses.[22]

20 Objective factors which are capable of negating foreseeability and subjective belief would require explicit prior indications by the survivor of non-consent. This is clearly illustrated in the SCA's factual analysis in *Coko*, where it found that:

20.1 the survivor had specifically brought it to the accused's attention that she was a virgin and wished to preserve that status until she was ready to engage in penetrative sex;

20.2 the accused had conceded that sexual intercourse was not part of the plan for the evening;

20.3 there was an element of physical resistance by the survivor earlier in their interaction, which was followed by reassurances given by the accused and;

20.4 the accused could only offer incoherent and nebulous explanations as to how he ended up sexually penetrating the survivor.[23]

21 These objective factors, taken cumulatively, enabled the SCA to conclude that the accused must have foreseen the possibility that consent was absent notwithstanding his claimed intention.[24]

[22] Embrace Applicants' Written Submissions at paras 33-44.
[23] *Director of Public Prosecutions, Eastern Cape, Makhanda v Coko* 2024 (2) SACR 113 (SCA) at para 63.
[24] *Director of Public Prosecutions, Eastern Cape, Makhanda v Coko* 2024 (2) SACR 113 (SCA) at para 64.

22 Absent these explicit objective indicators, *dolus eventualis* is of no avail.

23 This was precisely what transpired in Ms Holzträger's case. WLC correctly accepts that it is inappropriate for it to attempt to evaluate the evidence presented to the Regional Court based on what WLC has before it.[25] However, nothwithstanding this, it proceeds to do so, performing a leap of logic in the process. Its logical leap lies in this conclusion:

> "*Ms Holzträger's evidence that she did not consent, if accepted, is conclusive proof of her absence of consent. It is not at all explained why the Magistrate nevertheless concluded that the State had not proven the absence of consent beyond a reasonable doubt*."[26]

24 This, says WLC, proves that "*Ms Holzträger's, as was the case of the complainant in Coko, was a matter of the Court getting the law wrong*".[27] But the proper test for *dolus eventualis* is not to conclusively prove an absence of consent (which is an objective construction).

25 WLC appears to have misread the *Amos* judgment. The Court did not find that the State had not proven the absence of consent. It expressly found that consent was lacking. But the Court further found that the State had failed to prove the presence of *dolus* (in any form).

26 Where Ms Holzträger had not outwardly signified her opposition in any way, it was impossible for the Magistrate to conclude that the requisite subjective intent (even in the form of *dolus eventualis*) was established. The objective circumstances did not show, beyond reasonable doubt, that the accused

[25] WLC's Written Submission at para 60.
[26] WLC's Written Submission at para 65.2.
[27] WLC's Written Submission at para 66.

must have foreseen the risk that consent was lacking.[28] The standard for *dolus eventualis*, as a species of intent, is actual foresight – not reasonable foreseeability.

27 Neither can the test be that "*if there are no objective factors to support an accused's version that he did not know or did not foresee that consent was absent, then his version must be rejected as not being reasonably possibly true*".[29] This stretches far beyond the subjective bounds of *dolus eventualis*. It also inverts the onus. Absent an objective standard, the impugned provisions are simply incapable of the far-fetched interpretation that WLC seeks to ascribe to them.

28 For these reasons, WLC appears not only to misunderstand the nature of the Embrace Applicants' case, but also the proper construction of *dolus eventualis* and, by extension, the actual utility of the SCA's decision in *Coko* in circumstances of genuine but unreasonable belief in consent.

WLC'S CLAIM THAT THE COURTS KEEP GETTING IT WRONG

29 WLC appears to suggest that the courts tend to misapply the test for *dolus eventualis* in consent-based sexual offences.[30] In support of this bold assertion, it engages in a lengthy deconstruction of the *Amos* and *Mashego* cases to conclude that those Courts got it wrong.[31]

[28] Regional Court Judgment (CC Record Vol 2 p216).
[29] WLC's Written Submission at paras 87-88.
[30] WLC's Written Submission at paras 85-86.
[31] WLC's Written Submission at paras 52-84.

30 Even if we accept that those Courts got it wrong, and that countless other lower courts have got it wrong in unreported decisions, that does not mean it is the judiciary's fault.

31 On the contrary, if there is such a widespread phenomenon of courts getting these cases wrong, that in fact suggests that the law, not the interpreters of the law, is to blame.

WLC'S FAILURE TO ADDRESS THE RIGHTS VIOLATION

32 WLC ignores the rights violation complaint. In circumstances where it seeks to oppose the declaratory relief, it ought to have engaged in the constitutional issues at hand rather than adopting a purely technical analysis of intention and consent of the Act's impugned provisions.[32] Where the Minister has conceded that the retention of the *Amos* defence limits rights in the Bill of Rights, he bore an onus to show that the limitation is reasonable and justifiable. WLC has failed to place its case within the framework of a limitations analysis.

33 WLC simply expresses a concern that confirming the declaration would be akin to introducing a "*competent verdict for rape in circumstances where intention is not established beyond a reasonable doubt*".[33] But that is precisely the point.

[32] Embrace Applicants' Written Submissions at paras 17-50.
[33] WLC's Written Submission at paras 8-9.

34 We have already provided extensive submissions on South Africa's obligations under international law,[34] the upshot of which was captured by this Court in *AK v Minister of Police* where it held that "*these instruments regard gender based violence as a pernicious form of discrimination against women that undermines their rights to equality and sexual autonomy*".[35]

35 If we are to accept that the infringement of rights occurs in every case of gender based violence – it does not matter whether an accused inflicts that infringement intentionally or negligently.[36] Moreover, our international obligations underscore the need to eliminate <u>all</u> forms of violence against women.[37] It is because the impugned provisions in the Act frame the offence exclusively through the lens of an accused's personal beliefs, even if they are unreasonable (backward, sexist or otherwise), that those provisions fall foul of the Constitution.

36 As we have already outlined how the *Amos* defence violates the rights of victims and survivors of sexual violence,[38] and why that violation is unjustifiable,[39] we do not repeat it here.

37 What WLC has failed to do is address how that violation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[40]

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[34] Embrace Applicants' Written Submissions at paras 63-85.
[35] *AK v Minister of Police* 2023 (2) SA 321 (CC) at para 88.
[36] Embrace Applicants' Written Submissions at paras 52-53.
[37] Embrace Applicants' Written Submissions at para 57.
[38] Embrace Applicants' Written Submissions at paras 17 to 50.
[39] Embrace Applicants' Written Submissions at paras 51 to 56.
[40] The Constitution, section 36.

38 In circumstances where the "*state has a duty to protect women against all forms of gender based violence*"[41] and where both the SCA and this Court have long recognised that violating a person's sexual integrity and autonomy constitutes a gross violation of human rights – then it ought to explain why legalising negligence in this context is a reasonable and justifiable limitation of those rights.[42]

39 We submit that WLC has not done so because there is no conceivable basis for it to do so.

WLC'S CONCERNS ABOUT THE "REASONABLE STEPS" REQUIREMENT

40 WLC's concerns about alleged unintended consequences of a "reasonable steps" requirement are both speculative and overstated. WLC offers no empirical evidence to suggest that the reform will impose undue evidentiary burdens, enable retaliatory claims against survivors or encourage coercively persistent actions by offenders. Conjecture of this nature should not override the demonstrable shortcomings of the Act.

41 WLC's comparative concerns centre on a caution raised by a single academic source regarding Canada's introduction of the "reasonable steps" requirement in sexual offence cases. They highlight fears that the requirement has created confusion, redundancy, and ultimately complicated judicial assessments of consent, resulting in judges applying subjective or extra-legal reasoning rather than adhering strictly to the law.

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[41] *AK v Minister of Police* 2023 (2) SA 321 (CC) at para 3.
[42] Embrace Applicants' Written Submissions at fn 41, together with paras 45-50.

42 However, WLC's reliance on a single Canadian academic critique is inadequate when contrasted with the comprehensive comparative analysis provided by the Embrace Applicants, which spans more than ten examples from various democratic jurisdictions where the "reasonable steps" requirement has been successfully integrated into legal frameworks. Moreover, while Vandervort's critique underscores certain limitations and challenges experienced since Canada's adoption of the "reasonable steps"test, she does not establish that the purely subjective position is superior or more effective at protecting complainants' rights or ensuring appropriate verdicts.

43 Crucially, the Canadian Supreme Court itself acknowledged and directly engaged with Vandervort's critique in *R v Barton*,[43] explicitly providing clarity and guidance on how the "reasonable steps" requirement should be applied. There, the Court emphasised that reasonable steps have both subjective and objective dimensions – steps taken must be objectively reasonable considering the circumstances subjectively known to the accused at the time.[44]

44 Significantly, the Court clarified the underlying purpose of the "reasonable steps" requirement: rejecting outdated assumptions equating silence or passivity with consent. It reinforced that reliance on silence, passivity, or ambiguous conduct is inherently unreasonable, and that reasonable steps cannot involve reliance on stereotypes or rape myths.[45] Thus, far from

[43] *R v Barton* [2019] 2 SCR 579 at para 103.
[44] Id at para 104.
[45] Id at paras 107-109.

abandoning the requirement due to identified challenges, the Supreme Court actively sought to refine and bolster its application in practice, effectively rebutting Vandervort's concerns while maintaining the requirement's necessity.

45 WLC also expresses fears of unintended consequences if the "reasonable steps" requirement is introduced in South Africa, suggesting it could create ambiguity about what constitutes "reasonable steps", potentially place undue evidentiary burdens on complainants and prosecutors, lead to retaliatory complaints from accused persons, and facilitate coercive, repetitive enquiries about consent.[46]

46 But the notion of reasonableness is already deeply embedded and extensively applied in South African law across numerous contexts, including civil and criminal law. It is inherently flexible and context-specific, deliberately designed to respond to factual scenarios. Consequently, WLC's reservations about the introduction and interpretation of a "reasonable steps" requirement are not only unwarranted, but they also disregard South African courts' established capacity to adjudicate the concept of reasonableness with clarity and consistency.

47 Finally, WLC's insistence on deferring to legislative processes overlooks this Court's constitutional duty to protect fundamental rights where legislation has failed to do so. The Embrace Applicants' *interim* reading-in – which is modelled on both comparable provisions already present within the Act as

[46] WLC's Written Submission at para 107.

well as the approaches followed in comparative jurisdictions – is sufficiently precise and restrained for purposes of respecting legislative prerogatives while simultaneously addressing the pressing constitutional violations identified.[47]

48 We do not deny that careful scrutiny of the legislation, research and legislative intervention may be required. It is for this very reason that the relief which the High Court ordered, and that which the Embrace Applicants now seek to confirm, is ***interim*** in nature.[48]

CONCLUSION

49 For all these reasons, we respectfully submit that WLC's intervention is of limited assistance to this Court and its opposition should not impede the confirmation of both the declaratory relief as well as the interim reading-in as sought by the Embrace Applicants.

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17 July 2025

[47] Embrace Applicants' Written Submissions at paras 100-109.
[48] Embrace Applicants' Written Submissions at para 98.