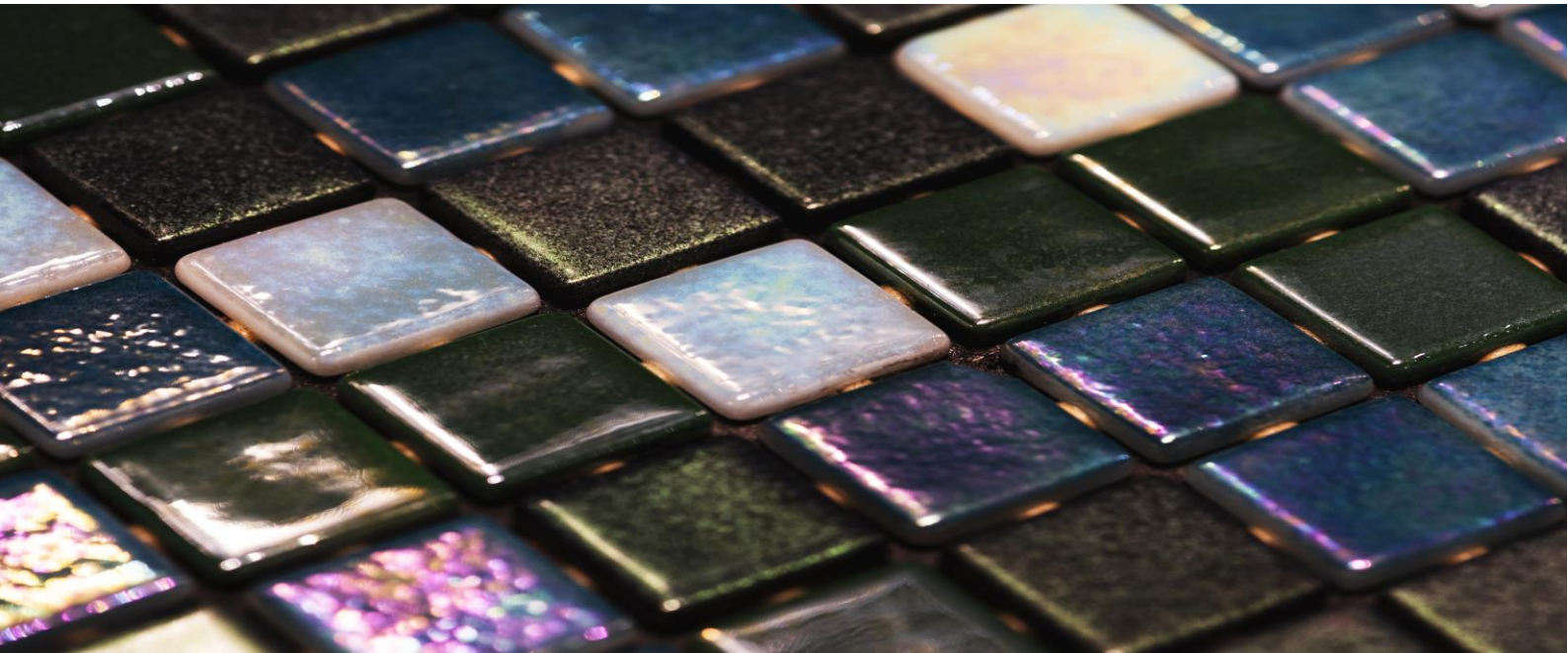


Harare, June 2019



**AGE OF CONSENT, SEXUAL INTERCOURSE
WITH YOUNG PERSONS AND ACCESS TO
SEXUAL AND REPRODUCTIVE HEALTH CARE
IN ZIMBABWE**

JUSTICE FOR CHILDREN

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AND ACCESS TO SEXUAL AND REPRODUCTIVE HEALTH CARE IN
ZIMBABWE**

A publication of

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Harare

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FOREWORD

Age of consent and surrounding issues have been perennially topical in Zimbabwe. Access to adolescent sexual and reproductive health, rising levels of teen pregnancies and the all-time high illegal termination of pregnancies involving minors, the high levels of sexual abuse, and the thorny issue of child marriages have all contributed to this. For instance, following the Constitutional Court decision of *Mudzuru & Anor v Minister of Justice, Legal and Parliamentary Affairs & Ors* CC 12-15, the President was quoted in the public media announcing that government would look to raise the age of consent from the current 16 to 18, to align it with the constitutional protection afforded to all children below the age of 18 years.

As other issues emerged and continue to emerge, such as the scourge of child prostitution in places like Epworth and the hotspots in Zimbabwe's haulage trucking routes such as Ngundu, Beitbridge and Kazungula Border Post, the age of consent has been brought into the spotlight. Most recently, allegations of a discussion on the possible lowering of the age of consent reportedly discussed by the Parliamentary Portfolio Committee on Health in March 2019 sparked discussion on the age of consent. The Committee's Chair was to later issue a statement, announcing that it was in fact access to sexual and reproductive health services that came under discussion as opposed to lowering the age of consent. However one takes it, the age of consent has once again been brought to the fore.

Justice for Children (JCT), as an institution, has been at the forefront of child protection in Zimbabwe through the provision of legal services, legal education, and through lobby and advocacy. In close to two decades of child protection work, JCT has interfaced with child protection issues that are vital and central to the age of consent discourse. Within this context, this publication has been put together as a discussion paper to assist in shaping the discourse on the age of consent in Zimbabwe. It captures issues on the age of consent, not in isolation, but as interconnected and intertwined to other issues such as access to sexual and reproductive health services and the protection of children who have sexual intercourse with other children. The latter is particularly important in light of the fact that as JCT, a significant chunk of cases of children in conflict with the law that our lawyers handle in the criminal courts throughout the country, pertain to children charged for having sexual intercourse with a young person under section 70 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

We trust that this publication will serve as an information pack and reference point to the discussion on the age of consent and related topics, as Child Protection Practitioners, Government, law and policy makers, parents and guardians, and children themselves address this critical but complex topic.

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GLOSSARY OF KEY TERMS

| | |
|-----------------------|--|
| Adolescent | Adolescent refers to a person in the period of adolescence. Adolescence refers to a transitional stage of physical and psychological development that generally occurs during the period from puberty to legal adulthood. Adolescence is usually associated with the teenage years, but its physical, psychological or cultural expressions may begin earlier and end later. |
| Age of consent | The legal age at which a person can validly and legally consent to a sexual act with another person. |
| Child or Minor | Any boy or girl below the age of 18 years. |
| Criminal Code | The Criminal Law (Codification and Reform) Act [<i>Chapter 9:23</i>]. |
| Defilement | The act of committing a sexual act with a young person below the age of consent. In the Criminal Law (Codification and Reform) Act [<i>Chapter 9:23</i>] the words “sexual intercourse or performing indecent acts with young persons” are used. |
| Juvenile | Refers to a young person who is not yet old enough to be considered an adult. |
| Legislation | A law passed by Parliament, commonly referred to as an Act of Parliament or a Statute of Parliament. |
| SRHS | Sexual and Reproductive Health Services |
| Young person | In the context of sexual offences in the Criminal Law (Codification and Reform) Act [<i>Chapter 9:23</i>], means a boy or a girl below the age of 16 years. |

LIST OF LEGISLATION AND CASES REFERRED TO

Legislation and Legal Instruments

African Charter on the Rights and Welfare of the Child, 1990
Children's Act [Chapter 5:06]
Children's Amendment Bill, 2017
Committee on Economic, Social and Cultural Rights, General Comment No. 22 on the Right to sexual and reproductive health (2016)
Committee on the Rights of the Child (CRC), General Comment No. 15 on the Right of the child to the enjoyment of the highest attainable standard of health (2013)
Constitution of Zimbabwe (1979)
Constitution of Zimbabwe Amendment (No. 20) Act of 2013
Criminal Law (Codification and Reform) Act [Chapter 9:23]
Customary Marriages Act [Chapter 5:07]
Education Act [Chapter 25:04]
Education Amendment Bill, 2019
Marriage Act [Chapter 5:11]
Marriages Bill, 2018
Medicines and Allied Substances Control (General) Regulations, 1991, Statutory Instrument 150 of 1991
Public Health Act [Chapter 15:17]
Termination of Pregnancy Act [Chapter 15:10]
United Nations Convention on the Rights of the Child, 1989

Cases

Brend v Wood (1946) 62 TLR 462 (England)
CKW v Attorney General & Director of Public Prosecutions [2014] eKLR Petition No. 6 of 2013 High Court (Kenya)
Kamowa v Republic [2017] MWHC 26 (Malawi)
Kayira v S [2015] MWHC 432 (Malawi)
Lejony v The State (2000) 2 BLR 145 CA (Botswana)
Manewe v The State (2005) 1 BLR 276 (Botswana)
Mudzuru & Anor v Minister of Justice, Legal and Parliamentary Affairs & Ors CC 12-15 (Zimbabwe)
Republic v Goliat and Jonasi [1971 – 72] ALR (MW) 251 (Malawi)
R v K [2001] 3 All ER 897 (England)
R v Prince (1875) LR 2 CCR 154 (England)
R v Tolson (1889) 23 QBD 168 (England)
S v CF (A Juvenile) HH 143-11 (Zimbabwe)
S v Juvenile (RPS) HH 18-03 (Zimbabwe)
S v LC (A Juvenile) HH 34-14 (Zimbabwe)
S v Masuku HH 106-15 (Zimbabwe)
S v Mharapara HMA 26-17 (Zimbabwe)
S v Nare 1983 [2] ZLR 135 (Zimbabwe)

Sherras v De Rutzen [1895] 1 QB 918 (England)

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

1. INTRODUCTION AND BACKGROUND

Issues of age of consent, having sexual intercourse with young persons and access to sexual and reproductive health services cannot be separated. They are intertwined. For that reason, this publication seeks to give an overview encompassing all these issues so that the discussion is situated within its proper and complete context.

Age of consent has remained a standing topical issue in Zimbabwe. It is the consequences and effects of the age of consent that have continuously triggered the ongoing discussion, ranging from the incessant child marriages, to the disturbingly high levels of child sexual abuse. Access to health services, particularly sexual and reproductive health services, is yet another. Are there gaps in our law and policy? Are there perhaps gaps in the implementation of the existing legal framework? Do our law and practice conform to the international law standards to which our country subscribes? What does our law say concerning age of consent and protection of children from sexual abuse? What are the implications of such laws? The questions are numerous. It is to these issues that this discussion is devoted.

2. DEFINING AGE OF CONSENT

Age of consent is the age at which someone can legally and competently have sexual activity with another person. Put differently, it is the legally defined age at which a person is deemed legally competent to consent to sexual activity. Various inscriptions can be given to this definition, but the import remains the same.

What age of consent does is that it sets a legal demarcation in terms of age, below which point engaging in a consensual sexual activity with someone is deemed an offence. Different names are given to this offence in different parts of the world, the most common being “defilement”, “statutory rape laws”, and the phrase “having sexual intercourse or performing an indecent act with a young person”. The latter is the description used in Zimbabwe. However, where such sexual intercourse or activity is non-consensual, the sexual offences laws that generally apply to everyone are equally applicable, with offences such as rape, indecent assault and aggravated indecent assault attaching, as the case may be.

3. WHAT IS THE AGE OF CONSENT IN ZIMBABWE?

Is the age of consent in Zimbabwe 12 or 16 years? For reasons that become clearer below, this is not a rhetorical question, but a real question for which confusion may abound, not just among persons who are lay to the law. The age of consent in Zimbabwe is 16 years. However, that age was not always 16 years as once upon a time, Zimbabwe’s age of consent was 12 years. The age was raised from 12 to 16 years through an amendment to the

Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. When the General Laws Amendment Bill addressing this subject was brought to debate and discussion, especially during the Committee stages, some legislators put up a spirited fight to have the age placed at 18 years. Ultimately, a compromise was reached at 16 years.

Where in our law do we get this position that the age of consent is 16 years? We get it from section 70 as read with section 61(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. These two provisions must, of necessity, be read together in order to derive the age of consent.

Section 61(1) defines a “young person” as “*a boy or girl under the age of 16 years*”. Section 70 then makes it a criminal offence to have consensual sexual intercourse or performing indecent acts with a young person. But the offence is not that of rape. Rather, it is the lesser offence of having sexual intercourse or performing indecent acts with young persons. Section 70, in relevant part, provides as follows:

“70 Sexual intercourse or performing indecent acts with young persons

(1) Subject to subsection (2), any person who—

- (a) has extra-marital sexual intercourse with a young person; or
- (b) commits upon a young person any act involving physical contact that would be regarded by a reasonable person to be an indecent act; or
- (c) solicits or entices a young person to have extra-marital sexual intercourse with him or her or to commit any act with him or her involving physical contact that would be regarded by a reasonable person to be an indecent act;

shall be guilty of sexual intercourse or performing an indecent act with a young person, as the case may be, and liable to a fine not exceeding level twelve or imprisonment for a period not exceeding ten years or both.

(2) It shall be no defence to a charge of sexual intercourse or performing an indecent act with a young person to prove that he or she consented to such sexual intercourse or indecent act.

(2a) Where extra-marital sexual intercourse or an indecent act occurs between young persons who are both over the age of twelve years but below the age of sixteen years at the time of the sexual intercourse or the indecent act, neither of them shall be charged with sexual intercourse or performing an indecent act with a young person except upon a report of a probation officer appointed in terms of the Children’s Act [*Chapter 5:06*] showing that it is appropriate to charge one of them with that crime.

(3) It shall be a defence to a charge under subsection (1) for the accused person to satisfy the court that he or she had reasonable cause to believe that the young person concerned was of or over the age of sixteen years at the time of the alleged crime:

Provided that the apparent physical maturity of the young person concerned shall not, on its own, constitute reasonable cause for the purposes of this subsection.

...”

However, if there is no consent, the offence becomes that of rape, aggravated indecent assault or indecent assault as the case may be, in terms of sections 65, 66 and 67 of the Criminal Code, respectively.

4. EXTRA-MARITAL SEXUAL INTERCOURSE IN THE CONTEXT OF SECTION 70 OF THE CRIMINAL CODE

A reading of section 70 (1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] reveals that the offence of “sexual intercourse with young persons” will only attach where the perpetrator has “extra-marital sexual intercourse” with a young person. The question naturally is: what amounts to extra-marital sexual intercourse?

Quite literally, the meaning and import of that phrase is that one is only guilty of the offence if the sexual intercourse with a young person happens outside the context of a marriage. If the perpetrator is married to that young person, then there is no offence. In legal terms, it would be a defence to a charge under section 70 to argue that “we were married”.

In order to understand this provision in today’s terms, one has to look at the historical context of the provision. Section 70 was crafted in the era of the 1979 Constitution which has since been replaced by the Constitution of Zimbabwe Amendment (No. 20) Act of 2013. Prior to 2013, the law allowed children, that is, any boy or girl below the age of 18, to marry or to be married. The matrimonial legislation, being the Marriage Act [*Chapter 5:11*] and the Customary Marriages Act [*Chapter 5:07*] permitted and regulated the manner in which children could be married. However, that position was changed with the introduction of section 78 of the Constitution of Zimbabwe, 2013, which section provides as follows:

“78 Marriage rights

- (1) Every person who has attained the age of eighteen years has the right to found a family.
- (2) No person may be compelled to enter into marriage against their will.
- (3) Persons of the same sex are prohibited from marrying each other.”

This provision read literally and purposively means that anyone below the age of 18 years cannot marry and be married, and there are no exceptions. The age 18 years was taken from the definition of a child in section 81(1) of the same Constitution. This position has been confirmed by the Constitutional Court in the celebrated anti-child marriages judgment of *Mudzuru & Anor v Minister of Justice, Legal and Parliamentary affairs & Ors* CC 12-15 which ruled the relevant provision of the Marriage Act [*Chapter 5:11*] that permitted and facilitated child marriages to be unconstitutional. A harmonised Marriages Bill, 2018 is currently before Parliament which will, among other things, do away with the provisions that were declared unconstitutional by the apex court and expressly prohibit child marriages.

The import of all this is that the phrase “extra-marital” in section 70 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] is now redundant. It can no longer be a defence for a person who commits a sexual act with a young person to plead marriage, for child marriage is now an illegal act. The provision thus begs for alignment with the Constitution.

5. SECTION 64 OF THE CRIMINAL CODE

Section 70 of the Criminal Code, however, does not operate in a vacuum. There is another clause that brings a new dimension to the provision, and that is section 64 of the Criminal Code. In terms of section 64(1) of the Criminal Code, a person who engages in sexual intercourse, anal sexual intercourse or other sexual conduct with a young person of or under the age of 12 shall be charged with rape, aggravated indecent assault or indecent assault, as the case may be, and not with sexual intercourse or performing an indecent act with a young person or sodomy. In terms of section 64(2), the same shall apply in the case of having a sexual act with a young person between 12 and 14, unless there is evidence that the young person (a) was capable of giving consent to the sexual intercourse, anal sexual intercourse or other sexual conduct; and (b) gave his or her consent thereto. The provision in relevant part, for purposes of reference, is as follows:

“64 Competent charges in cases of unlawful sexual conduct involving young or mentally incompetent persons

- (1) A person accused of engaging in sexual intercourse, anal sexual intercourse or other sexual conduct with a young person of or under the age of twelve years shall be charged with rape, aggravated indecent assault or indecent assault, as the case may be, and not with sexual intercourse or performing an indecent act with a young person, or sodomy.
- (2) A person accused of engaging in sexual intercourse, anal sexual intercourse or other sexual conduct with a young person above the age of twelve years but of or below the age of fourteen years shall be charged with rape, aggravated indecent assault or indecent assault, as the case may be, and not with sexual intercourse or performing an indecent act with a young person or sodomy, unless there is evidence that the young person—
 - (a) was capable of giving consent to the sexual intercourse, anal sexual intercourse or other sexual conduct; and
 - (b) gave his or her consent thereto.

...”

We thus see additional protection accorded to the 12-14 years age group.

5.1. Does our law create a form of partial consent?

Section 64 inevitably raises a question: does our law create partial consent of some sort? From the face of it, it does. This then becomes a departure from the general position, on the basis of putative consent. Our law recognises putative consent for those above 12 years of age, although such consent then attracts a lesser offence as opposed to the offence of rape.

If age of consent is 16, why is a separate offence created when a child above 12 years of age consents? Is there discordance in the law?

In terms of our law, if one has sexual intercourse with a young person below 16 but above 12 years of age, that is not rape, but having sexual intercourse with a young person. Other countries call this “defilement”, and they use that term in their statutes and case law.

Thus, in our law, absolute protection is only given to a minor below 12 years of age, in that anyone who has sexual intercourse with a child below 12 years of age is guilty of the offence of rape as opposed to having sexual intercourse with a young person under section 70, whether or not there was consent. This is a function of section 64(1) of the Criminal Code.

5.2. Gendered nature of sexual offences in Zimbabwe

One notices that in terms of sections 64 and 70 of the Criminal Code, a man who commits a sexual act on an underage girl is charged with rape, having sexual intercourse with a young person, or performing an indecent act with a young person, as the case may be, whereas a woman who commits the same acts, whether on a boy or girl, will be charged with “performing indecent acts with young persons” or aggravated indecent assault, as the case may be. A woman cannot be charged with the offence of rape or of “having sexual intercourse” with a young person.

Section 65 provides for the offence of rape as follows:

“65 Rape

- (1) If a male person knowingly has sexual intercourse or anal sexual intercourse with a female person and, at the time of the intercourse -
 - (a) the female person has not consented to it; and
 - (b) he knows that she has not consented to it or realises that there is a real risk or possibility that she may not have consented to it;he shall be guilty of rape and liable to imprisonment for life or any shorter period.

...”

The provision refers to “a male person”. However, when a woman is involved, she will be charged with aggravated indecent assault under section 66 of the Criminal Code. A male

person can also be charged with aggravated indecent assault and both a male and a female person can be charged with indecent assault (under section 67 of the Criminal Code).

This gendered approach to sexual offences is an approach Zimbabwe inherited from English law. However, several countries that adopted a similar approach have since changed that position, removing the gendered approach to sexual offences. Namibia and South Africa, for instance, have since changed that position through amendments to their respective sexual offences penal laws.¹

One may argue that the gendered distinction currently existing in our law is immaterial given that penalties are similar for both male and female perpetrator under each of the respective sections 65, 66, 67 and 70 of the Criminal Code. As similar as the penalties may be, nomenclature is a form of power, and has an undeniable effect on societal perception of justice. To the society, saying “rape” in respect of a child, and saying “indecent act” in respect of another, are two different things to which society may attach varying degrees of reprehensibility. The cliché “*What’s in a name?*” is apt here. The question is whether the gendered distinction of sexual offences in Zimbabwe serves any legitimate purpose, or passes the test of constitutionality given the non-discriminatory approach of the Constitution. The answer seems to be a “no” on both counts.

6. HOW DO OTHER COUNTRIES FARE WITH THE AGE OF CONSENT?

While putting in place an age of consent is almost a universal approach, there is no global uniformity as to what the benchmark age is. The legal ages at which one is deemed capable of agreeing to sexual activities ranges from 11 to 21 years in different countries around the world. Generally, the age of consent to sexual activity is not clearly set out in law, but is inferred from criminal laws that criminalise sexual activity with individuals below a specific age.² Below is an outline of the positions in some countries of the world:

| AGE (YEARS) | COUNTRY/COUNTRIES | REGION(S) |
|-------------|---|----------------|
| 11 | Nigeria | Africa |
| 12 | Angola, Philippines | Africa Asia |
| 13 | Japan, Burkina Faso, Comoros Islands, Niger, Sahrawi Arab Democratic Republic | Asia Africa |

¹ See for Namibia the Combating of Rape Act 8 of 2000 and for South Africa the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

² SRHR Africa Trust (SAT) “Age of Consent: Global Legal Review” page 12. Available at <https://www.trust.org/contentAsset/raw-data/b4e4a24b-f66d-4170-aa46-6713e038e139/file>. See also <https://www.ageofconsent.net/what-is-age-of-consent>.

| | | |
|-------|---|---|
| 14 | 32 countries, including: Albania, Austria, Bangladesh, Bolivia, Brazil, China, Eritrea, Italy, Germany, Hungary, Myanmar, Columbia, Portugal | Europe South America |
| 15 | 26 countries, including: Greenland, Iceland, Aruba, Croatia, North Korea, Poland | Mostly Europe |
| 16 | 76 countries, including: United States, United Kingdom, Canada, Russia, Taiwan, South Africa, Nepal, Mongolia, Lesotho | Africa North America Europe |
| 17 | Cyprus, Ireland, Mexico, Nauru | Europe Central America Oceania |
| 18 | 40 other countries, among them: Kenya, Iraq, Nicaragua, Vatican City, Vietnam, Argentina, Rwanda, India, Guatemala | Africa Europe Asia |
| 19 | Niue | South Pacific Ocean |
| 20 | South Korea | Asia |
| 21 | Bahrain | Middle East |
| Other | 13 nations do not have a legal age of consent and people in these countries can only engage in sexual activities if they are married. These countries have a predominantly Islamic population and include: Sudan, Libya, Iran, Afghanistan, Kuwait, Maldives, Pakistan, Oman, Palestine, Saudi Arabia, Qatar, the United Arab Emirates, Yemen. | North Africa Middle East South Asia |

The following is discernible from the table above:

- The majority of the countries of the world have the ages of consent at 16 and 18 years respectively.
- Only three countries have the age of consent above 19 years - Niue (19), South Korea (20) and Bahrain (21).
- There are 13 nations which do not have a legal age of consent and people in these countries can only engage in sexual activities if they are married. These countries have a predominantly Islamic population, situated in the Arab nations of North Africa, the Middle East, as well as South Asia.
- The age of consent does not necessarily follow regional patterns. Each region may have countries with disparately different ages of consent. The exception is the Arab world, particularly in the Middle East, where a significant number of countries in that

region have no specific legal age of consent and people in these countries can only engage in sexual activities if they are married.

In some countries, the age of consent is gender specific:

- Zambia and Malawi, for example, criminalise defilement, defined as sexual intercourse with **a girl** below the age of consent. In Zambia and Malawi, defilement provisions do not, therefore, apply to boys below the age of consent, unlike in Zimbabwe and South Africa. Other countries that followed a similar position have since reviewed or reformed their laws and adopted gender-neutral provisions such as Uganda and Kenya.
- On the other hand, it used to be the position in other countries to have different ages of consent for girls and boys.

International guidelines however suggest the following:

- Countries should clearly provide for the age of consent to sexual activity in law;
- The age of consent to sexual activity should be appropriate, taking into account the evolving capacity, age and maturity of young people; and
- The age of consent to sexual activity should be non-discriminatory on the basis of, among other things, gender and marital status.³

7. WHAT ARE THE CHALLENGES WITH THE AGE OF CONSENT IN ZIMBABWE AS IT CURRENTLY STANDS?

It is a notorious fact for recognition that children in Zimbabwe - as elsewhere - are indulging in sexual activity from an early age. This raises the question of access to contraceptives, termination of pregnancy, and other sexual and reproductive health services. In Zimbabwe,

³ SRHR Africa Trust (SAT) “Age of Consent: Global Legal Review” page 11. Available at <https://www.trust.org/contentAsset/raw-data/b4e4a24b-f66d-4170-aa46-6713e038e139/file>. The report records as follows: The CRC Committee has noted that countries who have ratified the CRC are required to ensure that specific legal provisions are provided for under domestic law that clearly set a minimum age for sexual consent. Further, the CRC Committee notes that the minimum age for sexual consent should be the same for males and females and that the minimum age should reflect the evolving capacity, age and maturity of the child. (Committee on the Rights of the Child (2003) General Comment No 4 (2003) Adolescent Health and Development in the Context of the Convention on the Rights of the Child, 1 July 2003, CRC/GC.2003/4 at para 9). General Comment No 22 (2016) on the Right to Sexual and Reproductive Health (UN Committee on Economic, Social and Cultural Rights (2016) General Comment No. 22 (2016) on the Right to sexual and reproductive health, 4 March 2016, E/C.12/GC/22) stresses the need for non-discrimination in the context of the right to sexual and reproductive health; (CESCR (2016) General Comment No 22 (2016) at para 23) on this basis laws on Age of Consent to sex should also ensure they apply uniformly to all persons, irrespective of sexual orientation, gender identity or intersex status.

there are age-related barriers to access to sexual and reproductive health services (SRHS). These barriers are outlined below:⁴

- Currently, there is no legislation that specifies the age limit below which parental consent is required to receive sexual and reproductive health services in general. Practice has however evolved a policy of its own: the common practice is that, as with many other health services, parental consent is required to provide sexual and reproductive health services, to a child under 16 years. Because a child under the age of 16 years cannot consent to sexual intercourse at law, it is then presumed that a child under the age of 16 years does not need contraceptives or other SRHS, which is a belief that prejudices children, as will be made clear below. This is because children between 12 and 16 years can among themselves have consensual sexual intercourse without offending any penal provision. That legal position aside - and most children are in fact not aware of that legal position - it is fact that children are engaging in sexual activity among themselves at early ages. Such children require access to sexual and reproductive health services as an intervention.
- For general medication, pharmacies in Zimbabwe require the parents and/or guardians to be present, or a written order signed by the parents or guardians before any medication can be dispensed to a child under 16 years. This includes contraceptives which are a form of medication, except for condoms. Any person above the age of 16 years can, without parental consent and without any challenges, access medical treatment, including contraceptives.
- As regards access to contraceptives that are in the form of barrier methods, such as condoms, there are no age restrictions as these are readily available over the counter, without parental consent being required.
- In terms of the Termination of Pregnancy Act [*Chapter 15:10*], abortion is only permitted in certain circumstances that include when a child has been sexually abused and a certificate has been issued by a magistrate of a court in the jurisdiction in which the pregnancy is to be terminated.
- The age of consent for cervical screening, which is related to sexual and reproductive health, is 16 years and requires no parental consent when the child is above that age. However, an individual younger than 16 years does not require parental consent if she is considered to be a “mature minor”. That determination is, of course, subjective to the health services provider.
- Similarly, health service providers will release HIV test results directly to a patient from the age of 16 years. If the patient is under the age of 16 years, an assessment of maturity will be carried out by the health service provider to determine whether the results can be released directly to him or her. Again, that assessment is subjective.

⁴ See SRHR Africa Trust (SAT) “Zimbabwe Age of consent Legal Review” Chapter Three: Access to contraception services and commodities at page 5.

Insofar as general access to medical services is concerned, two legislative provisions are relevant in this regard. The first provision is section 52(2) of the Medicines and Allied Substances Control (General) Regulations, 1991, Statutory Instrument 150 of 1991 (made in terms of the Medicines and Allied Substances Control Act [*Chapter 15:03*]) which provides as follows:

“No person shall sell any medicine to any person apparently under the age of 16 years —

- (a) in the case of a household remedy or a medicine listed in Part I of the Twelfth Schedule, except upon production of a written order signed by the parent or guardian of the child known to such person;
- (b) in the case of any other medicine not referred to in paragraph (a) except upon production and in terms of a prescription issued by a medical practitioner, dental practitioner or veterinary surgeon.”

The second provision is section 76 of the Children’s Act [*Chapter 5:06*]. This provision is to the effect that an order may be made by the magistrate where the parent or guardian has unreasonably refused to consent to the medical treatment or surgery of a minor child. The section states as follows:

“76 Consent to surgical or other treatment

- (1) Where the consent of a parent or guardian is necessary for the performance of any dental, medical, surgical or other treatment upon a minor and the consent of the parent or guardian is refused or cannot be obtained within a period which is reasonable in the circumstances, application may be made to a magistrate of the province where the minor is or is resident for authority to perform the treatment.
- (2) A magistrate to whom an application in terms of subsection (1) is made may—
 - (a) after due inquiry and after affording the parent or guardian concerned a reasonable opportunity of stating his reasons for refusing to give the necessary consent or without affording such person such opportunity if his whereabouts are unknown or if in the circumstances it is not reasonably practicable to afford him such opportunity; and
 - (b) if satisfied that any dental, medical, surgical or other treatment is necessary or desirable in the interests of the health of the minor; by order in writing authorize the performance at a hospital or other suitable place upon the minor concerned of such dental, medical, surgical or other treatment as may be specified in the order.

...”

Section 76 presupposes that consent is a prerequisite. Both the provisions above have been used to give legal backing to the established practice, that a minor under 16 years old cannot access sexual and reproductive health services and treatment without parental consent.

8. ACCESS TO SRHS AND THE CURRENT AGE OF CONSENT: ARE THEY MUTUALLY EXCLUSIVE?

A question that rings pertinent, given the above discussion, is whether the current age of consent and access to sexual and reproductive health services to those below the age of consent are mutually exclusive. Those who advocate for limitation of access to sexual and reproductive health services to those below the age of consent seek to fortify their views on the misplaced presumption that children below 16 are not having sexual intercourse, and any sexual intercourse below that age is illegal hence would come with a police report for medical access, or with adult company. But this belief or presumption poses some challenges. One such challenge is that the law does not in fact penalise consensual sexual activity among minors between the ages of 12 to 16 years. This legal position essentially creates an exception to the rule or norm which prohibits someone under 16 years of age from having sexual intercourse. Yet from an access to health perspective, coupled with the best interests of the child as provided for in section 81(2) of the Constitution, it would defy notions of child protection to deny such children access to sexual and reproductive health services in the name of protecting the very children – when they are in fact engaging in consensual sexual activity among themselves. The question we pose is: given that children are in fact engaging in consensual sexual activity among themselves, is it in their best interests that they be denied access to sexual and reproductive health services, or that they be granted access?

8.1. Legislation

Access to health care generally, and access to health care for children in particular, falls squarely within the realm of constitutional regulation. No discussion on this subject would be complete without reference to the constitutional framework. The general access to health care provision in the Constitution is section 76, which provides as follows:

“76. Right to health care

1. Every citizen and permanent resident of Zimbabwe has the right to have access to basic health-care services, including reproductive health-care services.
2. Every person living with a chronic illness has the right to have access to basic healthcare services for the illness.
3. No person may be refused emergency medical treatment in any health-care institution.
4. The State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of the rights set out in this section”.

Access to reproductive health-care services is made a right. Any limitation of such right thus must be in terms of the general limitations or savings clause of the Constitution, which is

section 86.⁵ However, in addition, there is an internal limitation in section 76, which is the progressive realisation of the right of health care, “within the limits of the resources available”.

When it comes to children, section 81(1)(f) of the Constitution captures the right to health care for children in the following terms:

“81. Rights of children

1. Every child, that is to say, every boy and girl under the age of eighteen years, has the right-

...

f. to education, health care services, nutrition and shelter;

...

2. A child's best interests are paramount in every matter concerning the child.

...”

The “right to health care services” captured in that provision is broad and does, of course, encompass sexual and reproductive health. A key notable distinction between section 81(1)(f) and section 76 is that unlike the latter, section 81(1)(f) has no internal limitation. This means this right is not qualified by resource constraints, or anything, outside a

⁵ The limitation of rights in Zimbabwe works as follows:

“86. Limitation of rights and freedoms

1. The fundamental rights and freedoms set out in this Chapter must be exercised reasonably and with due regard for the rights and freedoms of other persons.
2. The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors, including—
 - a. the nature of the right or freedom concerned;
 - b. the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest;
 - c. the nature and extent of the limitation;
 - d. the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others;
 - e. the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and
 - f. whether there are any less restrictive means of achieving the purpose of the limitation.
3. No law may limit the following rights enshrined in this Chapter, and no person may violate them—
 - a. the right to life, except to the extent specified in section 48;
 - b. the right to human dignity;
 - c. the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment;
 - d. the right not to be placed in slavery or servitude;
 - e. the right to a fair trial;
 - f. the right to obtain an order of habeas corpus as provided in section 50(7)(a).”

limitation permissible under section 86 of the Constitution. The right is thus immediately realisable.

This position codifies the international position which Zimbabwe ascribes to, by virtue of its ratification of the United Nations Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child (ACRWC). The UNCRC in Article 24(1) provides for the right to health as follows:

“States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.”.

The ACRWC provides as follows:

“Article 14: Health and Health Services

1. Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health.
2. States Parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures:
...
(b) to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
...”

It thus follows that the right to health as provided for in both the UNCRC and the ACRWC include the right to SRHS. Similarly, the right to health captured in section 81(1)(f) of the Constitution includes the right to SRHS. The Committee on Economic, Social and Cultural Rights in General Comment No. 22 on the right to sexual and reproductive health (2016) states as follows at para 1.1.:

“The right to sexual and reproductive health is an integral part of the right to health enshrined in article 12 of the International Covenant on Economic, Social and Cultural Rights. It is also reflected in other international human rights instruments.”

In respect to the latter part, the Committee refers to, among other instruments, the Convention on the Rights of the Child (1989) articles 23-25 and 27, as providing for that right, as read together with the Committee on the Rights of the Child (CRC) General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health (2013). According to the Committee on Economic, Social and Cultural Rights:

- “49. States parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of the right to sexual and reproductive health. In this

regard, States parties should be guided by contemporary human rights instruments and jurisprudence, as well as the most current international guidelines and protocols established by the UN agencies, in particular WHO and UNFPA. The core obligations include at least the following:

...

- (f) To ensure all individuals and groups have access to comprehensive education and information on sexual and reproductive health, that is non-discriminatory, non-biased, evidence-based and taking into account the evolving capacities of children and adolescents;

...”

The Committee on the Rights of the Child (CRC)’s General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health (2013) (Part II. Principles and premises for realizing children’s right to health) under the principle of the right to non-discrimination states as follows:

“All policies and programmes affecting children’s health should be grounded in a broad approach to gender equality that ensures young women’s full political participation; social and economic empowerment; recognition of equal rights related to sexual and reproductive health; and equal access to information, education, justice and security, including the elimination of all forms of sexual and gender-based violence.”

Still in the same General Comment, under the Normative Content of article 24 of the UNCRC (Part III of the General Comment), the Committee pertinently states that:

“Children’s right to health contains a set of freedoms and entitlements. The freedoms, which are of increasing importance in accordance with growing capacity and maturity, include the right to control one’s health and body, including sexual and reproductive freedom to make responsible choices. The entitlements include access to a range of facilities, goods, services and conditions that provide equality of opportunity for every child to enjoy the highest attainable standard of health.

“In accordance with their evolving capacities, children should have access to confidential counselling and advice without parental or legal guardian consent, where this is assessed by the professionals working with the child to be in the child’s best interests. States should clarify the legislative procedures for the designation of appropriate caregivers for children without parents or legal guardians, who can consent on the child’s behalf or assist the child in consenting, depending on the child’s age and maturity. States should review and consider allowing children to consent to certain medical treatments and interventions without the permission of a parent, caregiver, or guardian, such as HIV testing and sexual and reproductive health services, including education and guidance on sexual health, contraception and safe abortion.

“States should ensure that adolescents are not deprived of any sexual and reproductive health information or services due to providers’ conscientious objections.”

What emerges from the above is the unequivocal understanding that the right to health for children includes the right to sexual and reproductive health care. Taken in context, this conforms to the principles of life, survival and development of the child; non-discrimination and the best interests of the child - principles which underlie the very fabric of the UNCRC and the ACRWC. Any limitation of the right, which is captured in section 81(1)(f) of the Constitution has to pass constitutional muster in that it must meet the stipulations and criteria in section 86 (the limitations clause). It would appear such limitation comes in the form of section 52(2) of the Medicines and Allied Substances Control (General) Regulations. For unconstrained access to health care, it would appear that section 52(2) of the Medicines and Allied Substances Control (General) Regulations, 1991 would need revisiting to address the catch-all approach that it takes insofar as it demands parental consent for a person below 16 years of age to access “a household remedy or a medicine listed in Part I of the Twelfth Schedule”, without a written order signed by the parent or guardian of the child known to such person. The Twelfth Schedule in the Regulations is quite a broad list of medication. What such a requirement does is simply to cut access to health care from children, bearing in mind that most children would simply not inform their parents or guardians when in need of sexual and reproductive health care. The question arising is whether such a limitation is desirable, in terms of whether it serves to advance or promote the best interests of children insofar as sexual and reproductive health care is concerned, bearing in mind the context given above.

The new Public Health Act [*Chapter 15:17*] which was gazetted in August 2018 partially addresses the issue of consent. The Act defines a child as a person under eighteen years of age, in line with the Constitution, 2013. This new Act was passed to replace, update and align to the Constitution the old 1924 Public Health Act. The Act introduces a number of features, among them rights and duties in public health to align the law to section 76 of the Constitution. The preamble to the Act makes reference to the Bill of Rights in respect of sections 76 and 81(1)(f) of the Constitution, thereby placing a premium on the right to health in the Constitution. In that Act, the issue of “informed consent” is addressed in the following manner:

“35 Consent of user

- (1) For the purposes of this section "informed consent" means consent for the provision of a specified health service given by a person with legal capacity to do so and who has been informed as contemplated in section 34.
- (2) A health service shall not be provided to a user without the user's informed consent unless-
 - (a) the user is unable to give informed consent and such consent is given by a person mandated by the user in writing to grant consent on his or her behalf or authorised to give such consent in terms of any law or court order;
 - (b) the user is unable to give informed consent and no person is mandated or authorised to give such consent, and the consent is given by the spouse or partner of the user or, in the absence of such spouse or partner, a parent,

- grandparent, an adult child or a brother or a sister of the user. in the specific order as listed;
- (c) the provision of a health service without informed consent is authorised in terms of any law or court order;
 - (d) failure to treat the user, or group of people which includes the user will, in the reasonable opinion of the health practitioner, result in a serious risk to public health; or
 - (e) any delay in the provision of the health service to the user might result in his or her death or irreversible damage to his or her health and the user has not expressly or by conduct refused that service.
- (3) A health practitioner shall take all reasonable steps to obtain the user's informed consent.
- (4) Any health practitioner who fails to comply with subsections (2) and (3) shall be guilty of an offence and liable to a fine not exceeding level ten or imprisonment not exceeding one year or both such fine and such imprisonment.”

This provision goes hand in hand with another provision, which is section 44 of the same Act:

“44 Participation in decisions

- (1) A user has the right to participate in any decision affecting his or her personal health and treatment.
- (2) If the informed consent of the user is given by a person other than the user, such person must, if possible, consult the user before giving the required consent.
- (3) If a user is unable to participate in a decision affecting his or her personal health and treatment, he or she must be informed after the provision of the health service in question.”

Essentially, the Act retains the position that children require parental or adult consent to access medical health services in terms of exiting law, although new provisions are added. These additional provisions give medical practitioners a leeway to treat children when an adult has not provided the informed consent on behalf of the child in situations where failure to treat the child, or group of people which includes the child, will, in the reasonable opinion of the health practitioner, result in a serious risk to public health; or any delay in the provision of the health service to the child might result in his or her death or irreversible damage to his or her health. [See subsection 35(2) paragraphs (d) and (e) above]. Added to the new Act is the right to be heard for a child, who must be consulted before an adult gives consent. This accords with the right to be heard – which is one of the four cardinal principles of child protection.

Underlying any legal reform should be a practical realisation and acceptance that children are, in fact, engaging in sexual activity among themselves. Coming with that are unwanted pregnancies, and sexual and reproductive health issues, which are matters we cannot afford to ignore ironically in the name of protecting the children.

8.2. Protection of children from medical negligence

At common law, children below the age of 16 years have no capacity to enter into binding contracts. In addition, such children have no capacity to institute legal proceedings on their own without parental assistance, or the assistance of a legal guardian. Having children under 16 years access sexual and reproductive health services on their own is not and should not be a problem, for reasons enunciated throughout this document. However, a key question lingers for attention: given the incapacity at law of children to initiate legal proceedings on their own, what would the legal regime be surrounding medical negligence and liability when it involves a person who is under 16 years old who accesses sexual and reproductive health services without parental or guardian consent? In other words, how is the child protected from medical negligence? Who sues and who is liable?

One reading into these questions may lead one to arrive at the conclusion that section 52(2) of the Medicines and Allied Substances Control (General) Regulations, 1991 may have been inserted to protect the health professionals against such tricky situations, as with section 76 of the Children's Act [Chapter 5:06]. One could also go further and argue that such provisions provide children with some form of shield from medical negligence and unintended consequences, given their immaturity to form informed opinions in the first place regarding their treatment needs and options when they access medical treatment while unrepresented and without adult consent.

However, this is not and cannot be an end in itself. What needs to be addressed is, if children are indulging in widespread consensual sexual activity among themselves, what health care provisions should be put in place for them, and what mechanisms should be put in place to protect them in cases of medical negligence? The fundamental principle of child law and protection in our country is that "a child's best interests are paramount in every matter concerning the child", in terms of section 81(2) of the Constitution. Whatever position is adopted must, therefore, ensure that it is in advancement of the best interests of the child in the following terms:

- a. The reality of adolescent and child sexuality must be acknowledged. Additionally, while early sexual activity is and must be discouraged, the reality of it must be met with sex education as opposed to criminalising it and withholding health services from the children;
- b. The constitutional right to access health services must be honoured, and that right includes sexual and reproductive health care;
- c. There must be recognition of the immaturity of children and their inability at times to make informed decisions on medical or sexual and reproductive health choices, even in the presence of professional advice; and

- d. Unhindered access to sexual and reproductive health care by children below 16 years must be ensured but it must be provided and managed in such a way that children are protected from medical negligence and poor choices. Furthermore, these children must have access to redress – bearing in mind their legal incapacity to take legal action if unrepresented.

Ultimately, it is an exercise in proportionality, and a fine balance must be struck that achieves greater and enhanced protection of children, and the advancement of their best interests, ensuring that children are educated to make well-informed decisions where parental guidance is lacking. The caution to be sounded is that simply attending to one facet of the issue while neglecting the rest may result in legal inconsistencies that would cause challenges down the line, in an age in which the discourse is to ensure harmonisation and consistency of laws and of the legal protection afforded to people.

9. SEXUAL INTERCOURSE INVOLVING TWO YOUNG PERSONS

When it comes to consensual sexual intercourse involving two young persons, that is, young people between the ages of 12 and 16 years, our law takes the position that no criminal offence arises, based on a reading of the provisions of the Criminal Code. Defilement and statutory rape offences are unique in that there is consent, but nonetheless the statute creates an offence. The reason for that is to protect children from sexual exploitation by adults. When it is two children who engage in consensual sexual conduct, however, they are both victims of premature sex, and the question of exploitation may only arise in exceptional circumstances.

In Zimbabwe, as with most jurisdictions in Africa, the legislation was silent on the treatment of young people who engage in consensual sexual activity with each other. Section 70 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] did not in express terms address the question of what transpires when two young people between the ages of 12 and 16 years engage in a consensual sexual activity. However, the courts made a definitive pronouncement on the subject: a young person under the age of 16 years cannot be charged with “sexual intercourse or performing indecent acts with young persons” under section 70 of the Criminal Code where the complainant is above 12 years and has consented to the act. Where the act is non-consensual, however, such a young person will be charged with rape, aggravated indecent assault or indecent assault as the case may be, bearing in mind the criminal capacity of juveniles in sexual offences and for criminal offences generally.

The seminal case on the subject is *State v CF (A Juvenile)* HH 143-11 before Justices Kudya and Chitakunye in the High Court. In that review matter, the court had to decide whether under section 70(1)(a) of the Criminal Code, a male young person can be competently convicted of engaging in extra-marital sexual intercourse with a female young person. In

that case, a 15-year-old boy who was in Form 3 fell in love with a 14-year-old form 1 girl at a secondary school which they both attended. They had consensual sexual intercourse on many occasions. The matter came to light when the girl fell pregnant. The boy was then charged and convicted on his own plea of guilty of contravening section 70(1)(a) of the Criminal Law Code. He was sentenced to receive a moderate corporal punishment of 3 cuts with a rattan cane. The sentence was duly carried out even before the record was submitted on review. The judge asked the trial magistrate whether the conviction was competent at law, and the magistrate's response was: "*After going through the relevant section and other literature, I concede that I erred in convicting the accused person who is also a minor.*" The judge then remarked that in his discussions with other judges, it appeared that there were many such cases that were coming on review. Accordingly, he wrote to the Attorney-General seeking his opinion on the matter, and the Attorney-General's response was reproduced in full in the judgment as follows:

"The probation officer's report, which forms part of the record had the following findings and recommendations:

'Both juveniles will benefit from pre-marital sex counselling as they are both victims of it. Taking the girl to live with the boy would not yield fruitful results as they are both children who still need parental guidance to grow up physically and emotionally. In view of the above highlights, it is respectively recommended that the charges be dropped and the juvenile continue in school, [which] will guarantee a brighter future to and better control of the juvenile'.

Notwithstanding the probation officer's recommendations, both the trial prosecutor and the presiding magistrate seem not to have paid any due regard to the probation officer's report.

Be that as it may we have noted that s 61 of the Act defines 'young person' as 'a boy or girl under the age of sixteen years.' The offence in s 70 of the Act seeks to protect young persons from adults who take advantage of their immaturity by engaging with them in extra marital sexual activities. It is envisaged that young persons are not mature enough to appreciate the consequences of such activities. That is why the probationer officer remarked that both the boy and girl were victims of pre-marital sex.

It is clear from the wording of the legislation that not only girls are protected but young male persons are protected as well. In short, no offence is created where a young male person engages a young female person in any consensual sexual act. See the remarks of NDOU J in *S v Juvenile* (RPS) HC 18/03 that:

'Whilst it might be a bitter pill to swallow for parents, youngsters aged under sixteen can freely indulge in sexual activities outside criminal sanction of the Sexual Offences Act as long as the sexual act is consensual. This does not seem ideal in this era of HIV/AIDS. There is nothing criminal about accused's conduct although morally and religiously reprehensible'.

The facts in that case involved a 15-year-old boy who had sexual intercourse with a 15 year old girl. The conviction was set aside. The offence of having sexual intercourse with a young person under the Sexual Offences Act, now repealed, is the precursor to s 70 of the Criminal Law (Codification and Reform) Act [Cap 9:23]. However, s 70 of the Act did not change the position pronounced by NDOU J, supra.

It is our respectful view that if a proper consideration and due regard had been given to the above cited case; prosecution would not have been warranted in the circumstances.

Accordingly, the Attorney General is unable to support the conviction.”

The court agreed with the observations and conclusions of the Attorney-General (now Prosecutor-General) and proceeded to quash the conviction and sentence imposed on the juvenile, and the Registrar was directed to bring this review judgment to the attention of both the Chief Magistrate and the Director of Public Prosecutions for distribution to both magistrates and prosecutors throughout the country.

This decision is the *locus classicus* on the subject of a young person who has consensual sexual intercourse with another young person, where both are between 12 and 16 years of age. The decision was affirmed by two other judges of the High Court in the case of *S v LC (A Juvenile)* HH 34-14, before Justices Tagu and Tsanga, a case factually similar to that of *S v CF (A Juvenile)* HH 143-11. In *S v LC (A Juvenile)*, the matter came on review on a question of whether a 15-year-old accused who was convicted of consensual sexual intercourse with a 14-year-old girl had been competently charged and convicted. The two children were in a relationship. The boy was charged and convicted on his own plea of guilty of contravening section 70(1)(a) of the Criminal Code. He was sentenced to 3 months’ imprisonment which was wholly suspended on condition that the accused performed 105 hours of community service. The court made reference to the earlier decisions of *S v CF (A Juvenile)* HH 143-11 by Kudya J as well as the case of *S v Juvenile (RPS)* HC 18-03 per Ndou J, where the position was articulated that prosecution would not have been warranted in a case such as this. Although the juvenile had already served out his sentence, the court quashed both the conviction and sentence imposed on the juvenile.

This position taken by the courts was subsequently codified in a 2016 amendment to section 70 of the Criminal Code, with the insertion of section 70(2a) which states as follows:

“(2a) Where extra-marital sexual intercourse or an indecent act occurs between young persons who are both over the age of twelve years but below the age of sixteen years at the time of the sexual intercourse or the indecent act, neither of them shall be charged with sexual intercourse or performing an indecent act with a young person except upon a report of a probation officer appointed in terms of the Children’s Act [Chapter 5:06] showing that it is appropriate to charge one of them with that crime.”

The insertion provides a new dimension, which is that a probation officer may recommend prosecution for one of the young persons.

Comparative perspectives: South Africa and Kenya

South Africa is among the jurisdictions that used to criminalise consensual sexual intercourse among young people. However, reform was brought through a Constitutional

Court ruling. The Constitutional Court decriminalised consensual sexual intercourse in the case of *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2014 (2) SA 168 (CC). The issue before the court was whether sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act of South Africa were unconstitutional for criminalising consensual sexual conduct between adolescents in the age group 12 to 16 years. The court held that imposing criminal liability on adolescent sexual conduct that is otherwise normative had the effect of harming the adolescents they intend to protect. This harm constituted a deep encroachment on the rights of the child, including, dignity and privacy, and is against the best interests of the child principle. The court found the law to be unconstitutional, and directed Parliament to decriminalise consensual sexual activity between adolescents. The law was amended and subsequently passed in 2015. Furthermore, the new law decriminalised consensual sexual activity where the older adolescent is above 16 years but below 18 years, provided the age difference between the partners is not more than 2 years.

Kenya, however, holds a different view. In *CKW v Attorney General & Director of Public Prosecutions*, Petition No. 6 of 2013, the High Court of Kenya considered a challenge to defilement provisions of the Sexual Offences Act, Act 3 of 2006. Section 8 of the Sexual Offences Act defines defilement as an act of sexual penetration with a child (under Kenyan law, a child is defined as a person below the age of 18 years). A 16-year-old boy who was being prosecuted in the magistrate's court for committing the offense of defilement for having consensual sex with a girl of 16 years, petitioned the High Court to declare Sections 8(1) and 11(1) of the Sexual Offences Act invalid to the extent that they are inconsistent with the rights of children as protected under the Constitution of Kenya, for criminalising consensual sexual conduct between adolescents below the age of 18 years. The High Court of Kenya decided that criminalisation of consensual sexual conduct between adolescents was in the best interests of the child, to protect children from harmful acts of sexual activity. In making its determination, it considered the decision of the South African Constitutional Court in the *Teddy Bear Clinic* case.

In arriving at these diametrically opposed positions, both the South African and Kenyan courts claimed to be advancing the best interests of the child. *These two decisions are representative of the policy approaches that the states have adopted toward adolescent consensual sexual conduct: a punitive and a non-punitive approach.*⁶ Ultimately, the approach each country takes comes down to a policy direction which that country adopts for itself.⁷

Godfrey Dalitso Kangaude and Ann Skelton "(De)Criminalizing Adolescent Sex: A Rights-Based Assessment of Age of Consent Laws in Eastern and Southern Africa" (2008)

<https://journals.sagepub.com/doi/full/10.1177/2158244018806036>.

⁷ See *S v Masuku* HH 106-15 wherein Justice Tsanga appears to confirm this where she states as follows:

"To stem the dangers that arise for girls in particular from teenage sex, part of the answer would appear to lie in policy makers and society accepting the prevalence of youth sex and fashioning

What has come to be generally accepted globally, however, is that the best interests of the child are not served by labelling consensual sex of young people as criminal behaviour, and the move is now to reform age of consent laws to decriminalise consensual sex between adolescents in accordance with recognised rights of the child. According to Professor Pierre De Vos, “*the use of criminal law as a parenting tool in matters relating to the sexual development of teenagers is impossible to square with the rights guaranteed in the Constitution*”.⁸

In the *Teddy Bear Clinic* case, Justice Sisi Kampepe emphasised that the challenge with criminalising normative adolescent sexual conduct is that it drives adolescent sexual behaviour underground and this makes it very difficult for adults to provide affirmative support and guidance on matters of sexuality to the adolescents.

At international law level, the Committee on the Rights of the Child (CRC), in its General Comment 20 on the implementation of the rights of the child during adolescence (CRC General Comment 20),⁹ enjoined State parties to balance protection and evolving capacities when defining an acceptable minimum legal age for sexual consent. The CRC stated that “*States should avoid criminalizing adolescents of similar ages for factually consensual and non-exploitative sexual activity*”. A rights-based approach to regulating sexual conduct between adolescents is crucial. The principle of the development of the child requires that the increasing sexual awareness of the child and the evolving capacity of the child to engage in sexual activity should receive positive affirmation rather than a negative appreciation. This entails that adolescents receive the necessary education, and that from early in their lives, they develop equitable attitudes to gender and sexuality.¹⁰ The reality is that juvenile sexuality is a fact and a reality, and an apt response is needed. Given the context of young people increasingly engaging in sexual conduct among themselves, criminalising such sexual activity has implications beyond just the criminal sanctions: it shapes attitudes and the sexual health systems’ response in the country that will inevitably not provide support, treatment and sex education to the minors involved in the criminalised acts. Criminalising such conduct would most likely perpetuate stigma against children who engage in sexual activity, and this has a potentially negative influence on the attitudes of parents, teachers and health providers toward sexually-active children.¹¹

appropriate interventions. Availing contraceptive protection is one such intervention. A more rigorous and open approach to what is actually taught as sexual education in schools is another”.

⁸ Pierre De Vos “Teen sex: The law can’t replace parenting” *Daily Maverick* 10 October 2013, <https://www.dailymaverick.co.za/opinionista/2013-10-10-teen-sex-the-law-cant-replace-parenting/>

⁹ Committee on the Rights of the Child (CRC) General Comment 20: The implementation of the rights of the child during adolescence UN Doc CRC/C/GC/20 (December 6, 2016).

¹⁰ Godfrey Dalitso Kangaude and Ann Skelton “(De)Criminalizing Adolescent Sex: A Rights-Based Assessment of Age of Consent Laws in Eastern and Southern Africa” (2008) <https://journals.sagepub.com/doi/full/10.1177/2158244018806036>.

¹¹ Godfrey D Kangaude “Adolescent sex and 'defilement' in Malawi law and society” [2017] 24 *AHRLJ* 529-551 at 545.

10. THE 16-18 AGE GROUP

Our Constitution in section 81(1) defines a child or a minor as someone below the age of 18 years. Due to sections 61(1) and 70 of the Criminal Code, however, a child between 16 and 18 years who has consensual sexual intercourse with a young person between 12 and 16 years will be charged and convicted under section 70 of the Criminal Code. Where the complainant is between 12 and 14 years old, the charge of rape should be proffered in terms of section 64(1) of the Criminal Code. Comparatively, alongside theft and unlawful entry, the highest number of cases of children in conflict with the law brought before Zimbabwe's courts are under section 70 – where minors between 16 and 18 years old are having consensual sexual intercourse with young persons between 12 and 16 years old. This statistic is taken from many years of juvenile justice work done by Justice for Children.

Suffice it to give reference to the case of *State v Masuku* HH 106-15. In that case, the High Court of Zimbabwe reviewed the case of a boy of 17 years, who had consensual sexual intercourse with his girlfriend aged 15 years old, and was consequently convicted of the offense of having sexual intercourse with a young person. In her decision, Justice Amy Tsanga questioned the criminalisation of adolescent consensual sexual conduct. She was cognisant of the intention of criminal law to protect adolescents from sexual predation, discourage early sexual debut between adolescents, and to protect them from the risks and harms of sexual intercourse including sexually transmitted infections (STIs) and teenage pregnancies. However, she observed that an unintended consequence of the criminal law was the punishment of young people in romantic relationships, because the law did not distinguish between the predatory adult and the “lover-boy or girl”. In her judgment, she noted that *“Ignoring the reality of consensual sex among teenagers and adopting an overly formalistic approach to the crime can result not only in an unnecessarily punitive sentence, but also a criminal record and stigmatisation as a sex offender”*, and further that *“Sex among peers is a reality of adolescent sexuality. It does not justify a suspended imprisonment term for the teen male offender who has had sex as part of a romantic relationship with a peer”*. Justice Tsanga expressed the view that criminalising minors for having consensual sexual conduct was probably not the best way to achieve the intention of protecting adolescents, especially girls, from harms of sexual conduct. In her words:

“To stem the dangers that arise for girls in particular from teenage sex, part of the answer would appear to lie in policy makers and society accepting the prevalence of youth sex and fashioning appropriate interventions. Availing contraceptive protection is one such intervention. A more rigorous and open approach to what is actually taught as sexual education in schools is another”.

In short, the court recognised the vulnerability of the 16-18 age group in cases of consensual sexual intercourse with a young person as defined in the Criminal Code, as our law does not currently protect such juvenile perpetrators. Yet the 16-18 age group falls squarely within the definition of a child in terms of section 81(1) of the Constitution.

10.1. Close-in-age exemptions

What appears quite obvious from the above is the need to protect children in the 16 to 18 age group. Two solutions are apparent: the first would be to increase the age of consent from 16 to 18 so that those under 18 cannot be prosecuted from having consensual sexual intercourse with those under 18 (but above the age of 12). However, it is pertinent to take note that there have been recommendations that the age of consent should not be raised to above the age of 16.¹²

The second option is to introduce what are referred to as “close-in-age exemptions”. What these exemptions do is that they prevent prosecution of individuals who engage in consensual sexual activity when both participants are significantly close in age to each other, and one or both partners are below the age of consent. Such clauses are popularly referred to as the “Romeo and Juliet laws” in the United States. Some countries in our region have introduced into their laws, the close-in-age exemptions into their criminal statute books. For instance, Namibia does not prosecute adolescents in circumstances where the younger adolescent is below the age of 14 years and the older adolescent is not more than 3 years older, as stated in section 2(2)(d) of the Combating of Rape Act 8 of 2000. However, section 14 of the Combating of Immoral Practices Act 21 of 1980, sets the age of consent at 16 years, with a close-in-age clause of three years. This shows that already at a very early age, children can consent to sex, as long as their partner is not more than three years older. The amended South African Sexual Offences Act law has also done this following the *Teddy Bear Clinic* judgment, albeit putting the close-in-age at 2 years.

11. THE STATUTORY DEFENCE IN SECTION 70 CASES

The crime of defilement is a strict liability offence. Essentially, other than defences that negate voluntary conduct and the defence of compulsion, the only other possible defence is that statutorily created defence. This is a standard across many jurisdictions, including neighbouring countries such as Botswana, South Africa and Malawi. In Zimbabwe, section 70(3) of the Criminal Code provides this statutory defence in the following fashion:

“It shall be a defence to a charge under subsection (1) for the accused person to satisfy the court that he or she had reasonable cause to believe that the young person concerned was of or over the age of sixteen years at the time of the alleged crime:

Provided that the apparent physical maturity of the young person concerned shall not, on its own, constitute reasonable cause for the purposes of this subsection.”

¹² SRHR Africa Trust (SAT)’s global review of the age of consent comes up with a number of recommendations, one of which is “Do not make the age of sexual consent older than 16 years, and do not distinguish between young men and young women”. See SAT “Age of Consent: Global Legal Review” page i. Available at <https://www.trust.org/contentAsset/raw-data/b4e4a24b-f66d-4170-aa46-6713e038e139/file>.

In Malawi section 138 of the Malawi Penal Code provides for the offence of defilement, and a defence to the offence. In full, the section provides as follows:

“138. Defilement of girls under sixteen years of age

(1) Any person who unlawfully and carnally knows any girl under the age of sixteen years shall be guilty of a felony and shall be liable to imprisonment for life.

(2) Any person who attempts to have unlawful carnal knowledge of any girl under the age of sixteen years shall be guilty of felony and shall be liable to imprisonment for fourteen years.

Provided that it shall be a sufficient defence to any charge under this section if it shall be made to appear to the court, jury or assessors before whom the charge shall be brought that the person so charged had reasonable cause to believe and did in fact believe that the girl was of or above the age of sixteen years.”

This is to be read together with section 160B of the Penal Code. The 2011 amendments introduced a new offence through section 160B(1), of which the first part reads as follows:

“Any person who engages or indulges in sexual activity with a child shall be guilty of an offence and shall be liable to imprisonment for twenty-one years.”

Sexual activity is defined in section 160A to mean “*sexual contact other than sexual intercourse (whether between persons of the same or opposite sex) in the form of genital, oral-genital, anal-genital contact or otherwise, masturbation, touching of genitals, buttocks or breasts, sadistic or masochistic abuse and other deviant sexual behaviour.*” Section 160B was introduced to cover the lacuna left by section 138 which only deals with sexual intercourse. Section 160B introduces a blanket criminalisation of sexual activities with a child below 16 years of age, including normative and non-exploitative sexual activity between children who are peers.

In the Botswana Penal Code, the defence is set out in section 147(5) as follows:

“It shall be a sufficient defence to any charge under this section if it appears to the court before whom the charge is brought that the person so charged had reasonable cause to believe and did in fact believe that the person was of or above the age of 16 years or was such charged person's spouse”.

The question to be posed is:

How constitutional and proper is the statutory defence to having sexual intercourse with a young person, when the offence is a strict liability offence and the goal of penalising sexual intercourse with underage persons is to protect them from sexual exploitation?

Zimbabwean courts have not addressed this aspect, but an assessment of generally applicable legal principles, and the approaches enunciated by other courts in the region is instructive.

In Botswana the Court of Appeal has ruled in *Lejony v The State* (2000) 2 BLR 145 C.A. (full bench), that the offence of defilement has been created for the protection of young girls. Amissah JP held that:

“In the end result, it was to the court which tried the charge that the statute conferred the duty of finding whether the person charged had reasonable cause to believe and did in fact believe that the victim was of or above 16 years. The fact that the couple had been living together over a period of time or that the victim consented to the act charged, was really irrelevant. The law was enacted to protect girls below the age of 16 years, whether they consented to sexual intercourse or not. The Magistrate’s Court found, judging from the evidence and the looks of the victim, that Lejony could neither have had that belief, nor did he in fact believe, that the victim was 16 years or above. I have no reason to disagree with that finding. Accordingly, the appeal against conviction on this ground is dismissed.”

What this means is that where a person had reasonably believed the complainant to be an adult, then such a defence is completely valid. This could be the physical appearance of the young person, coupled with misrepresentation as to the young person’s age, and any other factors in an open list. What the accused is not required to do in terms of existing law is to ask the young person to produce his or her identity document before having sexual intercourse with such young person. Yet in having sexual intercourse with a girl or boy who does look young, the adult would be taking a risk, and it is up to such an adult to take necessary precaution to satisfy himself or herself as to the majority status of the young person.

In the Botswana Court of Appeal case cited above, the Court went on to state as follows at paragraph 8:

“The fact that the complainant in a case of defilement is a victim, on account of her age, is one of the factors to be weighed when considering whether the section 147(5) defence can prevail. That is why the court must be satisfied not only that the perpetrator had reason to believe that the victim was of or above sixteen, but that he did in fact so believe. This leaves no room for an adult man to take a chance on the age of a prospective young partner encountered at a social occasion or elsewhere”.

In another Botswana case, Nganunu CJ in *Manewe v The State* (2005) 1 BLR 276 at page 280, held that the size and physical development of a girl could provide reasonable grounds for belief that she was over sixteen. Whether the accused did in fact believe that, was a question of credibility to be decided by the court. Section 70(3) of the Criminal Code in Zimbabwe in this respect makes it clear that “*the apparent physical maturity of the young person concerned shall not, on its own, constitute reasonable cause for the purposes of this subsection.*” Thus, one cannot simply plead apparent physical maturity without more.

What emerges is that for the statutory defence to hold, two things must be established:

1. That the accused had reason to believe that the victim was of or above sixteen, and

2. That the accused did in fact so believe.

The defence requires that there be a reason to believe that the complainant is above the age of 16, but not only that; the accused must actually have had that belief. This introduces some inherent checks and qualifications to the defence. “Reasonable” belief, “reasonableness” and “reasonable foreseeability” etc. are acceptable qualifications to limitation of rights, and elements to certain defences generally in many aspects of the law – both criminal and civil. The inclusion of this aspect as a defence in cases of defilement is no exception. There is therefore an element of consistency in the law – a fundamental tenant of the principle of legality in law.

What must simply be borne in mind is that the law on defilement is enacted to protect young people, and so long as the defence does not detract from such protection, such defence is valid. Each case is then dealt on its own merits. A purposive interpretation of section 70 of the Criminal Code makes it clear that it seeks to protect young children from sexual exploitation. Where invoking the statutory defence does not conceal exploitation, then such defence would appear to pass constitutional muster. The High Court in Zimbabwe has held in the case of *S v Mharapara* HMA 26-17 as follows:

“In *S v Nare* 1983 [2] ZLR 135 GUBBAY J, as he then was, said the rationale for the offence of having sexual intercourse with a young person is the need to protect immature females from voluntarily engaging in sexual intercourse. They lack the capacity to appreciate the implications involved, and the possibility that they may suffer psychic or physical injury. But in my view, the rationale is much broader. Having sexual intercourse with a young person falls under a section of the Code that is titled “*Sexual crimes and crimes against morality*” [my emphasis]. Thus, it is against morality for a man to have extra marital intercourse with a girl 16 years of age and below. It is therefore for the preservation of society’s sense of morality that the offence exists.”

The default position in penal law is that ignorance of the law is no defence. However, that default position can be altered by means of express provisions which render ignorance a defence. In the case of the defilement defences, there is not just an exception, but an exception with two express conditions. Such conditions provide safeguards against abuse of such a defence. In other words, it is not a walk-over defence that can be raised and that will fly in any and every case of having sexual intercourse with a young person. We would venture to say that such a defence would only hold water in a negligible number of cases – a rarely successful defence as it were. In Malawi, the court has held in *Kamowa v Republic* [2017] MWHC 26 in respect of the statutory defence that “***The proviso should be interpreted strictly so that it does not provide opportunity to men to abuse unsuspecting girls***”. In the Zimbabwean case, that caution applies both in respect of male and female adults.

One must thus interrogate whether, properly taken in context and properly applied, the section 70(3) defence does not detract from constitutional protection of the rights of the

complainant, who is the victim, and the interests of justice or of society. Where the sexual intercourse is non-consensual, that defence is obviously inapplicable as section 65 (rape) becomes the charge and not section 70.

What the statutory defence entails is essentially an exercise in proportionality. On the one hand is the protection being afforded to the young person, and on the other is a consideration of the reasonable belief inducing the accused to act in a particular way believing not to be in violation of the law.

In England the House of Lords in *R v K* [2001] 3 All ER 897 considered the applicability of strict liability to the provisions of section 14 of the Sexual Offences Act 1956 (now replaced by section 3 of the Sexual Offences Act 2003) – the defilement laws. The defendant, aged 26 at the time of the incident, was charged under section 14 with the indecent assault of a girl aged 16. The complaint made by the schoolgirl was that she was indecently assaulted by K touching her private parts without her consent. K's case was that the girl told him that she was 16 and he had no reason to disbelieve her. She consented to all the sexual activity which occurred between them. The House of Lords, while quashing the conviction, concluded that where a defendant was charged with an indecent assault on a girl under the age of 16 contrary to section 14(1) of the 1956 Act, but the girl had in fact (although not in law) consented to the alleged assault, the prosecution was required to prove that the defendant had not honestly believed at the time of the incident that the girl was aged 16 or over. Such a conclusion was consistent with the constitutional principle that guilty knowledge was an essential ingredient of a statutory offence unless it was shown to be excluded by express words or necessary implication. If, however, it was shown that an underage victim had not in fact consented, and that the defendant had not genuinely believed that she had consented, any belief held by the defendant concerning her age is rendered irrelevant, since the victim's age is only relevant to her capacity to consent.

In that case, Lord Bingham proceeded as follows:

“The general rule that a crime involves a guilty mind as well as a forbidden act is, as the Latin version of the rule makes clear and as Lord Reid emphasised, of very long standing. Brett J in his dissenting judgment in *R v Prince* (1875) LR 2 CCR 154 referred to it at pp 159-169, concluding, at p169:

‘Upon all the cases I think it is proved that there can be no conviction for crime in England in the absence of a criminal mind or mens rea.’

In *R v Tolson* (1889) 23 QBD 168 Stephen J, an authority on the criminal law without rival in his time, observed, at p 187:

‘The mental element of most crimes is marked by one of the words 'maliciously', 'fraudulently', 'negligently', or 'knowingly', but it is the general - I might, I think, say, the invariable - practice of the legislature to leave unexpressed some of the mental elements of crime. In all cases whatever, competent age, sanity, and some degree of freedom from some kinds of coercion are assumed to be essential to criminality, but

I do not believe they are ever introduced into any statute by which any particular crime is defined.'

In *Sherras v De Rutzen* [1895] 1 QB 918, 921 Wright J held:

"There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals . . ."

He then went on to give examples of regulatory provisions which excluded the presumption of mens rea. In *Brend v Wood* (1946) 62 TLR 462 Lord Goddard CJ re-stated the rule, at p 463:

'It should first be observed that at common law there must always be *mens rea* to constitute a crime; if a person can show that he acted without *mens rea* that is a defence to a criminal prosecution. There are statutes and regulations in which Parliament has seen fit to create offences and make people responsible before criminal Courts although there is an absence of *mens rea*, but it is certainly not the Court's duty to be acute to find that *mens rea* is not a constituent part of the crime. It is of the utmost importance for the protection of the liberty of the subject that a Court should always bear in mind that unless a statute, either clearly or by necessary implication, rules out *mens rea* as a constituent part of a crime, the Court should not find a man guilty of an offence against the criminal law unless he has a guilty mind.'

..."

Thus, in defilement matters, the strict liability nature renders criminal intention (*mens rea*) irrelevant, but the statutory defence to defilement becomes the exception, inbuilt in the statute itself – a defence that can be raised to negate criminal intention. The protection in section 70 of the Criminal Code is that a minor's consent is vitiated by virtue of her age. The statutory defence on the other hand, does not detract from the child's presumed inability to consent, but rather deals with the reasonable belief of the accused as to the age of the girl. This distinction is important and therefore must be emphasised. Thus, in the Malawian case of *Republic v Goliat and Jonasi* [1971 – 72] ALR (MW) 251 at page 252, Chatsika J stated as follows: "*It must be stated quite clearly, lest there be some misunderstanding, that consent of the complainant provides no defence to a charge of defilement. A girl who is under the age of 13 is not capable of giving that consent. Be that as it may, the question of consent may be taken into account in considering the sentence*". This was before the 2011 amendments to the statute that raised the age to sixteen.

This case is critical for yet another reason: consent, though presumed a nullity by virtue of age, is taken as a mitigatory factor. In addressing the ground of appeal of whether the sentences passed by the trial court were manifestly excessive, the Malawian High Court in *Kayira v S* [2015] MWHC 432 took note of the fact that the Appellant and the victim were in a consensual sexual relationship and, therefore, the Court decided to reduce the sentences. Madise J at paragraphs 8.3 said:

“In this matter before me, it is clear that the girl Sarah Kalua was really in ‘love’ with the Appellant who was 24 years at the time. During trial she did all she could to save her so called husband but to no avail. She admitted that the Appellant was having sexual intercourse with her because he considered her as his second wife. Sarah did not accuse the Appellant of forcing her to have sexual intercourse. She allowed him to enter her body voluntarily. The medical report showed no injuries inside the walls of her vagina. Unfortunately for both ‘lovers’, Sarah was under the age of 16 years and therefore an offence was committed. (Our emphasis)”.

Similarly, in the case of *Kamowa v The Republic* cited above, the Malawian High Court held that consent is a mitigating factor in sentencing where there is evidence of consent sexual relationship. In that case the court ruled that:

“It is imperative for the prosecution to prove that [...] the girl was under the age of sixteen years. It appears that it is irrelevant whether the offender knew of the age of the girl or not. When you go out with any girl you take a risk that the girl will turn out to be sixteen. This is a departure from the case of *Maloza Manda v The State* Criminal Appeal Case No. 21 of 2010 Mzuzu District Registry which says that the prosecution has also to prove that the accused person had knowledge or ought to have known that the girl was under sixteen. Whether one knew or failed to make an effort to know the age of the girl is not an important ingredient of the offence. However, under the proviso, a defence is created if circumstances are shown by the offender to the satisfaction of the court that the offender had reasonable cause to believe and did believe that the girl was above the age of sixteen. This will only arise after the prosecution has laid down its case or the two important ingredients of the offence stated above.”

Taken within this context, a defence that the young person reasonably appeared to be above 16 years of age, and the accused in fact believed that to be the case, does not necessarily detract from this general approach of the courts as well as constitutional protections of children.

Finally, the penal law on having sexual intercourse or performing an indecent act with a young person provides protection to a child, thereby creating a right to such protection for the child. In terms of the Zimbabwean constitutional architecture, limitations of rights can only be in terms of the limitations clause in the Constitution. Section 86 of the Constitution provides in relevant part as follows:

“86. Limitation of rights and freedoms

[...]

2. The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors, including –
 - a. the nature of the right or freedom concerned;
 - b. the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest;

- c. the nature and extent of the limitation;
- d. the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others;
- e. the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and
- f. whether there are any less restrictive means of achieving the purpose of the limitation.

[...]” (Our emphasis)

The limitation of the protection given to a young person under the age of 16 years in section 70(3) of the Criminal Code must thus be weighed against the above provision. The question is whether an application of the limitation created by the statutory defence in section 70(3) of the Criminal Code is “reasonable” and whether it detracts from the essential protection afforded to a minor by the provision. One would have to identify constitutional provisions that may be infringed by such a limitation, while bearing in mind that the defence is not an automatic one, but is simply available to the accused, and the onus is on the accused to prove his defence on a balance of probabilities.

There has not been, to our knowledge, a case in any jurisdiction in which the constitutionality of the statutory defence to defilement or statutory rape provisions has been challenged based on the grounds of constitutionality.

12. THE CHILDREN’S AMENDMENT BILL OF 2017 AND THE EDUCATION AMENDMENT BILL OF 2019

Insofar as legal reform is concerned, the proposed Children’s Amendment Bill of 2017 and the Education Amendment Bill of 2019 provide a vital opportunity.

With the Children’s Amendment Bill, three provisions are of particular importance to the present discussion. The first provision relates to protection of children from sexual grooming. Clause 8 of the Amendment Bill makes it an offence to allow a child to participate in sexual grooming, through among other things exposure to pornography. The Act defines a child as a person who is below the age of 18 years. The principal Act currently defines a child as anyone below the age of 16 years, and a “young person” as any person who has attained the age of 16 years but has not attained the age of 18 years. The proposed amendment will do away with the category known as “young persons”, and this will mean that all children below the age of 18 years are protected, including those who may willingly participate in a sexual act, but are exposed to pornography before or after the act. The exposure to pornography will not affect the application of sections 64, 65, 66, 67 and 70 of the Criminal Code, but will itself constitute a separate offence in terms of the amended Children’s Act.

The second relevant provision in the Children's Amendment Bill relates to the insertion of a new part in the Principal Act (Part IIIA) on the establishment of a Sex Offenders' Register. Clause 11 of the Amendment Bill seeks to insert section 13A to the principle Act, which section provides for the establishment and contents of the Sex Offenders' Register. Those who are convicted of sexual offences will be entered into a sex offenders register, including a child offender in the 16-18 years age bracket. While the introduction of the Register itself would no doubt be a welcome deterrent, the prejudice occasioned on the children in the 16-18 age group, which is not protected by the law as it currently stands, is amplified. This gives further impetus to the need either to reform the age of consent upwards to match the definition of child, or to introduce a close-in-age exemption in our law.

The third relevant provision in the Children's Amendment Bill relates to medical examination and treatment of children and young persons. Clause 9 of the Amendment Bill seeks to insert a sub clause to section 9 of the principal Act which is titled "Medical examination and treatment of children and young persons". The proposed amendment reads as follows:

"(13) Any person who denies a child medical treatment or access to medical treatment shall be guilty of an offence and liable to a fine not exceeding level ten or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment".

Should this section be enacted into law, it would essentially permit children to have access to medical treatment, including access to medicines. For such a clause however to take effect without contradictions and inconsistencies in the law, other clauses that place age-related restrictions to access to certain medical treatments for children will have to be attended to and be addressed. For instance, the amendment does not make that provision subject to existing law, meaning that it is possible for a medical officer who denies a child treatment on the basis of absence of parental consent to be found guilty of contravention the amended Section 9(13) of the Children's Act. This would, obviously, create an inconsistency in the law. Yet another possible reading of the amendment is that a medical officer would only be liable of contravening the section in cases where the child comes to seek treatment in terms of existing law, that is, with parental consent, but is denied treatment. The possibility of these two readings is perhaps an indication of the need to be specific in the proposed amendment. The clause as it currently stands is therefore ambiguous.

The Education Amendment Bill seeks to introduce two critical aspects to the Education Act [*Chapter 25:04*]. The first relates to the appointment of sexual and reproductive health educators in schools. Essentially there is recognition of the need to start teaching sexual and reproductive health issues in the curricula. Sex education has always been advanced by both child protection specialists and our own courts as highlighted above, as a step in promoting

awareness among children. This awareness includes issues of abstinence, behavioural change, and the dangers of sexually-transmitted infections. Fundamentally, parents and guardians are the primary duty bearers in raising children, well suited and best positioned to teach these aspects to children. But an education system that is to be relevant to the needs and issues of the day demands that these issues be equally taught at school. Sexual and reproductive education is part of the solution.

The second aspect introduced by the Education Bill is the proposal that schools should not suspend or expel girls who are pregnant. The relevance of this proposal in the Bill is that it is factual acknowledgement and corroboration of what has been stated in this document, that children are in fact engaging in sexual activity among themselves. Protecting a girl child who then falls pregnant from being expelled or suspended becomes a mechanism to curb further challenges visiting the girl child in the sense that the child has already suffered pregnancy due to ill-advised early onset of sexual activity. It is also a measure to implement the non-discrimination requirements of the Constitution, since the boy child who impregnates is not suspended or expelled from school because he has made a girl pregnant.

Through these two Bills, the law is already making some moves to acknowledge what is on the ground, and instead of feigning ignorance or electing apathy, is being proactive to ensure that children are protected in all facets. These two Bills present an opportunity to effect other amendments necessary to ensure greater protection of children insofar as protection of children from sexual exploitation and ensuring access to sexual and reproductive health services are concerned.

13. CONCLUSION

The debate on age of consent is not a simplistic one. For it to bear fruit, which is to increase protection to children, the discourse must be evidence-based, founded on the practical realities and experiences of children in our society. Children must no doubt be protected from sexual exploitation and sexual predators. Children must also be treated differently in cases of children having sexual intercourse with other children in non-exploitative circumstances. At the time same, children must be accorded access to sexual and reproductive health services, as well as age-appropriate sex education and counselling.

A lot of the issues involved are policy decisions that require a proper reality check, as law does not act and should not act in a vacuum, devoid of the lived realities and experiences of society. Rather, such policy decision must be based on goals and aspirations that the society sets for itself, predicated on the society's priorities. Whatever those priorities may be, greater protection of children should rank high up.

END

ABOUT JUSTICE FOR CHILDREN

Justice for Children (JCT) is a nongovernmental organisation which was established in December 2002 as a Trust under Trust Deed Number MA1300/02. The organisation is registered with the Law Society of Zimbabwe to provide legal aid to orphans and vulnerable children below the age of 18 years. Its lawyers are registered both with the High Court of Zimbabwe and the Law Society of Zimbabwe. The organisation is also registered with the Department of Social Services as a Private Voluntary Organisation under PVO07/12.

The organisation was formed in view of the rising levels of poverty which were accompanied by escalating legal fees making it impossible for many to access justice. The HIV and AIDS pandemic also weighed in with the problems of orphanhood, child-headed households and denial of children's rights in cases like inheritance. Child abuse in all forms was on the increase and the children needed support as they go through the justice system. There was also general lack of knowledge on the laws and policies that protect children hence their rights would be violated without having recourse to the justice system. These factors are still prevailing in Zimbabwe

VISION:

A Zimbabwe in which all children have access to justice and enjoy their human rights.

MISSION:

Justice for Children ensures access to justice to and the enjoyment of human rights by all children below the aged of 18 years through:

- ❖ The provision of legal aid to children in difficult circumstances,
- ❖ Empowering the children and adults on child protection laws and child rights and responsibilities, and
- ❖ Research on issues affecting children and advocating reform.

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