Reporting sexual offences involving child patients: What is the current law following the Constitutional Court judgment?

P Mahery, LLB, LLM

Oliver Schreiner School of Law, University of the Witwatersrand, Johannesburg, South Africa

Corresponding author: *P Mahery (prinslean.mahery@wits.ac.za)*

The Constitutional Court of South Africa has recently invalidated certain sexual offences involving adolescents and placed a moratorium on reporting adolescents who engage in 'lawful' sexual activity. In evaluating the constitutionality of the law that criminalises sexual activity between adolescents, the Court recognised how the reporting obligations could exacerbate the violation of children's constitutional rights. However, in light of the Court's narrow focus, its judgment only slightly amends the reporting obligations of healthcare providers in terms of adolescent patients, and for the most part the current law remains intact. Despite this judgment, adolescent patients can still be exposed to the negative effects of the reporting obligations placed on healthcare providers, and healthcare providers are still faced with the challenges created by their duty to report sexual offences involving young patients. This article explores the judgment in order to clarify the current law on reporting sexual conduct involving adolescents, and also provides some analysis to assess the implications of the judgment for healthcare providers.

S Afr J BL 2014;7(1):26-29. DOI:10.7196/SAJBL.303

In South Africa a child is able to engage in sexual activity legally from the age of 16 years. The Criminal Law (Sexual Offences and Related Matters) Amendment Act[1] (hereinafter called the Sexual Offences Act) makes it an offence for anyone to engage in sexual conduct with children aged 12 - 15 years (hereinafter referred to as adolescents, following the Constitutional Court's approach of categorising children aged 12 - 15 as adolescents), even if this is done consensually (sections 15 and 16 of the Sexual Offences Act read with the definition of a child in section 1). Also, anyone who engages in sexual activity with a child under the age of 12 years commits an offence. The Act further obligates everyone, including healthcare providers, to report such incidents of sexual behaviour involving adolescents to the police should they have knowledge of them. Failure to report is an offence, and according to section 54(1)(b) of the Act, perpetrators face a penalty of a fine or imprisonment upon conviction.

What this means, for example, is that if a 13-year-old boy approaches a clinic nurse for treatment of a sexually transmitted infection, or a 14-year-old girl goes to a clinic for prenatal care or for an abortion, in terms of the law the attending nurse or other healthcare provider would have knowledge of a sexual offence and would be obliged to report the incident to the police or risk penalties for failure to report. In creating these reporting obligations, the lawmakers effectively force healthcare providers to disclose confidential information probably obtained during consultation. While such reporting would be in direct conflict with laws such as the Choice on Termination of Pregnancy Act 92 of 1996,[2] which require strict confidentiality, or the objectives of the healthcare provisions in the Children's Act,[3] other laws such as the National Health Act[4] (section 14(2)(b)) and the Ethical Rules of Conduct for practitioners registered in terms of the Health Professions Act 56 of 1974[5] (section 13(1)(a)) actually authorise healthcare providers to disclose patient information when a law requires such disclosure. The ethical duty of maintaining patient confidentiality can therefore be limited by any law that legally requires a breach of such confidentiality, such as mandatory reporting provisions.

Although the Constitutional Court had the final say on the constitutionality of sexual offences involving adolescents, both the High Court and the Constitutional Court explored the effects of the reporting obligations attached to the sexual offences laws. This article therefore considers both court decisions in order to establish the current law on sexual offences involving adolescents and the consequent impact of the judgments on the reporting obligations set out in the Sexual Offences Act.

The High Court case[6]

In April 2012 two non-profit organisations providing child protection services approached the North Gauteng High Court seeking orders to decriminalise consensual sexual conduct between adolescents. The matter was heard on 23 and 24 April by J Rabie, and in January 2013 he delivered his judgment. The judgment highlighted the negative implications of sections 15 and 16 of the Sexual Offences Act generally, and also the negative effects of the reporting obligations triggered when persons such as healthcare providers become aware of sexual conduct between adolescents. The Court found in paragraph 53 that:

> 'The impugned provisions will furthermore in all probability prevent the vast majority of adolescents from seeking help because they would fear that they would be charged with a crime. After all, any councillor or other person in authority would be placed in an

invidious position for the simple reason that in order to properly conduct his or her duties, or assist the adolescent and to build a trust relationship with the adolescent, they have to solicit the required information in order to do so. However, once they have received this information they would be required to report the child for the behaviour which has been elicited. This will isolate adolescents from potentially supportive resources and systems.'

The Court ultimately found the relevant provisions to be unconstitutional. Following the declaration of invalidity, Rabie took the route of deleting words from and reading words into the Act to rectify its defects and refused to grant Parliament an opportunity to amend the Act. The Constitutional Court took a different approach, as is discussed below. The High Court judgment created much debate on its effects on the reporting obligations of healthcare providers. The issue was discussed by McQuoid-Mason[7] and Strode *et al*.[8] in two articles published in the *SAJBL*. I believe that Strode *et al*. describe the effects of the case more accurately, and some of their arguments still apply after the Constitutional Court judgment.

The Constitutional Court case[9]

The Constitutional Court heard the matter on 30 May 2013. The applicants argued again before this court that the relevant provisions of the Sexual Offences Act were unconstitutional because it was irrational, caused harm, violated various rights of children including their right to dignity and privacy, and failed to serve the best interests of children. Judgment was handed down on 3 October 2013.

In its judgment the Court emphasised the narrow scope of the case before it, which concerned the prohibition of sex between adolescents. The case was not about the law that prohibits sexual acts with a child below the age of 12. It was also not about unlawful sexual conduct between adults and adolescents, or between 16- and 17-year-olds and children aged 12 - 15.

After analysing the law this court too was convinced that the offences created by the Act breached the constitutional rights of adolescents. The Court had this to say about the reporting obligations set out in the Act (paragraph 60):

'The offences allow police officers, prosecutors and judicial officers to scrutinise and assume control of the intimate relationships of adolescents, thereby intruding into a deeply personal realm of their lives. This intrusion is exacerbated by the reporting provisions: trusted third parties are obliged by section 54 of the Sexual Offences Act to disclose information which may have been shared with them in the strictest confidence, on pain of prosecution.'

It was held further (paragraph 72):

'… that the existence and enforcement of the offences created by … the Sexual Offences Act exacerbate harm and risk to adolescents by undermining support structures, preventing adolescents from seeking help and potentially driving adolescent sexual behaviour underground.'

and that (paragraph 73):

'… the expert report indicates that the reporting provisions are likely to create an atmosphere in which adolescents will not freely communicate about sexual relations with parents and counsellors.'

The order

The Court confirmed that the relevant provisions of the Sexual Offences Act were unconstitutional and declared it invalid. This meant that the provisions which criminalise consensual sexual behaviour between adolescents are no longer in force and that the requirement to report such consensual sexual behaviour also falls away. However, the Court suspended its order of invalidity and gave Parliament 18 months to amend the relevant provisions (paragraphs 110 and 117 of the judgment; see also section 172(1)(b)(ii) of the Constitution[10]). An order suspending the declaration of invalidity effectively keeps the invalidated law in operation.[11] The decision to suspend the order usually serves to 'control the effects of invalidity'.[11] In this case the Court found that not suspending the order would have unintended consequences such as creating a gap in the law that proscribes sex between children and adults, which could not be allowed. Furthermore, the Court emphasised that Parliament as the lawmaking body was in a better position to improve the provisions (paragraphs 107 - 109 of the judgment).

Given the negative impact of the reporting obligations, the Court decided to supplement its order of invalidity. It was held in paragraph 117 that:

'From the date of this judgment, a moratorium is placed on all investigations into, arrests of, prosecutions of, and criminal and ancillary proceedings against children under the age of 16 years in relation to sections 15 and 16 of the Act, pending Parliament's correction of the defects in the Act.'

The Court clarified this in the judgment (paragraph 111), stating that:

'[t]his moratorium will put in abeyance any related reporting obligations which may otherwise have arisen from the operation of section 54 of the Act.'

To counter the consequence of suspending its order, the Court therefore expressly suspended the reporting obligations in respect of adolescents who engage in consensual sexual activity with other adolescents. This means that if a healthcare provider becomes aware of an adolescent patient voluntarily engaging in sexual conduct with another adolescent, in contrast to the previous situation they do not have to report the incident, and these children can now rely on confidentiality. However, the moratorium is limited in its reach and benefits. Firstly, it only suspends reporting of *consensual* sexual activities *between adolescents* for a period of 18 months from the date of the Constitutional Court order. Secondly, if the child patient is an adolescent and the sexual partner is 16 or 17 or an adult, the healthcare provider will still have to disclose the confidential information obtained from the adolescent in order to report the sexual partner. The sexual partner will have a right to defend any prosecution, and as noted by Strode *et al*.,[8] the adolescent could then still be exposed to 'the same harmful consequences that were identified in the Teddy Bear case'.

As part of the Constitutional Court order, the moratorium must be understood and implemented effectively. However, what happens if a healthcare provider is faced with a situation where an adolescent has engaged in consensual sexual conduct with someone but it is not totally clear whether the moratorium applies or not? No legal obligation exists to force a child patient to disclose private

intimate information to enable healthcare providers to determine whether or not the moratorium applies in a particular instance. To make a proper decision, certain questions could be asked during consultation. However, what if the adolescent does not want to disclose the age of the sexual partner, or refuses to say anything about the sexual partner at all? It is submitted that in such instances the healthcare provider has no knowledge of a sexual offence and so the duty to report the incident in terms of the Sexual Offences Act is not triggered.

It is also important to note that neither the High Court nor the Constitutional Court considered the constitutionality of the reporting obligations as a separate issue. Both courts considered the duty to report only in relation to the criminal prohibitions that were under scrutiny. This means that reporting obligations are still open to constitutional challenge, as was conceded by the High Court and advocated by others (e.g. McQuoid-Mason[12]). The Teddy Bear Clinic case illustrates how the duty to report can be detrimental to children's rights. In this case the sexual offence created by the Act had the effect that the reporting obligation could not serve the best interests of the children affected, but instead proved detrimental to their rights to privacy, dignity and physical integrity. By invalidating the offence, the Constitutional Court rendered the reporting obligation inoperative only to a certain extent and consequently minimised (but certainly did not erase) the negative effects that mandatory reporting could have for adolescents engaging in consensual sex. More needs to be done to ensure that the duty to report always serves the best interests of children. Healthcare providers are therefore urged to engage and attempt to persuade Parliament during its amendment process to reconsider the reporting obligations and align it more with the Constitution.

The effect of the Constitutional Court judgment is significant but narrow when considered in the broader scope of the reporting obligations of healthcare providers in relation to sexual conduct of children. The current reporting obligations of healthcare providers in terms of the Sexual Offences Act are set out in Table 1.

It is quite clear from the above that in order to avoid confusion on the effect of the Constitutional Court judgment, an education campaign is needed to ensure that the law is properly understood and applied by healthcare providers. Healthcare providers must also remember that the Children's Act also creates reporting obligations that have not been altered by this judgment. The Sexual Offences Act and the Children's Act have different reporting approaches. These Acts differ with regard to what triggers the reporting obligation, the particular incidents that require reporting, and to whom the report needs to be made. Reporting in terms of the Children's Act is triggered when a healthcare provider finds reasonable grounds to conclude that a child patient has been abused physically or sexually or that a child has been neglected deliberately. The report can be made to a child protection organisation, the Department of Social Development, or a police officer (section 110). In contrast, as noted above, the Sexual Offences Act requires reporting as soon as there is any knowledge of a sexual violation, and that report must be made to a police officer. In comparison with the Sexual Offences Act, the reporting provision in the Children's Act is more protective because it generally limits unnecessary interference with the rights of adolescents.

Conclusion

The Constitutional Court judgment has the effect of removing some barriers to allow adolescents and healthcare providers the freedom to engage in issues around sexual health without either fearing the

Table 1. The reporting obligations of health providers in relation to the Sexual Offences Act

Sexual activity involving children, in terms of the Act	If a health provider becomes aware of such activity he/she should:
Anyone who commits a sexual act with a child of any age without their consent is committing an offence	Report the incident
Anyone who commits a sexual act with a child below the age of 12 years commits an offence (even if consensual)	Report the incident
Incidents of children aged 12 - 15 years engaging in consensual sexual activity with partners also in this age category	Not report the incident (following the moratorium)
If a 16- or 17-year-old engages in sexual activity (including sexual intercourse) with a child between the ages of 12 and 15 years, an offence is committed (even if consensual)	Report the incident *Note:* In these instances only the 16- and 17-year-olds can be prosecuted *Note further:* In the case of sexual acts not involving penetration it is a defence to claim that there is a less than 2-year age gap between the sexual partners; I submit that it is not the work of the health provider to investigate this defence before reporting the incident
If an adult (persons 18 years and older) engages in sexual activity with a child aged 12 - 15 years, then a sexual offence is committed (even if consensual)	Report the incident; only the adult will be prosecuted
Note: The legal age of consent to engage in sexual conduct remains 16, and if children of this age engage in consensual sexual activity with anyone 16 years or older no offence is committed	Not report the incident
Note: If in **any of the abovementioned instances** the child concerned is clearly incapable of consenting to sexual conduct, no matter what their age, for example if the child is mentally disabled, then it is an offence for anyone to engage in sexual conduct with such a child	Report the incident

consequences stemming from reporting obligations. However, much of the current law on reporting sexual offences involving adolescents remains intact, which could result in these children still being exposed to the negative effects of the mandatory reporting provisions. When issues of sexual conduct arise in the course of providing healthcare services to child patients, healthcare providers therefore have a responsibility to ensure that the law in general is applied properly and that sexual offences are still identified and reported accordingly.

References

1. South African National Government. Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007. http://www.gov.za/documents/index.php?term=Criminal+Law&dfrom=&dto=&yr=2007&tps%5B%5D=1&subjs%5B%5D=0 (accessed 13 March 2014).
2. South African National Government. Choice on Termination of Pregnancy Act 92 of 1996. http://www.gov.za/documents/index.php?term=Choice+on&dfrom=&dto=&yr=1996&tps%5B%5D=1&subjs%5B%5D=0 (accessed 13 March 2014).
3. South African National Government. The Children's Act No. 38 of 2005. http://www.justice.gov.za/legislation/acts/2005-038%20childrensact.pdf (accessed 13 March 2014).
4. South African National Government. National Health Act No. 61 of 2003. http://www.gov.za/documents/index.php?term=national+health&dfrom=&dto=&yr=0&tps%5B%5D=1&subjs%5B%5D=0 (accessed 13 March 2014).
5. National Department of Health. Government Notice No. 717 of 2006. http://www.gov.za/documents/index.php?term=health&dfrom=&dto=&yr=2006&tps%5B%5D=4&subjs%5B%5D=0 (accessed 13 March 2014).
6. The Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development 2013 JDR 0025 (GNP) (unreported).
7. McQuoid-Mason D. Decriminalisation of consensual sexual conduct between children: What should doctors do regarding the reporting of sexual offences under the Sexual Offences Act until the Constitutional Court confirms the judgment of the Teddy Bear Clinic case? South African Journal of Bioethics and Law 2013;6(1):10-12. [http://dx.doi.org/10.7196/SAJBL.257]
8. Strode A, Toohey J, Slack C, et al. Reporting underage consensual sex after the Teddy Bear case: A different perspective. South African Journal of Bioethics and Law 2013;6(2):45-57. [http://dx.doi.org/10.7196/SAJBL.289]
9. Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another 2014 (2) SA 168 (CC).
10. Constitution of the Republic of South Africa 1996. http://www.thehda.co.za/uploads/images/unpan005172.pdf (accessed 13 March 2014).
11. Currie I, De Waal J. The New Constitutional and Administrative Law. Vol. 1. Cape Town: Juta & Co, 2001:287 and 295.
12. McQuoid-Mason D. Mandatory reporting of sexual abuse under the Sexual Offences Act and the 'best interests of the child'. South African Journal of Bioethics and Law 2011;4(2):74-78.