

Mandatory reporting of sexual abuse under the Sexual Offences Act and the 'best interests of the child'

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It may not be necessary for doctors to report cases of consensual sexual penetration in terms of the Criminal Law (Sexual Offences Act and Related Matters) Amendment Act, where the children involved are under 16 years old and their age difference is not more than 2 years, if such a requirement is unconstitutional. The mandatory reporting provision regarding such conduct may be unconstitutional if it violates the constitutional 'best interests of the child' principle and unreasonably and unjustifiably limits the constitutional rights of children to bodily and psychological integrity and privacy. It may also undermine the provisions of the Choice on Termination of Pregnancy Act regarding terminations of pregnancy by girl children, the confidentiality provisions of the Children's Act regarding the distribution of condoms and contraceptives to sexually active children and their testing for HIV, and the efficacy of the Child Justice Act which aims to divert children away from the criminal justice system. It will also be unnecessary to report such conduct in terms of the Children's Act if the doctor concerned does not believe on reasonable grounds that child abuse has occurred and the doctor is acting in the 'best interests of the child' as required by the Constitution and the Children's Act.

The Criminal Law (Sexual Offences and Related Matters) Amendment Act¹ (hereafter referred to as the Sexual Offences Act) provides that in respect of statutory sexual assault – but not in respect of consensual sexual penetration – it is a defence that both the accused were children under the age of 16 years and the age difference between them was not more than 2 years at the time of the alleged offence. The question arises whether the requirement that consensual sexual penetration between children under the age of 16 years where the age difference between them was not more than 2 years, is unconstitutional – given that it undermines the 'best interests of the child' principle and several other fundamental rights in the Constitution,² as well as number of statutes designed to protect children, such as the Choice on Termination of Pregnancy Act³ (hereafter referred to as the Choice Act), the Children's Act⁴ and the Child Justice Act.⁵ If the provision is unconstitutional it should be amended to provide the same defence as is provided in the case of consensual sexual assault where both children were under the age of 16 years and the age difference between them was not more than 2 years.⁶

Reasons for not reporting cases of consensual sexual penetration involving children under 16 years where the age difference between them is not more than 2 years

It is submitted that there are a number of good reasons why doctors may be able to avoid criminal liability in terms of the Sexual Offences Act¹ for not reporting cases of consensual sexual penetration where the children involved are under 16 years old and their age difference is not more than 2 years. For instance, the criminalisation of such conduct involving young adolescents may violate the constitutional imperative of the 'best interests of the child' which applies to doctors and everyone else.⁷ It may also be an unreasonable and unjustifiable limitation of the constitutional rights of children to bodily and psychological integrity⁸ and privacy.⁹ Imposing the reporting obligation on doctors consulted for terminations of pregnancy, where young adolescents have engaged

in consensual sexual penetration, would undermine the purpose of the Choice Act which is to provide women (including young girls) with 'early, safe and legal termination of pregnancy', and to prevent them seeking back-street abortions.¹⁰ Such an obligation may also undermine the provisions of the Children's Act⁴ dealing with the distribution of condoms to sexually active children,¹¹ and those dealing with the prescription of contraceptives to sexually active girl children,¹² both of which guarantee such children confidentiality.¹³ It may also undermine the provisions of the Children's Act⁴ dealing with HIV testing of sexually active children¹⁴ which guarantee such children confidentiality.¹⁵ The duty to report will also undermine the efficacy of the Child Justice Act⁵ which aims to divert children away from the criminal justice system.¹⁶ In any event, it may be unnecessary to report such conduct in terms of the Children's Act⁴ if the doctor concerned does not believe on reasonable grounds that child abuse has occurred, and such doctor is acting in the 'best interests of the child' as is required by the Constitution⁷ and the Children's Act.¹⁷

Is the mandatory reporting of consensual sexual penetration between children under 16 years where their age difference is less than 2 years a violation of the constitutional imperative of the 'best interests of the child'?

The Constitution states: 'A child's best interests are of paramount importance in every matter concerning the child'.⁷ The Constitution does not define the child's 'best interests' but these have been defined in the Children's Act.¹⁷ In terms of the Children's Act some of the factors that should be taken into account when applying standard of the 'best interests of the child' are: (i) the nature of the relationship between 'the child and any other care-giver or person relevant in those circumstances'; (ii) the child's age, maturity and stage of development, gender, background and any other relevant characteristic of the child; (iii) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development; (iv) the need to protect the child from any physical

or psychological harm that may be caused by subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; and (v) deciding which action would avoid or minimise further legal or administrative proceedings in relation to the child.¹⁷ It is submitted that criminalising consensual sexual penetration between adolescents where both are children under 16 years and their age difference is not more than 2 years at the time of the alleged offence, and requiring doctors to report such conduct to the authorities, violates most of the above-listed factors affecting the 'best interests of the child' standard and may be considered unconstitutional.

In the light of the above, the undesirable consequences of the duty to report in such circumstances which may result in a criminal prosecution, subject to the discretion of the National Director of Public Prosecutions,¹⁸ are (i) possible harm to the relationship between the doctor as a 'relevant person' regarding the termination of the pregnancy and the child concerned; (ii) a failure to take into account the children's age, maturity and stage of development, gender, background and any other relevant characteristics; (iii) possible harm to the children's physical and emotional security and an adverse effect on their intellectual, emotional, social and cultural development; (iv) physical or psychological harm caused to the children by exposing them to degradation or other harmful behaviour when they are interrogated by the police or other role-players in the criminal justice system; and (v) exposure of the children to legal or administrative proceedings which the Children's Act¹⁷ states should be avoided. In short, it can be argued that the criminalisation of, and duty to report, consensual sexual penetration between adolescents where both are children under the age of 16 years and the age difference between them is not more than 2 years at the time of the alleged offence are unconstitutional because they violate the 'best interests of the child' principle.

Is the mandatory reporting of consensual sexual penetration between children under 16 years where their age difference is less than 2 years an unreasonable and unjustifiable limitation of their constitutional right to bodily and psychological integrity?

Children are entitled to the protection of the fundamental rights in the Constitution that apply to everyone else. Criminalising consensual sexual penetration between adolescents where they are both under 16 years and the age difference between them is not more than 2 years at the time of the alleged offence is prima facie a violation of the children's constitutional right to bodily and psychological integrity.⁸ The Constitution states that fundamental rights in the Constitution may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society. When considering whether the limitation is reasonable and justifiable the following factors must be taken into account: (i) the nature of the right; (ii) how important it is to limit the right; (iii) the nature of the limitation and its extent; (iv) the relationship between the limitation and its purpose; and (v) whether there are less restrictive means to achieve the purpose.¹⁸

The criminalisation of consensual sexual penetration between adolescents where both are under the age of 16 years and the age difference between them is not more than 2 years at the time of the alleged offence in the Sexual Offences Act¹ is a law of general

application because it applies to anyone who engages in sexual penetration with a child.¹⁹ The nature of right that is being limited is the right of children to bodily and psychological integrity by denying them freedom of choice to explore their sexuality²⁰ by engaging in consensual sexual penetration with their peers who are less than 2 years older than them. The limitation is aggravated by the fact that 'sexual penetration' is much more widely defined than the common-law crime of rape which required penile penetration of the vagina.²¹ In terms of the Sexual Offences Act any form of sexual penetration – not just by the penis into the vagina – but also by other parts of the body such as fingers or the tongue or penetration by objects 'into or beyond the genital organs or anus of another person' qualifies as 'sexual penetration'.²² This means that adolescent sexual exploration involving penetration of the genital organs or anus by other parts of the body or by objects, without involving penile penetration of the vagina, could result in criminal prosecution. The importance of the limitation of the right is supposedly to reduce the incidence of sexual penetration of children; however whether it is desirable to criminalise consensual sexual penetration between children who are under 16 years and with a less than 2-year age difference is debatable, considering that large numbers of teenage children are sexually active, as is recognised in the Choice on Termination of Pregnancy Act¹⁰ and the Children's Act.^{11,12}

The nature of the limitation and its extent are such that large numbers of teenage children who are experimenting with consensual sexual penetration could become psychologically harmed by being subjected to prosecution at the discretion of the National Director of Public Prosecutions – even though probation officers and prosecutors may use the diversion provisions of the Child Justice Act.⁵ The relationship between the limitation and its purpose seems to be that by criminalising consensual sexual penetration between children the latter will be less likely to engage in sexual activities that include penetration. As previously mentioned, given that the Sexual Offences Act¹ now defines sexual penetration much more widely than under the common law it is most unlikely that the purpose of the limitation will be achieved. There are less restrictive means of achieving the same objective by ensuring that children receive responsible and responsive sex education in schools and only criminalising consensual sexual penetration where the age difference between the children under 16 years is more than 2 years or the perpetrator is in a position of power or control over the other child. Proper sex education may well be as effective and much less harmful than the criminal provisions of the Sexual Offences Act.¹

Finally, to pass muster as a constitutional limitation on the rights of children to bodily and psychological integrity the provisions of the Sexual Offences Act¹ must be reasonable and justifiable in an open and democratic society. An example of an open and democratic society that has influenced constitutional law developments in South Africa is Canada, where the Canadian Criminal Code²³ provides that 12- or 13-year-olds can consent to sexual activity with a person not more than 2 years older than them²⁴ and a 14- or 15-year-old can consent to sexual activity with a partner who is no more than 5 years older than them.²⁵ It can be argued therefore that section 15 of the Act does not satisfy the reasonable and justifiable test of the Constitution. If this argument holds water, doctors do not have to report activities that have been unconstitutionally criminalised by the Sexual Offences Act.¹ In any event it is submitted that section 56 of the Sexual Offences

Act should be amended to provide a similar defence to that in section 56(2)(b) of the Act regarding statutory sexual assault in circumstances where both the accused are children under the age of 16 years and the age difference between them was not more than 2 years at the time of the alleged offence. In the meantime doctors should be guided by the 'best interests of the child' principle as required by the Constitution.⁷

Is the mandatory reporting of consensual sexual penetration between children under 16 years where their age difference is less than 2 years an unreasonable and unjustifiable limitation of their constitutional right to privacy?

The right to privacy is protected by the Constitution,⁹ the National Health Act,²⁶ the Children's Act^{11,12} and the common law.²⁷ A breach of confidentiality and the right to privacy of children may result in legal action unless there is a valid defence such as consent, a court order, a statutory duty or a privileged occasion.²⁸ Imposing a legal duty on doctors to report consensual sexual penetration between adolescents where both children are under 16 years and the age difference between them is not more than 2 years at the time of the alleged offence is prima facie a violation of the children's constitutional right to privacy.⁹ Once again it would have to be shown that the imposition of a duty that limits the right to privacy of such children is reasonable and justifiable in an open and democratic society. If a duty imposed by statute is unconstitutional there is no duty on doctors or anyone else to comply with it.

The arguments concerning the factors that must be taken into account in determining whether the limitation is reasonable and justifiable are the same as those discussed in relation to the right to bodily and psychological integrity. The nature of right that is being limited is the right of children to bodily and psychological privacy by requiring doctors to report their penetrative sexual conduct to the police. The importance of the limitation of the right is supposedly to ensure that all incidents of sexual penetration of children are reported to the authorities. However whether criminalising the failure of doctors to report consensual sexual penetration between children who are under 16 years and with a less than 2 years age difference between them is constitutional is open to question, particularly because the right to privacy of children is specifically protected in other statutes affecting their sexuality such as the Choice Act²⁹ and the Children's Act.^{11,12}

The nature of the limitation and its extent on the right to privacy is such that if doctors are obliged to report the activities of children engaged in consensual sexual penetration with their peers, large numbers of teenage children may have their private sex lives exposed to their parents in violation of the Constitution,² the Choice Act²⁹ and the Children's Act.^{11,12} Such children would also have their private sexual conduct exposed to police officers, probation officers and prosecutors if subjected to prosecution at the discretion of the National Director of Public Prosecutions – in spite of the limited safeguards in the diversion provisions of the Child Justice Act.⁵ The relationship between the limitation and its purpose seems to assume that, by requiring doctors to report consensual sexual penetration between children who are peers, the incidence of such activities is likely to be reduced. It is likely, however, that there is little empirical evidence to confirm such an assumption. As previously mentioned, a less restrictive method of achieving the same objective may be to introduce proper sex education in all schools. This would also enable doctors to maintain the confidence of their teenage patients requiring assistance in

sexually related matters without the latter withholding information from their doctors because they fear that their sexual activities may be reported to the authorities.

Imposing the reporting obligation in terms of the Sexual Offences Act on doctors consulted for terminations of pregnancy in cases where young adolescents have engaged in consensual penetrative sex would undermine the purpose of the Choice Act

The Choice Act¹⁰ recognises that children may be engaging in penetrative sex but does not require such conduct to be reported to the authorities. The Choice Act allows a female of any age to consent to a termination of pregnancy without her parents or anyone else being informed.²⁹ There is no requirement that the child's pregnancy or the fact that she has engaged in sexual intercourse be reported to the authorities. The termination of pregnancy, however, must be reported to the director general of health without disclosing the identity of the female concerned.³⁰ The Preamble to the Choice Act states that it is aimed at 'affording every woman the right to choose whether to have an early, safe and legal termination of pregnancy'.³¹ Thus the Choice Act accepts that young girls may fall pregnant and is aimed at steering them away from back-street abortions. If girl children thought that their pregnancies would be reported by the doctors they consult, because they had had consensual penetrative sex with someone, they would be reluctant to consult medical practitioners and would resort to back-street abortions. Therefore imposing the reporting obligation in terms of the Sexual Offences Act¹ on doctors consulted for terminations of pregnancy in cases where young adolescents under the age of 16 years have engaged in consensual penetrative sex with boys less than 2 years older than them would undermine the whole purpose of the Choice Act which is to encourage safe and legal terminations of pregnancy. Such a result would not be in the 'best interests of the child' and for this reason it is submitted that doctors are not obliged to report such consensual sexual conduct under the Sexual Offences Act.

Imposing the reporting obligation in terms of the Sexual Offences Act on health professionals who are consulted by boys or girls over 12 but under 16 years of age who want condoms because they are engaging in consensual penetrative sex with other teenagers less than 2 years older than them undermines the purpose of the Children's Act

The Children's Act makes it an offence to refuse to sell or supply children over the age of 12 years with condoms.¹¹ Imposing a reporting obligation on health professionals who are consulted for the purpose of obtaining condoms by children over 12 but under 16 years of age who are having consensual penetrative sex with teenagers who are less than 2 years older than them may undermine the provisions of the Children's Act.¹¹ The Children's Act guarantees such children confidentiality,¹³ and is aimed at preventing the unwanted pregnancies among girl children and the spread of HIV infection among sexually active children generally. It is submitted that it was not the intention of the drafters of the Sexual Offences Act¹ to discourage teenagers from accessing condoms in order to reduce the risk of pregnancy or HIV infection. If this were to occur it would not be in the 'best interests' of such children, and it is submitted would entitle the health professionals concerned not to report such consensual sexual penetration of the children as required by the Sexual Offences Act.

Imposing the reporting obligation in terms of the Sexual Offences Act on doctors who are consulted by girl children over 12 but under 16 years of age who seek contraceptive assistance because they are engaging in consensual penetrative sex with boys less than 2 years older than them undermines the purpose of the Children's Act and the Choice Act

Imposing the reporting obligation on doctors who are consulted for the purpose of contraception by a girl child over 12 but under 16 years of age who is having consensual penetrative sex with a boy who is less than 2 years older than her may also undermine the provisions of the Children's Act⁴ dealing with the prescription of contraceptives to sexually active children.¹² The Children's Act guarantees such children confidentiality¹³ and is aimed at preventing teenage pregnancies to obviate the Choice Act³ being used for contraceptive purposes.³¹ It is submitted that it was not the intention of the drafters of the Sexual Offences Act¹ to discourage young girls from seeking contraceptive advice in order to reduce the risk of pregnancy. If this were to occur, it would not be in the 'best interests of the child', in which case doctors may legally refrain from reporting such consensual sexual conduct in terms of the Sexual Offences Act.

Imposing the reporting obligation in terms of the Sexual Offences Act on doctors who are consulted for the purpose of an HIV test by children over 12 but under 16 years of age who are having consensual penetrative sex with persons less than 2 years younger than them undermines the provisions of the Children's Act dealing with HIV testing of sexually active children which guarantee such children confidentiality

Imposing the reporting obligation in terms of the Sexual Offences Act on doctors who are consulted for the purpose of an HIV test by children over 12 but under 16 years of age who are having consensual penetrative sex with persons less than 2 years younger than them undermines the provisions of the Children's Act⁴ dealing with HIV testing of sexually active children¹⁴ which guarantee such children confidentiality.¹⁵ In situations where it is in the 'best interests' of the children concerned, the provisions in the Children's Act are clearly aimed at enabling children over 12 years to ascertain their HIV status in order to allow them to obtain treatment and to take steps to prevent spreading the disease, without their parents or the authorities being notified. If in such situations there was a duty on doctors to report the sexual conduct of the children seeking HIV tests to the authorities, it would discourage such children from undergoing HIV testing in situations when it was in their 'best interest' to do so. This would make the confidentiality provisions of the Children's Act¹¹ meaningless. In any event, in terms of the Constitution,⁷ doctors will not be obliged to report the sexual conduct of child patients undergoing HIV tests to the authorities if they are satisfied that it is not in the 'best interests' of such children.

Imposing the reporting obligation in terms of the Sexual Offences Act on doctors who are consulted by young adolescents over 12 but under 16 years of age who are engaging in consensual penetrative with persons less than 2 years older than them may adversely affect the implementation of the Child Justice Act

Imposing the reporting obligation on doctors who are consulted by young adolescents over the age of 12 but under the age of 16 years of age who are engaging in consensual penetrative

with persons less than 2 years older than them, to report such conduct to the authorities will undermine the efficacy of the Child Justice Act¹⁶ which aims to divert children away from the criminal justice system.¹⁷ It is submitted that it will not be in the 'best interests' of the children concerned, nor in the 'best interests' of the many other children in conflict with the law who require to be accommodated in diversion programmes in terms of the Act, if large numbers of cases are reported to the police. This is because if thousands of cases of consensual sex between adolescents with less than 2 years age difference between them were to be reported to the authorities annually, it is most unlikely that the already overstretched probation services would be able to provide the necessary support and assistance to children who have come into conflict with the law in this respect.

Should consensual penetrative sex by teenagers over 12 but under 16 years of age with persons less than 2 years older than them be reportable as 'child abuse' in terms of Children's Amendment Act?

'Child abuse' may be defined as 'maltreatment of children which results in harm or the potential risk of harm to a child, usually of a physical, emotional or sexual nature'.³² The Children's Amendment Act³³ imposes a legal duty on a number of individuals and professionals including dentists, homeopaths, medical practitioners, midwives, nurses, occupational therapists, physiotherapists, psychologists, speech therapists and traditional health practitioners, who on reasonable grounds conclude that a child has been physically injured, sexually abused or deliberately neglected.³⁴

The person making the report must have reasonable grounds for concluding that the child has been physically or sexually abused or deliberately neglected and is in need of care and protection. Therefore, if the doctor concerned does not conclude on reasonable grounds that child abuse has occurred, he or she will not have to report such conduct in terms of the Children's Amendment Act,³³ provided such doctor is acting in the 'best interests of the child' as required by section 28(2) of the Constitution² and section 9 of the Children's Act.⁴

It is submitted that, as is the case in Canada,²⁴ it may well be argued that where teenagers over 12 but under 16 years of age have consensual penetrative sex with persons less than 2 years older than them such conduct does not constitute child sexual abuse and should not be criminalised unless one of the children was in a position of power or control over the other.

Conclusion

Strong arguments may be made that the requirement in the Sexual Offences Act requiring doctors to report cases of consensual sexual penetration, where the children involved are less than 16 years old and their age difference is not more than 2 years, is unconstitutional. The requirement violates the constitutional 'best interests of the child' principle and unreasonably and unjustifiably limits the constitutional rights of children to bodily and psychological integrity and privacy. The requirement also undermines the provisions of the Choice Act regarding terminations of pregnancy by girl children, the confidentiality provisions of the Children's Act regarding the distribution of condoms and contraceptives to sexually active children and their testing for HIV, and the efficacy of the Child Justice Act which aims to divert children away from the

criminal justice system. Finally, it will be unnecessary for doctors to report such conduct in terms of the Children's Act if the doctor concerned does not believe on reasonable grounds that child abuse has occurred and the doctor is acting in the 'best interests of the child' as required by the Constitution and the Children's Act.

References

1. Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.
2. Constitution of the Republic of South Africa of 1996.
3. Choice on Termination of Pregnancy Act No. 92 of 1996.
4. Children's Act No. 38 of 2005.
5. Child Justice Act No. 75 of 2008.
6. Section 56(2)(b) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.
7. Section 28(2) of the Constitution of the Republic of South Africa of 1996.
8. Section 12(2) of the Constitution of the Republic of South Africa of 1996.
9. Section 14 of the Constitution of the Republic of South Africa of 1996.
10. Preamble to the Choice on Termination of Pregnancy Act No. 92 of 1996 (the Choice Act).
11. Section 134(1) of the Children's Act 38 of 2005.
12. Section 134(2) of the Children's Act 38 of 2005.
13. Section 134(3) of the Children's Act 38 of 2005.
14. Section 130 of the Children's Act 38 of 2005.
15. Section 133 of the Children's Act 38 of 2005.
16. Preamble to the Child Justice Act No. 75 of 2008.
17. Section 7(1) of the Children's Act No. 38 of 2005.
18. Section 36(1) of the Constitution of the Republic of South Africa of 1996.
19. Section 15 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.
20. See generally, on the normality of adolescent sexual behaviour, Wolfe DA, Mash EJ. Behavioral and Emotional Disorders in Adolescents: Nature, Assessment and Treatment. New York: The Guildford Press, 2006: 593.
21. Cf. S v M(2) 1990 (1) SACR 456 (N).
22. Section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.
23. Canadian Criminal Code RSC.1985, c.C-46.
24. Section 150.1(2)(a) of the Canadian Criminal Code RSC.1985, c.C-46.
25. Section 150.1(2.1)(a)(i) of the Canadian Criminal Code RSC.1985, c.C-46.
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29. Section 5(2) and 5(3) of the Choice on Termination of Pregnancy Act No. 92 of 1996.
30. Section 7 of the Choice on Termination of Pregnancy Act No. 92 of 1996.
31. See Preamble to Choice on Termination of Pregnancy Act No. 92 of 1996.
32. McQuoid-Mason D, Dada M. A-Z of Nursing Law. Cape Town: Juta, 2009: 45.
33. Children's Amendment Act No. 41 of 2007.
34. Section 110 of the Children's Act No. 38 of 2005, as amended by the Children's Amendment Act No. 41 of 2007.