

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 judgement of the Teddy Bear Clinic case?

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In the Teddy Bear Clinic case, the High Court declared some sections of the Sexual Offences Act unconstitutional, a decision which is still to be confirmed by the Constitutional Court. However, until the Constitutional Court pronounces on the matter, doctors faced with child patients who have been involved in 'consensual sexual penetration' or 'consensual sexual violations' with other children would be fully justified in not reporting such conduct to the authorities because (i) the High Court has judged the criminalisation of such conduct as unconstitutional, which is likely to be upheld by the Constitutional Court; and (ii) there is no duty to report consensual sexual activities involving children if this would violate the constitutional 'best interests of the child' principle.

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Currently, the Criminal Law (Sexual Offences and Related Matters) Amendment Act (Sexual Offences Act)^[1] criminalises 'consensual sexual penetration' between children and other 'consensual sexual violations' between children. However, in the Teddy Bear Clinic case, the High Court judged that the provisions of the Act are unconstitutional and should be amended.^[2] Similar views have been expressed elsewhere in relation to the reporting of such sexual activities where it is not in 'the best interests' of the children concerned.^[3] What should doctors do until the court decision declaring the relevant sections of the Act unconstitutional is confirmed by the Constitutional Court?

The crime of 'consensual sexual penetration' with a child when both parties are children

The court in the Teddy Bear Clinic case held that the following provisions of the Sexual Offences Act are unconstitutional: (i) the offence of 'consensual sexual penetration' with a child (statutory rape) between children; (ii) the defence that applies to 'consensual sexual violation' with a child between children that decriminalises such violation where the age difference between both accused persons is less than 2 years at the time of the offence; and (iii) the very broad definition of 'sexual penetration'.^[1] They were deemed unconstitutional to the extent that they:

- criminalise a child who is between 12 and 16 years of age for engaging in an act of consensual sexual penetration with another child between 12 and 16 years of age

- criminalise a child who is between 16 and 18 years of age for engaging in an act of consensual sexual penetration with a child who is younger than 16 years and is 2 years or less younger than the former.^[2]

This is because the effect of the sections in the Act is discriminatory. For instance, if a first child who is between 16 and 17 years of age has 'consensual sexual penetration' with a second child aged 12 - 15 years, only the first child commits an offence. However, where the first child and the second child are both 12 - 15 years of age, both are guilty of an offence.^[2] The result is that if 2 younger children engage in 'consensual sexual penetration' they may both be prosecuted, whereas if 1 child has sex with an older child between 16 and 17 years, only the older child can be prosecuted. The court also pointed out that the Act's definition of 'sexual penetration' was so wide that it criminalises 'many forms of consensual sexual play and exploration which cannot cause pregnancy or the transmission of sexual disease'.^[2]

The court ordered that to remedy the defect in section 15 dealing with 'sexual penetration', the section should be amended to read as follows: 'A person ('A') who commits an act of sexual penetration with a child ('B') is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child, unless at the time of the sexual penetration (i) A is a child: or (ii) A is younger than 18 years old and B is 2 years or less younger than A at the time of such acts.'

The crime of 'consensual sexual violation' with a child when both parties are children

In the Teddy Bear Clinic case, the court held that the offence of 'consensual sexual violation' with a child;^[1] the defence that decriminalises such violation where the age difference between both accused persons is less than two years at the time of the offence;^[1] and the very broad definition of 'sexual violation';^[1] are unconstitutional to the extent that the offence criminalises a child who is between 12 and 16 years of age for engaging in an act of consensual sexual violation with another child between 12 and 16 years of age, where there is more than a 2-year age difference between them.^[2]

This section is also discriminatory: if a first child who is between 16 and 17 years of age engages in a 'consensual sexual violation' with a second child aged 12 - 15 years of age, only the first child commits an offence – if the age difference between them is more than 2 years. However, where the first child and the second child are both 12 - 15 years of age, and there is more than 2 years between them, both are guilty of an offence.^[2] Therefore, if 2 younger children engage in a 'consensual sexual violation', where there is more than 2 years between them, they may both be prosecuted, whereas if one of them is between 16 and 17 years of age, and there is more than two years between them, only the elder can be prosecuted. The court also observed that the definition of 'sexual violation' was so wide that it criminalises 'conduct (such as kissing and light petting) that virtually every normal adolescent participates in at some stage'.^[2]

The court ordered that to remedy the defect in section 16 dealing with 'sexual violation' it should be amended to read as follows: 'A person ('A') who commits an act of sexual violation with a child ('B') is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual violation with a child, unless at the time of the sexual violation A is a child.'

The crimes of 'consensual sexual penetration' and 'consensual sexual violation' with a child where both parties are children and the 'best interests' of the child

The Teddy Bear Clinic court found that the crimes of 'consensual sexual penetration' and 'consensual sexual violation' with a child where both parties are children undermined the 'best interests of the child' principle in the Constitution^[4] and the objectives of the Child Justice Act,^[5] as has been suggested elsewhere.^[6] The court found that the evidence presented in the case 'clearly indicates' that the impugned provisions of the Sexual Offences Act 'may cause harm to children'^[2] and, in accordance with past decisions of the Constitutional Court,^[6] 'stigmatise and degrade children on the basis of their consensual sexual conduct'.^[2] The provisions also violate the constitutionally protected rights of children to determine their personal relationships and their rights to autonomy, dignity and privacy.^[2] Furthermore, the diversion provisions in the Child Justice Act^[5] 'would not avoid the substantial trauma and harm that the children would endure' as they would have been exposed to the earlier processes in the criminal justice system 'such as arrest, being required to provide detailed statements about their sexual conduct, being questioned by police and other authorities about the sexual conduct, and detention in police cells'.^[2]

The effect of the Teddy Bear Clinic judgement on the duty to report sexual offences between children under the Sexual Offences Act

The Teddy Bear Clinic court mentioned that although the duty to report sexual offences against children listed in the Act^[1] had not been raised, it may be the subject of a separate constitutional challenge.^[2] However, the court acknowledged that its effect may still 'play a role in the consideration of the constitutionality of the impugned provisions'.^[2] Prior to the Teddy Bear Clinic case it had been submitted that the duty to report 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.^[3] This submission also suggested that the reporting requirement may undermine the purpose and confidentiality provisions of the Choice on Termination of Pregnancy Act^[7] affecting 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;^[8] as well as the provisions of the Child Justice Act,^[5] which aims to divert children away from the criminal justice system.^[6]

The effect of the Teddy Bear Clinic judgement is that once 'consensual sexual penetration' between children and 'consensual sexual violations' between children become decriminalised for being in violation of the Constitution, the duty to report such conduct in terms of the Sexual Offences Act will automatically fall away unless it amounts to child abuse – in which case it would be reportable under the Children's Amendment Act.^[9]

What should doctors do pending confirmation of the Teddy Bear Clinic judgement by the Constitutional Court?

As has been previously mentioned, the decision of the court in the Teddy Bear Clinic case declaring the relevant sections of the Sexual Offences Act unconstitutional must still be confirmed by the Constitutional Court. However, until the Constitutional Court pronounces on the matter, doctors faced with child patients who have been involved in 'consensual sexual penetration' or 'consensual sexual violations' with other children would still be fully justified in not reporting such conduct to the authorities for two reasons: (i) the High Court has judged the criminalisation of such conduct as unconstitutional (and this is likely to be upheld by the Constitutional Court); and (ii) because there is no duty to report consensual sexual activities involving children if doing so would violate the constitutional 'best interests of the child' principle.

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