

# POLICY BRIEF

THE ROLE OF MEMBERS OF PARLIAMENT IN  
INFLUENCING POSITIVE POLICY REFORM ON ACCESS TO  
SEXUAL REPRODUCTIVE HEALTH RIGHTS AND  
SERVICES AS AN ESSENTIAL RIGHT TO UNIVERSAL  
HEALTH CARE FOR CHILDREN!



BY



WITH SUPPORT FROM



## PURPOSE

The purpose of this policy brief is to facilitate and influence dialogue by and among policy makers for purposes of reform on;

Age of consent to sexual intercourse

· Access to sexual and reproductive health services for children.

This can only be achieved by strengthening the role of Parliamentarians in promoting the incorporation of policies and programs that address young peoples' specific situations with regards to SRHS.

## KEY TERMS

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 (Section 81 of the Constitution of Zimbabwe)

SRHS - Sexual and Reproductive Health Services

SRHR - Sexual and Reproductive Health Rights

Young person - In the context of sexual offences in the <sup>1</sup>Criminal Law (Codification and Reform) Act [Chapter 9:23], means a boy or a girl below the age of 16 years

## INTRODUCTION

The age of consent to sexual intercourse in Zimbabwe is 16 years for both females and males who are unmarried as provided for by our law. The law also presumes that a 12 year old can consent to sexual intercourse but this is subject to the presiding officers' assessment of a matter presented to him or her. Even though our laws provide for the age of consent there is no law that protects the 16-18 year age group from consensual sexual intercourse with their peers and from sexual predators who take advantage of this age group.

What this brief seeks to do is to provide guidance to policy makers on the challenges presented by the current legal position and common practices for children seeking access to SRHR. Much needed reforms can address problems that arise with early indulgence in sexual intercourse of young people which are HIV and AIDS, STI's, unwanted teen pregnancies, obstetric fistula and unsafe abortions to name just a few. Duty bearers are largely unaware that the age of consent to sexual intercourse and access to sexual and reproductive health services are two issues that work hand in glove. One cannot speak of access to sexual and reproductive health services for young people whilst not factoring in the legal aspects thereto. Thus it would be commendable to strengthen our laws and policies to meet the sexual and reproductive health needs of young people in Zimbabwe.

## RATIONALE

Despite the cultural beliefs entrenched in our communities that sexual intercourse related matters are a taboo, children as young as 10 years are sexually active before they reach the age of 18 years as per the Zimbabwe's demographic health data survey of 2015. <sup>2</sup>The survey reveals that 40% of girls and 24% of boys are sexually active before they are 18 years of age. Issues continue to emerge, such as the scourge of child prostitution in places like Epworth and Hopley as well as hotspot areas in Zimbabwe's haulage trucking routes such as Ngundu, Beitbridge and Kazungula Border posts. These scourges have necessitated the age of consent and access to SRHS debates. Sexual activities remain detrimental to the health and wellbeing of young persons and they put them at high risk of various reproductive health challenges such as unwanted pregnancies, unsafe abortions and high levels of STI and HIV infections which are a major public health concern.

### a) 12-14 year age group

Sexual intercourse with a minor child below the age of 12 years is rape, indecent assault or aggravated indecent assault depending on circumstances. The 12-14 year age group can however consent to sexual intercourse if capable of doing so but in most cases this is for the presiding officer to ascertain. This has created problems as different presiding officers interpret the law differently. One interpreting can safely say that the law appreciates that a 12 year old can consent to sexual intercourse if capable of doing so.

### 14-16 age group

The 14-16 year age group is protected under section 70 of the Criminal Law (Codification and Reform) Act which provides for the crime of having sexual intercourse with a young person.

<sup>1</sup>Criminal Law (Codification and Reform) Act [Chapter 9:23]

<sup>2</sup>Zimstat, Zimbabwe Demographic Health Survey, 2015

### **c) 16+ age group**

The 16-18 year age group is only covered by the law when the sexual intercourse was not consensual but when one engages in consensual sexual intercourse with this age group there is no clear crime to be charged with, working to the advantage of sexual predators. Adolescent girls and boys are engaging in consensual sexual intercourse which is termed "child play" but due to lack of knowledge by some duty bearers these cases go through the justice system. In most cases upon being chastised or suspected of engaging in sexual intercourse the girl child cries "rape!" and the guardians rush to report the case to the police. The boy child ends up being punished without even looking at the aspect of consent and the age factor. Although the government has provided for the standardised age of consent there is need to protect "child play" survivors as well as the 16-18 year age group.

### **PARENTAL CONSENT TO ACCESS SERVICES**

In Zimbabwe, there is no legislation that specifies the age limit to which parental consent is required to receive medical treatment. However, the common practice is that parental consent is required to provide medical treatment to a child below 16 years old. Common practice has been that medical treatment to children below 16 years of age requires parental consent as provided for by the Medicines and Allied Substances Control (General) Regulations 1991. The Zimbabwean common practice of denying children under the age of 16 years access to sexual and reproductive health services without parental consent due to the adoption of the provisions of the Medicines Allied Substances Control (General) regulations is a hindrance for young persons to assert their sexual and reproductive health rights. The age of consent for cervical screening, which is relatively a sexual and reproductive health concern, 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" and this is left to the health provider's discretion. This same criteria is also used when a minor above 16 years goes for HIV/AIDS testing. The results are released to the minor child directly if they are 16 years old and above and if they are below 16 years the results are issued out to the minor child upon the health provider's assessment of the child's maturity. Thus one can safely conclude that the established practice is that a minor child below the age of 16 years cannot access sexual reproductive health services without parental consent. But is this the way to go when indeed research has shown that minor children are engaging in sexual intercourse either voluntarily or involuntarily.

### **CLOSE-IN-AGE EXCEPTIONS**

The absence of "close in age" exceptions to the age of consent to sexual intercourse has resulted in incarceration of the boy child in cases of "child play" through failure to assist the two experimenting adolescents.

### **THE ISSUES**

#### **The challenge with the Putative Consent**

The age of consent to sexual intercourse in Zimbabwe is 16 years for both females and males as provided for by our law; however the law provides for putative consent with regards to the 12 year age group whom upon the presiding officer's enquiry can competently be deemed capable of consenting to sexual intercourse.

#### **The 16+ years age group not covered by the law**

The 16-18 year age group is not covered by the law when the sexual intercourse is consensual although they are still children as provided for by the supreme law of the land, the Constitution. This has seen many sexual predators escaping the hands of the law by taking advantage of this age group.

#### **Inconsistencies in the definition of a child**

The Constitution of Zimbabwe which is the supreme of law of the land in section 2 defines a "child" as a boy or a girl below the age of eighteen years. The Children's Act [Chap 5:06] and the Public Health Act [Chap 15:09] define a child as a person under the age of sixteen years of age. The supremacy of the Constitution as provided for in section 2 of the Constitution thereby makes the definition of a child in the Children's Act and the Public Health Act invalid as it is inconsistent with the definition of a child in the Constitution.

#### **Lack of legal capacity by children to enter into legal contracts**

Our Common law provides that a minor has no legal capacity to enter into any legally binding contract. This follows that an agreement made between a health personnel and a 12 year old is not enforceable at law. The

question is, how can minor children who are deemed incompetent to enter into any legally binding agreement, agree to enter into health service provision agreements with service providers without the knowledge of their guardians whom they stay under their care?

### POINTS TO PONDER

- a) Who will be responsible in a case where the minor child's life is put at risk in the course of service provision?
- b) Will this not open flood gates of legal suits against service providers if there is no policy framework that addresses these key issues?

### THE SOLUTIONS

#### a) Statutory inclusions

The age of consent should not be raised to be above the age of 16 years but the law should provide for statutory inclusions that criminalise sexual intercourse with children below the age of 18 years.

#### b) Close-in-age-exemptions

Introduction of what is termed "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 also referred to as the "Romeo and Juliet clauses" in the United States. Some countries in our region have introduced into their laws, the close-in-age exemptions into their criminal statute books. <sup>3</sup>Zimbabwean can draw examples from Namibia in section 2(2) (d) of the Combating of Rape Act 8 of 2000 and also amended <sup>4</sup>South African Sexual Offences Act law following the Teddy Bear Clinic judgment, albeit putting the close-in-age at 2 years.

#### c) Acceptance that children are indulging into sexual intercourse

Practical realisation and acceptance that children are engaging in sexual activities amongst themselves is the way to go. 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. Thus there is need for unhindered access to sexual and reproductive health care by children below 16 years which must be ensured, provided and managed in such a way that children are protected from medical negligence and poor choices.

### RECOMMENDATIONS TO MEMBERS OF PARLIAMENT

- There should be a policy framework securing sexual and reproductive health rights of children.
- Pending Bills before the Parliament which are the Children's Amendment Bill, Child Justice Bill and the Marriages Bill are an opportunity to influence possible amendments that would promote holistic child protection with regard to children's sexual reproductive health rights.

<sup>3</sup>Parliament of the Republic of Namibia, Child Care Protection Act 3, (2015), Namibian Combating of Rape Actsec.2(2)(d)

<sup>4</sup>Constitutional Court of South Africa, Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another (2013)

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## ABOUT US

Justice for Children (JCT) is a non-governmental organisation which was established in December 2002. 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. The institution, has been at the forefront of child protection in Zimbabwe through the provision of legal services, legal education, and through lobby and advocacy. Its vision is to see a Zimbabwe in which all children have access to justice and enjoy their human rights.

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