

**UNIVERSITY OF KWAZULU-NATAL**

**Consensual Sexual Offences- Should we make our youth sexual offenders? A critical review  
on the Teddy Bear case**

**by**

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## Chapter one

### 1. Introduction

In South Africa adolescents aged 16 can consent to sexual intercourse.<sup>1</sup> Prior to the *Teddy Bear clinic* case<sup>2</sup>, adolescents aged 12-15 could not consent to sex or sexual activity as this consent was not recognised by law as being legally valid.<sup>3</sup> Since the *Teddy Bear clinic* judgment adolescents aged 12-15 can consent to sex or sexual activity as it is recognised as being legally valid, provided that there is a no more than 2-year age gap between the adolescents.<sup>4</sup>

“Section 15 of the Sexual Offences Act creates an offence of statutory rape in relation to the commission of sexual penetration”.<sup>5</sup> “Sexual penetration includes vaginal, anal and oral sexual intercourse, as well as some forms of masturbation by another person”.<sup>6</sup> “Section 16<sup>7</sup> creates an offence of statutory sexual assault in relation to sexual violation”.<sup>8</sup> “Sexual violation means the direct or indirect contact of different forms of masturbation by another person, petting, kissing and hugging”.<sup>9</sup>

Since the *Teddy Bear clinic* judgement sections 15 and 16 of the Sexual Offences Act has been amended so that adolescents are not punished for engaging in activities which are developmentally normative.<sup>10</sup> However, the Court insured that there are certain restrictions. The court held that it will be irrational to punish both adolescents for engaging in consensual sexual activity therefore if there is a more than two-year age gap between the adolescents, the older of the two will be prosecuted.<sup>11</sup>

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<sup>1</sup> Criminal Law (*Sexual Offences and Related Matters*) Amendment Act No. 32 of 2007 (hereinafter referred to as the Sexual Offences Act).

<sup>2</sup> *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* (CCT 12/13) [2013] ZACC.

<sup>3</sup> Section 15 & 16 of the Criminal Law (*Sexual Offences and Related Matters*) Amendment Act No. 32 of 2007.

<sup>4</sup> S Bhamjee, Z Essack, A Strode ‘Amendments to the Sexual Offences Act dealing with consensual underage sex: Implications for doctors and researchers’ (2016) 106 (3) SAMJ 257.

<sup>5</sup> *Teddy Bear Clinic* supra note 2 at 9.

<sup>6</sup> *Teddy Bear Clinic* supra note 2 at 9.

<sup>7</sup> Sexual Offences Act.

<sup>8</sup> *Teddy Bear Clinic* supra note 2 at 10.

<sup>9</sup> *Teddy Bear Clinic* supra note 2 at 10.

<sup>10</sup> *Teddy Bear Clinic* supra note 2 at 38.

<sup>11</sup> *Teddy Bear Clinic* supra note 2 at 37-38.

During a young age adolescents aged 12-15 start to explore their sexuality which is developmentally normal.<sup>12</sup> They are curious individuals who experiment by kissing, petting and engaging in penetrative sex.<sup>13</sup> Young adolescent's sexual behaviour is of great concern given the high number of adolescents engaging in "unprotected sex, having multiple sexual partners, STI, HIV infection and early pregnancy".<sup>14</sup> "A survey in South Africa found that adolescents aged 12-15 years engage in sexual behaviours such as kissing (71.4% of girls and 88.4% of boys) more commonly than oral (3.9% of girls and 13.8% of boys), vaginal (9.3% of girls and 30% of boys), or anal (1.4% of girls and 10.5% of boys) sex".<sup>15</sup> Currently there is a higher rate of adolescents engaging in sexual activity who are in relationships (21.1% of girls and 49.4% of boys) than those who are not (4.5% of girls and 20.2% of boys).<sup>16</sup>

In a another recent survey conducted by Gevers<sup>17</sup> *et al* on the percentage of adolescents engaging in sexual activity between the ages of 12-15, it should be noted that kissing was a common factor amongst girls and boys.<sup>18</sup> "6.4% of girls reported that they has experienced penetrative sex (oral, vaginal or anal) in the past three months and 11.8% had penetrative sex in their lifetime".<sup>19</sup> "34% of boys on the other hand had penetrative sex in their lifetime whereas 16.9% had done so in the past three months".<sup>20</sup>

Other research conducted on adolescents aged 12-15 years shows that 44.4% of males and 28.6% of females have been reported as having had sex during their lifetime.<sup>21</sup> It has further been reported that 20.2% of males and 4.2% of females engaged in sexual intercourse before the age of 14 years.<sup>22</sup> Lastly it has been reported that 55.2% of males and 36% of females aged 12-15 years has

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<sup>12</sup> *Teddy Bear Clinic* supra note 2 at 21-22.

<sup>13</sup> Gevers A, Mathews C, Cupp P, Russell M, Jewkes R 'Illegal yet developmentally normative: A descriptive analysis of young, urban adolescents dating and sexual behavior in Cape Town, South Africa' (2013) 13(31) BMC International Health and Human Rights 4.

<sup>14</sup> *ibid* 4.

<sup>15</sup> *ibid* 2.

<sup>16</sup> *ibid* 2.

<sup>17</sup> *ibid*.

<sup>18</sup> *ibid* 11.

<sup>19</sup> *ibid* 11.

<sup>20</sup> *ibid* 11.

<sup>21</sup> Reddy SP, James S, Sewpaul R, Sifunda S, Ellahebokus A, Kambaran NS, Omardien RG 'Umthente Uhlaba Usamila – The 3RD South African National Youth Risk Behaviour Survey 2011' (2013) Cape Town: South African Medical Research Council 26.

<sup>22</sup> *ibid* 26-27.

had more than two sexual partners in their lifetime.<sup>23</sup> This study found further that there were many factors related to adolescents engaging in sexual activity at such a young age.<sup>24</sup> These factors are “age, family poverty, parent-child relationship difficulties, personality, behavioural vulnerabilities and peer pressure that has been associated with risky sex among adolescents”<sup>25</sup>. The circumstances and the environment in which adolescents are exposed to influences the age at which they begin to engage in sexual activities.<sup>26</sup> Therefore we should be aware of the alarming rate of under-age consensual sex occurring between adolescents.<sup>27</sup>

It should be further noted that adolescent’s motivation for engaging in consensual sexual activity at a young age is amongst others; that they “wanted to have fun or experiment, to appear mature, to experience physical pleasure, to overcome boredom, to improve their social relationships, to obtain money in high poverty areas or because substance such as alcohol and drugs were taken”.<sup>28</sup> It is argued that these factors need to be addressed by sex education, legislation and better communication between a parent and child to ensure that adolescents make better decisions regarding their sexuality.<sup>29</sup>

Finally we should be aware of the fact that regardless of what law the legislature may draft adolescents are engaging in consensual sexual activity at a young age which is developmentally normal.<sup>30</sup> The high number of sexual encounters between adolescents should be alarming and there is a need for comprehensive education to guide adolescents to have protected and safe sex.

Sexual activities between all individuals and adolescents are regulated by sections 15 and 16 of the Sexual Offences Act.<sup>31</sup> The Sexual Offences Act “criminalised a wide range of consensual sexual activities between adolescents aged 12-15 which included kissing on the mouth, hugging, sexual touching and sexual intercourse”.<sup>32</sup> The Constitutional Court delivered a judgement in the

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<sup>23</sup> *ibid* 27.

<sup>24</sup> *ibid* 26-27.

<sup>25</sup> Gevers (note 13 above; 14).

<sup>26</sup> *ibid* 14.

<sup>27</sup> *ibid* 14.

<sup>28</sup> *ibid* 14.

<sup>29</sup> *ibid* 14.

<sup>30</sup> *ibid* 15.

<sup>31</sup> Act No. 32 of 2007.

<sup>32</sup> Moulton, K. & Müller, A ‘Navigating conflicting laws in sexual and reproductive health service provision for teenagers’ (2016) 39 (1) *Curationis* 1.

*Teddy Bear clinic* case<sup>33</sup> which challenged the constitutionality of sections 15 & 16 of the Sexual Offences Act.<sup>34</sup>

In the *Teddy Bear clinic* case the issue which the Constitutional Court dealt with was “whether the impugned sections are inconsistent with the Constitution insofar as they impose criminal liability on children for engaging in consensual sexual conduct”.<sup>35</sup> The applicants argued that sections 15 and 16 were unconstitutional as it infringed on adolescents right to dignity, privacy, bodily and psychological integrity.<sup>36</sup> It was further argued that the impugned sections failed to take into account ‘the best interest of the child’.<sup>37</sup>

In the *Teddy Bear clinic* case the Constitutional Court agreed with the applicants and declared the impugned provisions unconstitutional as it “imposed criminal liability on children under the age of 16” and contravened the ‘best interest of the child’ principle.<sup>38</sup> The court gave legislature 18 months to revise sections 15 & 16 of the Sexual Offences Act and all criminal charges against adolescents during that period was suspended.<sup>39</sup> In 2015 the Legislature published the Criminal Law (Sexual Offences & Related Matters) Amendment Act 5 of 2015 (herein referred to as the 2015 SOA Amendment Act).

The 2015 SOA Amendment Act made two significant changes to the existing law. The first amendment was that it decriminalized consensual sexual activity between adolescents aged 12-15 in certain circumstances.<sup>40</sup> And secondly it decriminalised consensual sexual activity between 12-15 year olds and 16-17 year olds provided that there is not more than two years age difference between them.<sup>41</sup> Since the decriminalisation of consensual sexual activity the 2015 SOA Amendment Act underlines the importance of discouraging adolescents from engaging in sexual activity.<sup>42</sup> Therefore legislature, educators and parents need to work together to uphold the

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<sup>33</sup> *Teddy Bear Clinic* supra note 5.

<sup>34</sup> Act No. 32 of 2007.

<sup>35</sup> *Teddy Bear Clinic* supra note 5 at 17.

<sup>36</sup> *Teddy Bear Clinic* supra note 5 at 14.

<sup>37</sup> *Teddy Bear Clinic* supra note 5 at 14.

<sup>38</sup> *Teddy Bear Clinic* supra note 5 at 47.

<sup>39</sup> *Teddy Bear Clinic* supra note 5 at 52.

<sup>40</sup> Moulton (note 13 above; 5).

<sup>41</sup> *ibid* 5.

<sup>42</sup> *ibid* 5.

preamble of the 2015 SOA Amendment Act by ensuring that they educate adolescents on the repercussions of engaging in sexual activity at a young age.

## **2. The legal framework for regulating underage sex**

In South Africa children are seen as vulnerable groups of society who must be protected against the harsh realities of life.<sup>43</sup> Prior to the *Teddy Bear clinic* case section 15 and 16 of the Sexual Offences Act criminalised consensual sexual activity between adolescents aged 12-15, which impacted gravely on adolescent's sexual development.<sup>44</sup>

Sections 15 and 16 of the Sexual Offences Act deals with the criminalisation of sexual activity between adolescents. These sections state that a person who commits a sexual act (i.e. statutory rape) or violation with an adolescent (aged 12-16) is despite consent, guilty of an offence.<sup>45</sup> An act of sexual penetration (section 15) means “vaginal, anal and oral sexual intercourse, as well as some forms of masturbation by another person”.<sup>46</sup> And an act of sexual violation (section 16) means the “direct or indirect contact of different forms of masturbation by another person, petting, kissing and hugging”.<sup>47</sup> The implication of this was that, if two adolescents engaged in consensual sexual intercourse, both adolescents will be prosecuted if reported to police officials by any individual. From these sections<sup>48</sup> we can see what the legislature was trying to do, which was to protect adolescents however the manner in which these sections were drafted harmed adolescents instead of protecting them.<sup>49</sup>

## **3. Problems with the way in which the Sexual Offences Act dealt with under-age sex**

The main problem is that prior to the *Teddy Bear clinic* case, sections 15 and 16 criminalised consensual sexual activity between adolescents, which in turn meant that if an adolescent was “caught” engaging in sexual activity with another adolescent they would be dragged through the criminal justice system and be registered as a sex offender.<sup>50</sup>

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<sup>43</sup> *Teddy Bear Clinic* supra note 5 at 2.

<sup>44</sup> Moulton (note 13 above; 4).

<sup>45</sup> Sexual Offences Act s15 & s 16.

<sup>46</sup> *Teddy Bear Clinic* supra note 5 at 9.

<sup>47</sup> *Teddy Bear Clinic* supra note 5 at 10.

<sup>48</sup> Sexual Offences Act s15 & s16.

<sup>49</sup> Moulton (note 32 above; 1).

<sup>50</sup> Essack Z, Toohey J, Strode A ‘Reflecting on adolescents’ evolving sexual and reproductive health rights: canvassing the opinion of social workers in KwaZulu-Natal, South Africa’ (2016) 196.

Also of concern was section 54(1) (a), which provides that “a person who has knowledge that a sexual offence has been committed against a child must report such knowledge immediately to a police official”.<sup>51</sup> This section placed an obligation on all health care providers, nurses and researchers to report consensual sexual activity between minors to the police.<sup>52</sup> Accordingly, this “reporting obligation meant that health care providers assisting minors with a termination of pregnancy would be obliged to report that a sexual offence has occurred”.<sup>53</sup> Furthermore this duty to report may lead to back street abortions as adolescents are afraid to go to a health care provider.<sup>54</sup> This reporting obligation limits a child’s right to consent to termination of pregnancy, to access contraceptive advice and to consent to HIV testing.<sup>55</sup> However it should be noted that this was an issue raised by literature and not the court in the *Teddy Bear clinic* case.

Another problematic issue with the impugned provisions was that if an adolescents was convicted, they would have faced the risk of his/her name being entered in a National Register for Sex Offenders in terms of the Sexual Offences Act.<sup>56</sup> This would have had a negative impact on their lives. Firstly they would have been labelled as paedophiles and secondly labelled a sex offender carries with it shame, humiliation, loss of employment and many other harsh consequences.<sup>57</sup> It is very important to note that this is no longer an issue since the *J v National Director of Public Prosecutions and Another* <sup>58</sup>case.

A further concern was the fact that the Sexual Offences Act was in conflict with the Choice on Termination of Pregnancy Act 92 of 1996 which required confidentiality between the doctor and patient while section 54 requires doctors to break such confidentiality by reporting adolescents to

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<sup>51</sup> Sexual Offences Act s54.

<sup>52</sup> Strode A, Toohey J, Slack C, Bhamjee S ‘Reporting underage consensual sex after the Teddy Bear case: A different perspective’ (2013) 6 (2) SAJBL 45.

<sup>53</sup> *ibid* 45.

<sup>54</sup> Strode A, Slack C ‘ Sex, Lies and Disclosures: Researchers and the Reporting of under-age sex’ (2009), The South African Journal of HIV Medicine, 9.

<sup>55</sup> Strode (note 52 above; 45).

<sup>56</sup> Sexual Offences Act s50.

<sup>57</sup> P Stevens ‘Recent Developments in Sexual Offences against Children- A Constitutional Perspective’ (2016) 19 PER/PELJ 23.

<sup>58</sup> 2014 (2) SACR 1 (CC).

police officials.<sup>59</sup> Another factor which needs to be taken into account was the reporting obligations under the Children's Act.<sup>60</sup> In the Children's Act the reporting obligation is triggered when a health care provider finds reasonable grounds to conclude that a child patient has been abused physically or sexually or that a child has been neglected deliberately. In contrast the Sexual Offences Act required reporting as soon as there is knowledge.<sup>61</sup>

#### **4. The *Teddy Bear clinic* case**

##### **4.1. High Court Judgement**

The High Court declared sections 15 and 16 of the Sexual Offences Act unconstitutional in the *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another, (73300/10) [2013] ZAGPPHC 1* case.

The issue before the High Court was the validity of sections 15 & 16 of the Sexual Offences Act.<sup>62</sup> The applicants in this case sought to change the constitutional validity of sections 15, 16 & 56(2) (this is a defence used in relation to sections 15 & 16) of the Sexual Offences Act as these sections infringed on adolescents rights to engaged in consensual sex or sexual activity with other adolescents aged 12-15.<sup>63</sup> In their application the applicants held that should the above fail, they then sought to challenge sections 54(1) (mandatory reporting), 50(1)(a)(i) & 50(2)(a)(i) (adolescents names being added to the National Register for Sex Offenders list, if caught engaging in consensual sexual activity).<sup>64</sup>

Rabie J in his ruling declared that the two impugned sections were unconstitutional in so far as they criminalised consensual sexual activity between adolescents aged 12-15 and further they criminalized an adolescent aged 16-18 for engaging in consensual sexual activity with a child who is younger than 16 years.<sup>65</sup> The High Court held that sections 15 & 16 must be interpreted as implying that an adult (aged 18 or older) who engages in consensual sexual acts of penetration and

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<sup>59</sup> P Mahery 'Reporting sexual offences involving child patients: What is the current law following the Constitutional Court judgment?' (2014) 7(1) SAJBL 26.

<sup>60</sup> *ibid* 28-29.

<sup>61</sup> *ibid* 28-29.

<sup>62</sup> *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another, (73300/10) [2013] ZAGPPHC 1, 2.*

<sup>63</sup> *Teddy Bear Clinic* supra note 62 at 2.

<sup>64</sup> *Teddy Bear Clinic* supra note 62 at 2.

<sup>65</sup> *Teddy Bear Clinic* supra note 62 at para 105.

violation with a child 12 to 15 will be guilty of an offence.<sup>66</sup> The court further held that the impugned sections need to be amended as to reflect the decision of the court.<sup>67</sup>

The rationale behind the court's decision is that the impugned sections violated various rights of children. The court held that the impugned section violated children's right to make choices about their bodies and reproduction.<sup>68</sup> The court further held that the impugned sections violated a child's right to privacy in terms of section 14 of the Constitution, as the impugned sections intruded on a child's private and intimate relationships.<sup>69</sup> And finally the court stated that sections 15 and 16 was not drafted properly to balance children's rights to autonomy, dignity and privacy therefore the impugned sections was irrational.<sup>70</sup>

The High Court's remedy was that it introduced a close-in-age defence to adolescents engaging in consensual sexual activity with one another.<sup>71</sup> The close-in-age defence stated that adolescents engaging in consensual sexual activity with one another, provided that there was no more than two years age gap between them. The matter was then referred to the Constitutional Court for confirmation.

#### **4.2. Constitutional Court Judgement**

The Constitutional Court brought to light important factors which impacted on children in *the Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another (CCT 12/13) [2013] ZACC 35* (hereinafter referred to as the *Teddy Bear Clinic* case).

In the Constitutional Court, the respondents opposed the High Court's judgement. This meant that the Constitutional Court had to determine the following two main issues: 1) "whether it was constitutionally permissible for children to be subject to criminal sanctions in order to deter early sexual intimacy and combat the risks associated with it"<sup>72</sup> and 2) "whether sections 15 & 16 of the act which deal with the offences of 'statutory rape' and 'statutory sexual assault' are

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<sup>66</sup> *Teddy Bear Clinic* supra note 62 at para 22.

<sup>67</sup> *Teddy Bear Clinic* supra note 62 at para 123.

<sup>68</sup> *Teddy Bear Clinic* supra note 62 at para 78.

<sup>69</sup> *Teddy Bear Clinic* supra note 62 at para 79.

<sup>70</sup> *Teddy Bear Clinic* supra note 62 at para 83.

<sup>71</sup> *Teddy Bear Clinic* supra note 62 at para 123.

<sup>72</sup> *Teddy Bear Clinic* supra note 62 at para 3.

constitutionally valid, that was whether the impugned sections are inconsistent with the constitution insofar as they impose criminal liability on children for engaging in consensual sexual conduct”.<sup>73</sup> Three ancillary issues also arises for “determination: a) whether any rights were limited by the impugned provisions; b) if so, are these limitations reasonable and justifiable in terms of section 36 of the Constitution? and c) if not, what as the appropriate remedy?”<sup>74</sup> These questions will be dealt with in more detail in chapter 2.

In the *Teddy Bear Clinic* case the applicants challenged the constitutionality of sections 15 and 16 of the Sexual Offences Act, arguing that whilst these provisions “intended to protect teenagers from unwanted or ill-advised sexual activity, their implementation has been highly problematic and has not always resulted in the ‘best interest of the child’ being upheld”.<sup>75</sup> Sections 15 and 16 harmed adolescents, in that they criminalised consensual sexual activity between children aged 12-15, exposing them to the criminal system.<sup>76</sup> In the Constitutional Court it was highlighted that these sections infringed on children’s rights to dignity, privacy, integrity and the best interest of the child.<sup>77</sup> “Therefore, the court had to decide if it was constitutional that children faced criminal sanctions for developmentally appropriate, consensual sexual behaviour in order to delay sexual activity and reduce the risks associated with it”.<sup>78</sup>

The Constitutional Court held that the impugned sections was unconstitutional as it infringed on children’s rights to privacy, dignity and further it infringes on the ‘best interest of the child’ principle.<sup>79</sup> The court further held that the close-in-age defence shall apply in instances of statutory rape and statutory assault.<sup>80</sup> The court suspended sections 15 & 16 for a period of 18 months so that legislature can remedy the defects of it.<sup>81</sup> Furthermore there was a “suspension on all investigations, arrests and criminal proceedings against all adolescents who were charged with sections 15 & 16 until Parliament remedies the said defects of the impugned sections”.<sup>82</sup> It was

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<sup>73</sup> *Teddy Bear Clinic* supra note 62 at para 37.

<sup>74</sup> *Teddy Bear Clinic* supra note 62 at para 37.

<sup>75</sup> Moulton (note 32 above; 4).

<sup>76</sup> *ibid* 1.

<sup>77</sup> Moulton (note 32 above; 4).

<sup>78</sup> Moulton (note 32 above; 4).

<sup>79</sup> *Teddy Bear Clinic* supra note 62 at para 76.

<sup>80</sup> *Teddy Bear Clinic* supra note 62 at para 105.

<sup>81</sup> *Teddy Bear Clinic* supra note 62 at para 110.

<sup>82</sup> *Teddy Bear Clinic* supra note 62 at para 111.

further held that all reporting obligations under sections 54 was suspended for 18 months.<sup>83</sup> However, this suspension is limited. “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”.<sup>84</sup> And lastly the court ordered that if an adolescents was convicted in terms of sections 15 and 16 of the Sexual Offences Act his/her name will not be entered into the National Sex Offenders Register and if it was previously entered before this judgement his/her name should be expunged from the list.<sup>85</sup>

## **5. Literature Review**

There are several articles that have been published since the High Court and the Constitutional Court judgement of the *Teddy Bear clinic* case, some of them deal with section 54(1) of the Sexual Offences Act (i.e. duty to report), the impact of sections 15 & 16 on adolescents, children’s rights, children’s development and sex education. In this chapter we will explore the different views of all the authors who wrote about the Teddy Bear clinic judgement and the impact it has on adolescents aged 12-15.

The first issue that was raised in the literature was the impact criminalisation has on adolescents engaging in consensual sex and sexual activity. In Stevens’s article he states that section 15 and 16 criminalised ‘consensual’ sexual activity between adolescents. The impugned sections affected adolescents greatly as it impacted on how they view their own sexual experiences and their development. He states that these sections were drafted to protect adolescents from predatory adults yet it prosecuted them for engaging in consensual sexual acts with their peers. Further, for adolescents the unintended consequence of this would be that they would be dragged through the criminal systems for engaging in consensual sexual conduct which is developmentally normal.<sup>86</sup> Other literature shows that consensual sexual activity between adolescents remains a reality at

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<sup>83</sup> *Teddy Bear Clinic* supra note 62 at para 111.

<sup>84</sup> P Mahery ‘Reporting sexual offences involving child patients: What is the current law following the Constitutional Court judgment?’ (2014) 7(1) SAJBL 27.

<sup>85</sup> *Teddy Bear Clinic* supra note 62 at para 117.

<sup>86</sup> Stevens (note 57 above; 23).

present and to punish adolescents for such conduct will cause more harm than resolving the problem.

Stevens affirms that the judgement will have many issues as it opens the door to morally objectionable behaviour between adolescents which may lead to early pregnancy or sexually transmitted diseases and even HIV.<sup>87</sup> The reason for this is that consensual sex and sexual activity between adolescents have been decriminalised, which gives adolescents the freedom to do what they want without having any consequences attached to their actions.<sup>88</sup>

Another problematic issue emerging from the literature is that once an adolescent is convicted they were automatically entered onto the National Register for sex offenders which has a serious impact on them. The negative impact of adolescents having their names on the Register was that they cannot be employed to work with children; hold any position of authority, supervision or care of children; be granted a licence or approval to manage or operate an entity, business or trade in relation to the care of children and become foster parents, kinship caregivers, or adoptive parents.<sup>89</sup>

Some authors submit that it is hard to believe that the legislature intended to create such a section which infringes on a child's right not to be punished in a cruel inhuman manner (section 12(1)(e) of the Constitution). "Being labelled as a sex offender 'carries with it shame, humiliation, ostracism, loss of employment and decreased opportunities for employment, perhaps even physical violence, and a multitude of other consequences'.<sup>90</sup>

Several authors have commented on an issue that was not addressed by the *Teddy Bear clinic* case namely the mandatory duty to report under-age sexual activity between adolescents. "Section 54(1) of the Act also provided that any person 'who has knowledge that a sexual offence has been committed against a child' must report this 'immediately' to the police".<sup>91</sup> Accordingly, this placed

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<sup>87</sup> P Stevens 'Decriminalising consensual sexual acts between adolescents within a constitutional framework: The Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Others Case: 73300/10 [2013] ZAGPPHC 1 (4 January 2013)' (2013) 1 SACJ 54.

<sup>88</sup> S Bhamjee, Z Essack, A Strode 'Amendments to the Sexual Offences Act dealing with consensual underage sex: Implications for doctors and researchers' (2016) 106 (3) SAMJ 257.

<sup>89</sup> *J v National Director of Public Prosecutions and Another* 2014 (2) SACR 1 (CC), para 21.

<sup>90</sup> Stevens (note 87 above; 53).

<sup>91</sup> Sexual Offences Act s54.

an obligation on all service providers, including doctors, nurses and health researchers, to report consensual underage sex or sexual activity.<sup>92</sup>

McQuoid-Mason states that the criminalisation of and the duty to report consensual sexual activity between adolescents where both children are under the age of 16 years and not more than two-year age gap between them is not in the best interest of a child as it is unconstitutional.<sup>93</sup> He suggests that once “consensual sexual penetration between children and ‘consensual sexual violations’ between children become decriminalised, 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”.<sup>94</sup> He further states that doctors who are 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.<sup>95</sup> McQuoid-Mason argues that the duty to report sexually active adolescents is unconstitutional, as it encroaches on the best interest of the child and limits the child’s constitutional right to privacy.<sup>96</sup> On the other hand Strobe and Slack et al suggest that only ‘exploitative’ underage consensual sex should be reported, while Bhana *et al.* suggest that in such situations researchers should work with a non-governmental organisation (NGO), such as ChildLine that could act as an intermediary in the reporting process.<sup>97</sup>

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<sup>92</sup> A Strobe, J Toohey, C Slack, S Bhamjee ‘Reporting underage consensual sex after the Teddy Bear case: A different perspective’ (2013) 6(2) *SAJBL* 45.

<sup>93</sup> McQuoid-Mason, D ‘Mandatory reporting of sexual abuse under the Sexual Offences Act and the ‘best interest of the child’’ (2011) 4(2) *SAJBL* 75.

<sup>94</sup> *ibid* 75.

<sup>95</sup> D J McQuoid-Mason ‘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?’ (2013), 6(1) *SAJBL* 11.

<sup>96</sup> Strobe (note 92; 45).

<sup>97</sup> *ibid* 45-46.

Strode, Toohey, Slack & Bhamjee state that if a child aged 12 - 15 has sex with an older partner aged 16 - 17 there may not be more than a 2-year age gap between them or the older person will still be committing a criminal offence. Accordingly, again, reporting will be required.<sup>98</sup>

“They suggest that the *Teddy Bear Clinic* case has eased the burden of reporting, in that researchers and health care providers are no longer automatically required to report underage sex. Following the *Teddy Bear Clinic* case only the older partner (either the person over 18 or the older adolescent of 16 - 17) is an offender. Therefore, there is not always an obligation to report, as the researcher or healthcare worker may not have ‘knowledge’ of the person who committed the sexual offence with the 12 - 15-year-old”.<sup>99</sup>

The authors above agree with Professor McQuoid-Mason in that they both believe that adolescents should not just be reported to the police once a health care provider has knowledge of adolescents engaging in consensual sex or sexual activity. They both are on the same standing point by stating that adolescents must be reported only if there is sexual abuse or if there is a more than two year age gap between the adolescents.

In the *Teddy Bear Clinic* case it was held that consensual sex where both parties are aged 12 - 15 is now no longer a sexual offence and the adolescent cannot be charged. “This takes away the reporting dilemma that healthcare providers and researchers faced in the past, where they had to elect to either comply with the criminal law or the Children’s Act”.<sup>100</sup> Strode, Toohey, Slack & Bhamjee submit that the “judgment is narrow in its scope and as a result researchers and healthcare providers must be aware that certain forms of consensual, underage sex or sexual activity with 12 - 15 year olds will still have to be reported if one of the participants is: Over the age of 18, aged 16 - 17 with more than a 2-year age gap between the participant and their younger sexual partner and under the age of 12”.<sup>101</sup>

If an adolescent advises a health care provider that they are engaging in consensual sex or sexual activity with another person who is more than two years older than them, a health care provider

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<sup>98</sup> ibid 46.

<sup>99</sup> ibid 46.

<sup>100</sup> ibid 46.

<sup>101</sup> ibid 46.

will be obliged to report that adolescent to the police.<sup>102</sup> This has a negative effect on adolescents as they will be dragged through the criminal justice system which the Teddy Bear clinic judgement was trying to avoid.<sup>103</sup> Strode, Toohey, Slack & Bhamjee state that even after the *Teddy Bear* case, a more nuanced approach may be required”.<sup>104</sup>

In a similar view Nomdo believes that consensual sexual experiences of children are considered taboo in the South African society.<sup>105</sup> “Adults feel more comfortable believing that children are ignorant of sex due to their conceptions of the innocence of childhood”.<sup>106</sup> And further the greatest harm to children is that access to counselling and health care services related to sexual decision making have now been derailed because they would have to report children who engage in consensual sexual activity to the police.<sup>107</sup> Children are therefore afraid to seek help and assistance when needed from health care providers or counsellors.

“The emphatic mandatory reporting provision in the Sexual Offences Act was fundamentally at odds with legislation that specifically aims to help and support children. The Children Act stipulates that no person may refuse to sell condoms to children over the age of 12 or to provide a child over the age of 12 with condoms on request where condoms are distributed or provided free of charge. She states that Teddy Bear Clinic, RAPCAN and the Centre for Child Law believes that whilst the Children’s Act protects and upholds children’s right to privacy, the Sexual Offences Act destroyed any prospect of confidentiality through its mandatory reporting provision. Prosecuting children for normal, healthy sexual experimentation fundamentally violated their dignity when they are put through the criminal justice system and forced to talk about something as private as their sexual activities”.<sup>108</sup>

Buthelezi and Bernard agree with the High Court ruling which states that criminalisation, together with the duty to report offenders, in terms of section 54(1)(a) of the act would have the effect of

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<sup>102</sup> *ibid* 46.

<sup>103</sup> *ibid* 46.

<sup>104</sup> *ibid* 46.

<sup>105</sup> C Nomdo ‘The dynamics of youth justice & the convention on the rights of the child in South Africa- Criminalising consensual sexual activities of adolescents in South Africa’ (2014) 16(1) RAPCAN 3.

<sup>106</sup> *ibid* 3.

<sup>107</sup> *ibid* 3.

<sup>108</sup> *ibid* 3.

limiting “the ability of support organisations to educate, empower, guide and support adolescents in their social development”.<sup>109</sup> The negative impact of the provisions would also affect health professionals who supply condoms and other contraceptives, as well as parents and peers who hear about an adolescent who has become sexually active – and where they fail to report such sexual activities. They further state that the impugned provisions also have the negative effect of discouraging rape victims from reporting rape, as the victim of the rape may also be charged with contravention of section 15 of the Sexual Offences Act – where the alleged rape victim is under the age of 16 years (par 54). South Africa cannot afford such a situation, given the prevalence of rape of women and children in the country”<sup>110</sup>. They further agree with the Court, in that prosecution of children must be the last resort. They submit that even the prospect of diversion will still be traumatic to children who are subjected to judicial proceedings, and this will be more harmful than beneficial.<sup>111</sup>

They suggest that in creating section 54(1) 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, which require strict confidentiality, or the objectives of the healthcare provisions in the Children’s Act, other laws such as the National Health Act (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”.<sup>112</sup>

Mahery questions a valid point which is ‘what should health care providers do when they have knowledge that adolescents are engaging in consensual sexual activity?’ ‘Should they report them to police officials or not?’<sup>113</sup>. She states that there is no law in place to force adolescents to disclose such intimate information about their sexual partners to health care providers. Therefore it is within the health care providers discretion to report said adolescent or not.

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<sup>109</sup> MB Buthelezi, RB Bernard ‘The Court Knows the Law’ (2014) 4 TSAR 630.

<sup>110</sup> *ibid* 630.

<sup>111</sup> *ibid* 631.

<sup>112</sup> Mahery (note 84 above; 26).

<sup>113</sup> *ibid* 27-28.

Furthermore there are other questions which have been unanswered, these questions are what if an adolescent does not want to disclose the age of their partner or refuses to say anything about their sexual partner at all?<sup>114</sup> In such a situation a health care provider has no knowledge of any sexual offence therefore the mandatory duty to report obligation falls away.<sup>115</sup>

In the *Teddy Bear clinic* case neither the High Court nor the Constitutional Court considered the constitutionality of the mandatory reporting obligation as entrenched in section 54 of the Sexual Offences Act as this was not an issue raised before the court.

Mahery states that 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”.<sup>116</sup> Some authors argue that law reform alone, as changed by the *Teddy Bear clinic* case will be insufficient.<sup>117</sup> Advocacy needs to be implemented to inform health care providers of the laws which they need to abide by and which laws have changed.<sup>118</sup> For example the Children’s Act has its own reporting obligations which has not been altered by the *Teddy Bear clinic* judgement.<sup>119</sup>

In terms of the Children’s Act a health care provider must on reasonable grounds report an adolescent who has been abused physically or sexually or that a child has been neglected deliberately.<sup>120</sup> “The report can be made to a child protection organisation, the Department of Social Development, or a police officer (section 110)”.<sup>121</sup> In contrast, the Sexual Offences Act requires all persons who has knowledge of adolescents engaging in consensual sexual activity to be reported to police officials which has a negative impact on adolescents as they become exposed to the criminal justice system.

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<sup>114</sup> *ibid* 27-28.

<sup>115</sup> *ibid* 27-28.

<sup>116</sup> *ibid* 28-29.

<sup>117</sup> *ibid* 28-29.

<sup>118</sup> *ibid* 28-29.

<sup>119</sup> *ibid* 28-29.

<sup>120</sup> *ibid* 28-29.

<sup>121</sup> *ibid* 28-29.

In a similar vein Bhamjee *et al* states that the Teddy Bear clinic judgement has not amended section 54 of the Sexual Offences Act.<sup>122</sup> She states that there are two changes which came about through this case. Firstly consensual sexual activity has been decriminalised. Secondly the 2-year age gap theory has been enforced to over both 16 and 17 year olds provided there is a 2 year age gap between them and other adolescent from age 12-15. “This ‘close-in-age’ defence has been expanded to include sexual violation”.<sup>123</sup> Steven’s points out that the scope of criminal liability was very wide as these sections did not provide any defences or protection to adolescents who were 16 and 17 years old.<sup>124</sup> As a result of the *Teddy Bear Clinic* decision, these problematic issues have been addressed. They state further that if though the Act has not been amended, the criminalisation of certain activities have been narrowed down. In turn this means that “doctors, health care providers and researchers do not need to report certain activities unless one of the parties are under the age of 12, the activity is non-consensual, the younger participant was 12 - 15 years old and the older participant 16 - 17, and the age difference between them was more than 2 years at the time of the act and the younger participant was 12 - 15 years old and their partner was an adult”.<sup>125</sup> A key outstanding issue is therefore that when the law is amended it does not solve the ethical issues that arise from it.<sup>126</sup> For example in terms of the Choice to Termination of Pregnancy Act, a girl at any age can legally terminate her pregnancy if she has sufficient maturity to make that decision however in terms of the Sexual Offences Act she has to be reported to police officials even if she had consented to sex.<sup>127</sup> Therefore given this horrific dilemma adolescents may choose to have back-street abortions because of the fear of them being reported and their partners being criminally charged.<sup>128</sup>

Secondly as with termination of pregnancy the Children’s Act allows children under the age of 12 to consent to an HIV test.<sup>129</sup> In this circumstance a health care provider may become aware that the child is sexually active and will therefore have to report him/her to police officials.<sup>130</sup> In this

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<sup>122</sup> Bhamjee (note 88 above; 257).

<sup>123</sup> *ibid* 257.

<sup>124</sup> Stevens (note 57 above; 23).

<sup>125</sup> Bhamjee (note 88 above; 257).

<sup>126</sup> *ibid* 257-258.

<sup>127</sup> *ibid* 257-258.

<sup>128</sup> *ibid* 257-258.

<sup>129</sup> *ibid* 258.

<sup>130</sup> *ibid* 258.

situation health care providers are placed in a difficult position as they will have to break their doctor-patient relationship when reporting said adolescent to the police.<sup>131</sup> When this occurs adolescents will not come forward to have an HIV test which will have a negative impact on them and their loved ones as they will not know their HIV status and how to protect themselves.<sup>132</sup>

Thirdly, the Children's Act and the Termination of Pregnancy Act requires health care providers to provide adolescents with sexual and reproductive health care services regardless of whether sexual intercourse in consensual or not and whether it requires them to report said adolescent to police officials.<sup>133</sup> In this instance health care providers are placed in an ethical problem because some adolescents who have been victims of sexual abuse do not want same to be reported however a health care provider has an obligation to report that information to the police.<sup>134</sup>

Fourthly, even though consensual sexual activity has been decriminalised, there will be ethical issues around adolescents, specifically female adolescents who have partners who are older than them.<sup>135</sup> In these circumstances girls will be required to be witnesses and provide evidence which will incriminate their partner in terms of criminal law.<sup>136</sup> Again the reporting obligation by health care providers or researchers will create mistrust and unease which may lead to adolescent not disclosing their partners age, which may also impact on the service they will be provided and counselling.<sup>137</sup>

Professor McQuoid- Mason is of the view that the reporting obligation under section 54 of the Sexual Offences Act violates the 'best interest of the child' principle.<sup>138</sup> Furthermore, it is an unjustified and unreasonable limitation on children's rights to bodily and psychological integrity and privacy.<sup>139</sup> And lastly he strongly believes that section 54 undermines the Choice to Termination of Pregnancy Act as adolescents (girls) will be afraid to approach doctors for an

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<sup>131</sup> *ibid* 258.

<sup>132</sup> *ibid* 258.

<sup>133</sup> *ibid* 258.

<sup>134</sup> *ibid* 258.

<sup>135</sup> *ibid* 258.

<sup>136</sup> *ibid* 258.

<sup>137</sup> *ibid* 258.

<sup>138</sup> McQuoid-Mason (note 93 above; 74).

<sup>139</sup> *ibid* 74.

abortion as they will be reported to police officials for engaging in consensual sexual activity, this in turn will lead to a higher rate of back-street abortions.<sup>140</sup>

Moult & Muller conducted research on health care providers and came to a conclusion that majority of them do not know their obligations under various Act.<sup>141</sup> Furthermore, the age to consent to sexual activity, the age of consent to contraceptive and termination of pregnancies is a blur to all health care providers as they do not know what is the age of consent for adolescents.<sup>142</sup> During their research Moult & Muller also discovered that health care providers were oblivious to the obligation under section 54 of the Sexual Offences Act and when faced with under age consensual sexual activity between adolescents they will refer them to a social worker instead of reporting them to the police.<sup>143</sup>

Another key theme that emerged in the literature is that of children's rights and Stevens states that the judgment to a larger extent confirms that adolescents are autonomous beings who should be afforded the right to sexual autonomy.<sup>144</sup> "Research on adolescent teenage sexual behaviour suggests that sexual exploration is a normal and expected phase of development. Criminalising consensual sexual acts between adolescents could accordingly prove severely detrimental to children infringing not only their autonomy interests with reference to the child's right to freedom of choice of lifestyle and social relations; but also developmental interests of the child to enter adulthood free from prejudice and stigmatisation".<sup>145</sup>

Lutchman is of the view that the concept of a 'sexual right' has not been developed by the courts.<sup>146</sup> However, the Constitutional Court in the *Teddy Bear clinic* case did state that by criminalising consensual sexual activity between adolescents diminishes one's self-worth as they are engaging in conduct which is developmentally normal.<sup>147</sup>

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<sup>140</sup> *ibid* 74.

<sup>141</sup> Moult (note 32 above; 5).

<sup>142</sup> *ibid* 5.

<sup>143</sup> *ibid* 5.

<sup>144</sup> Stevens (note 87 above; 52).

<sup>145</sup> *ibid* 52.

<sup>146</sup> S Lutchman 'Child Savers' v 'Kiddie Libbers': The Sexual Rights of Adolescents' (2014) 30 SAJHR 570.

<sup>147</sup> *ibid* 570.

Another issue is how to ensure that the net of criminal liability is not too large. In ensuring that criminal liability is kept to the minimum the court in the *Teddy Bear clinic* case dealt with 16 and 17-year-old adolescents engaging in consensual sexual activities with adolescents aged 12-15.<sup>148</sup> In this case the court held that a 16 or 17 year old will not be held criminally liable for engaging in consensual sexual activity with an adolescent aged 12-15 provided that there is a not more than two year age gap between them.

The evolving capacity of children is also significant thread through literature as research indicates that professionals and adults need to educate themselves about the sexual development of adolescents.<sup>149</sup> Murphy and Ellias state that adolescents sexual development evolves through different stages of their physical, emotional, cognitive, social and moral development.<sup>150</sup> They are of the view that adolescent's sexual perceptions and understandings are influenced through social practices.<sup>151</sup> Steinberg believes that at all children reach developmental milestones at different ages which means that that they express different desires at different ages.<sup>152</sup> Children desire to be accepted and liked by their friends and peers at different ages therefore adults need to be aware of this at all times.<sup>153</sup>

“Frayser states that the sexuality of children is a process that manifests itself in different ways as the child goes through the different developmental stages. On the other hand, Oswalt reminds us that children between the ages of 12–15 years, although sexually active, may lack cognitive and emotional maturity to make sound decisions about their sexual choices”.<sup>154</sup>“Some researchers are of the view that sexual behaviour by children is a result of a natural, human, biological and psychological developmental process. Other researchers believe that the sexual behaviour of children can be regarded as normal and typical when judged within the environments in which they live”.<sup>155</sup>

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<sup>148</sup> Stevens (note 57 above; 24).

<sup>149</sup> R Songca, M Karels ‘The Impact of Legislation on Childhood Sexuality in South Africa’ (2016) *OBITER* 230-231.

<sup>150</sup> *ibid* 230-231.

<sup>151</sup> *ibid* 230-231.

<sup>152</sup> *ibid* 230-231.

<sup>153</sup> *ibid* 230-231.

<sup>154</sup> *ibid* 231.

<sup>155</sup> *ibid* 234.

The majority of the authors are of the view that the *Teddy Bear clinic* case has a great impact on adolescents as it recognises adolescent's right to sexual development.<sup>156</sup> Even though consensual sexual activity between adolescents have been decriminalised the 2015 Sexual Offences Amendment Act ensures that adolescents are discouraged from “engaging in sexual activity at such a young age”.<sup>157</sup>

The literature also addresses other ways of dealing with this social issue which are not as harsh as the criminal law. Stevens states that the judgment to a larger extent confirms that adolescents are autonomous beings who should be afforded the right to sexual autonomy.<sup>158</sup> “Research on adolescent teenage sexual behaviour suggests that sexual exploration is a normal and expected phase of development. Criminalising consensual sexual acts between adolescents could accordingly prove severely detrimental to children infringing not only their autonomy interests with reference to the child's right to freedom of choice of lifestyle and social relations; but also developmental interests of the child to enter adulthood free from prejudice and stigmatisation”.<sup>159</sup>

“It cannot be disputed that South Africa is facing a significant social problem with its youth in general, especially in the form of the AIDS pandemic, rampant sexual abuse, sky-rocketing teenage pregnancies and a prevalence of predators that prey on teenagers and young children”.<sup>160</sup> However, criminalising consensual sexual activity between adolescents does not solve the problem. In order for us to solve the problem or perhaps make the situation of adolescents engaging in consensual sexual activity better we should implement sex education.<sup>161</sup> It should be noted that in a diverse and liberal environment sexually explicit material is readily available to adolescents on the television or through the internet.<sup>162</sup> We all have to accept this as it is reality. “Thus, sex education needs to be directed at giving minors proper education on sexual matters, which can counter the negative influence of media propaganda – rather than imposing criminal sanctions”.<sup>163</sup>

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<sup>156</sup> *ibid* 239.

<sup>157</sup> *ibid* 240.

<sup>158</sup> Stevens (note 144 above; 52).

<sup>159</sup> *ibid* 52,

<sup>160</sup> MB Buthelezi, RB Bernard ‘The Court Knows the Law’ (2014) 4 TSAR 638-639.

<sup>161</sup> *ibid* 638-639.

<sup>162</sup> *ibid* 638-639.

<sup>163</sup> *ibid* 638-639.

Furthermore McQuoid- Masons also believes that the solution is proper sex education at schools which will be less harmful to adolescents than imposing a criminal sanction on them.<sup>164</sup>

In conclusion the majority of the authors are leaning towards the rights of adolescents. Adolescents are autonomous being who should be afforded the same rights as adults (with non-harmful limitations). The decriminalisation of consensual sexual activity between adolescents creates a major shift in our law towards the recognition of adolescent's sexual development. However, even though the Teddy Bear clinic case decriminalised consensual sexual activity between minors there is a gap in the law as the courts nor legislature dealt with the reporting of consensual sexual activity between adolescents as envisaged in section 54 of the Sexual Offences Act. Majority of the authors strongly believe that adolescents should only be reported to police officials in exceptional circumstances and not if adolescents engage in 'consensual' sexual activity.

Furthermore, since sexual development of adolescents have been recognised by the courts and law. Sex education needs to be implemented in schools to ensure that adolescents are aware of the negative impact sexual activity will have on them at a young at. We should educate adolescents so that they can protect themselves from HIV, STD and further how to use condoms and contraceptives and equip them with the knowledge to make the right decision.

## **6. Objectives of this dissertation**

In South Africa there are many issues affecting children, however the *Teddy Bear Clinic* case hit the core of children's development. In this case the main issue was the criminalisation of consensual sexual activity between children in terms of sections 15 and 16 of the Sexual Offences Act. This is one of the few cases which deals with sexual and reproductive health rights of children. This case is vital as children are a vulnerable group of society which needs to be protected by all means and by punishing them for something which is developmentally normal is harsh.

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<sup>164</sup> McQuoid-Mason (note 93 above; 75).

## **7. The Statement of the Problem**

The main problem with this judgement is that the Constitutional Court in the *Teddy Bear Clinic* narrowly looked at the issues regarding criminalising consensual sex. The court did not look at some of the broader socio-legal issues relating to issues, such as: a) mandatory reporting of illegal sexual intercourse between adolescents and b) the disparate impact on de-criminalising under age sex on girls who generally have older partners as this means that they will be dragged into the criminal justice system. Section 54 which deals with the duty to report minors engaging in sexual activity to the police, remains unchanged which is actually in conflict with the decriminalisation of sections 15 and 16 of the Sexual Offences Act. On the one hand the court has granted adolescents the right to freely engage in consensual sexual intercourse without any consequences while on the other hand health care providers and any other person of such knowledge must report such activity between adolescents to the police.

Also of concern is the fact that the Sexual Offences Act is at odds with other legislation that specifically aims to help and support children.<sup>165</sup> For example the Children's Act stipulates that no person may refuse to sell condoms to children over the age of 12 or provide condoms to them when distributed freely. Another example would be the Choice on Termination of Pregnancy Act which requires strict confidentiality while the Sexual Offences Act requires these children to be reported to police officials.

Another problematic issue is the sky-rocketing percentage of teenage pregnancies, HIV, STD's, sexual abuse and the age at which sexual activity begins with adolescents. The court in the *Teddy Bear clinic* failed to deal with the issue of sex education. Sex education will play a vital role in adolescent's lives by making them aware of ways they can protect themselves, educating them on contraceptives and condoms, advising them of the harmful effects of engaging in sexual intercourse at a young age and trying to deter them from having sexual intercourse at a young age.

This dissertation will first discuss the overview of the *Teddy Bear clinic case* and the issues which the court did not deal with in the said case. We will then move on to discuss the *Teddy Bear clinic case* in-depth and critique the said case. We then discuss the amendments made to sections 15 and

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<sup>165</sup> Nomdo (note 104 above; 3).

16 in terms of the 2015 Sexual Offences Amendment Act. Thereafter we discuss the issue pertaining to sections 54 and finally provide remedies.

This dissertation will critically analyse the *Teddy Bear clinic* case and explore the revenues which was not dealt with by the court. This study is worth doing because in this dissertation a critical analysis of the *Teddy Bear Clinic* case will be explored with reference to its impact on adolescents in relation to sexual offences. It is important to first look at the *Teddy Bear Clinic case* in detail and explore the findings of the Constitutional Court and how the court protected children's rights, thereafter to look at the Sexual Offences Act as amended in 2015. This is an important and very significant case regarding sexual and reproductive health rights of children because this issue has not come before any court to date. Furthermore, this study will provide readers with different scholars' perspective on this matter and what issues the court failed to deal with.

#### **8. Statement of purpose:**

The purpose of this study is to critically review the *Teddy Bear Clinic* case and to critique the issues which constitutional court did not deal with in this case. This whole critique of the *Teddy Bear Clinic* case will be based on a desktop literature research.

#### **9. Research Questions:**

1. What issues were challenged in the Constitutional Court?
2. Why was consensual underage sex challenged in the Constitutional Court?
3. To what extent was the Constitutional Court judgment appropriate?
4. What issues were not dealt with by the Constitutional court and what are the implications of this?
5. Is there academic support for the judgement or not? What are scholars saying about the judgment? What proposals can be made to resolve any outstanding issues?

## **10. Chapter Outline:**

In chapter 2 we are going to explore the Constitutional Court judgement on the *Teddy Bear clinic* case and a critique thereof of the case. In chapter 3 we are going to view the amendments made to the impugned sections in terms of the 2015 Sexual Offences Amendment Act. In chapter 4 we are going to set out the conclusion and prospective recommendations thereof.

## **Chapter Two: *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another (CCT 12/13) [2013] ZACC 35***

### **2.1 Introduction**

In this chapter we are going to explore the landmark Constitutional Court judgement of the *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another (CCT 12/13) [2013] ZACC 35*. In this case Khampepe J, hands down a judgment dealing with whether it is constitutionally acceptable for adolescents to be criminalized for engaging in consensual sexual sex or activities with other adolescents aged 12-15 years old. Khampepe J, looks at a child's right to human dignity, privacy and the best interest of the child principle in conjunction with the impugned sections 15 and 16 of the Sexual Offences Act<sup>166</sup>. The court further determines "whether the impugned sections are inconsistent with the Constitution" insofar as it punishes adolescents for engaging in consensual sexual sex or activities with other adolescents aged 12-15 years old.<sup>167</sup> This chapter will first layout the factual background of the case and then explore the different aspects the court took into account for it to come to its final outcome. And further an analysis is then provided after each significant point of Khampepe J, with reference to the impact of criminalizing consensual sexual sex or activities between adolescents.

### **2.2 Facts**

The first applicant was the Teddy Bear Clinic for Abused Children, a non-profit company which offers assistance to abused children and they had created a programme to deter children sex offenders from the criminal justice system.<sup>168</sup> The first respondent was the Minister of Justice and Constitutional Development (Minister), cited because he is the administrator of the Sexual Offences Act.<sup>169</sup> The applicants in this case challenged the constitutionality of sections 15 and 16 of the Sexual Offences Act as the impugned sections infringed on children's rights to human dignity, privacy, bodily and psychological integrity, and the best interest of the child principle.<sup>170</sup> It was further argued that these "infringements could not be justified in terms of section 36 of the

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<sup>166</sup> Act No. 32 of 2007.

<sup>167</sup> *Teddy Bear Clinic for Abused Children and another v Minister of Justice and Constitutional Development and Another* (2013) ZACC 35 at para 37.

<sup>168</sup> *ibid* at para 4.

<sup>169</sup> *ibid* at para 7.

<sup>170</sup> *ibid* at para 29.

Constitution as less restrictive means could be used to achieve the purpose of the impugned sections”.<sup>171</sup> The respondents in this case opposed the relief sought by the applicants in every respect.<sup>172</sup> They allege that the impugned sections are in place to ensure that children’s rights are protected by “delaying the choice to engage in consensual sexual activity at a young age”.<sup>173</sup> The respondents further argued that the limitation of children’s rights as envisaged by sections 15 and 16 are not uncommon in an open and democratic society.<sup>174</sup> The respondents further argued that the impugned sections cannot be looked at in isolation from other children legislation such as the Children’s Act 38 of 2005 and the Child Justice Act 75 of 2008.<sup>175</sup> They further argued that the above mention acts protects adolescents from the harsh realities of the criminal justice system.<sup>176</sup> The respondents argued that the impugned provisions purpose was to protect adolescents from predatory adults, sexual predators, persons who sexually abuse children and perpetrators of sexual abuse.<sup>177</sup> The court found in the applicants favour and declared that the impugned sections are unconstitutional and invalid.

### 2.3 Issues before the court

The issue before the court was “whether the impugned sections are inconsistent with the Constitution as it imposes criminal liability on adolescents who engage in consensual sexual conduct with other adolescents aged 12-16 years old”.<sup>178</sup> The court had to determine whether the impugned sections limited any fundamental rights of adolescents.<sup>179</sup> The court held that the respondents had to prove that such limitation was reasonable and justifiable in an open and democratic society.<sup>180</sup> The court further held that such a determination raised three broad issues which were<sup>181</sup>:

- a) “Are any rights limited by the impugned provisions?”

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<sup>171</sup> *ibid* at para 30.

<sup>172</sup> *ibid* at para 61.

<sup>173</sup> *ibid* at para 31.

<sup>174</sup> *ibid* at para 31.

<sup>175</sup> *ibid* at para 62.

<sup>176</sup> *ibid* at para 65.

<sup>177</sup> *ibid* at para 104.

<sup>178</sup> *ibid* at para 37.

<sup>179</sup> *ibid* at para 37.

<sup>180</sup> *ibid* at para 37.

<sup>181</sup> *ibid* at para 37.

- b) If so, are these limitations reasonable and justifiable in terms of section 36 of the Constitution?
- c) If not, what is the appropriate remedy?"

## 2.4 Prior process judgement

The applicants first brought an application to the High Court to challenge the constitutional validity of sections 15, 16 and 56(2) of the Sexual Offences Act. Rabie J, examined arguments of both the applicants and the respondents and ruled that sections 15 and 16 were unconstitutional.<sup>182</sup> . The High Court ruled that some sections of the Criminal Law (Sexual Offences and Related Matters) Amendment Act<sup>183</sup> which relates to the “criminalization of consensual sexual conduct with children of a certain age are constitutionally invalid”.<sup>184</sup> The matter was then referred to the Constitutional Court for confirmation of the High Court judgement. The matter was then set down for the 30<sup>th</sup> May 2013 where Khampepe J made his ruling on this case.

### ***High Court’s ruling:***

The High Court<sup>185</sup> held that the impugned provisions of the Sexual Offences Act infringed on children’s right to dignity<sup>186</sup>, privacy<sup>187</sup>, bodily and psychological integrity<sup>188</sup> and further that it violated the best interest of a child which is entrenched in our Constitution<sup>189</sup>. Furthermore, the court held that these “infringements were not justifiable in terms of section 36”.<sup>190</sup> The Court held that section 15 and 56(2) (b)<sup>191</sup> and the definition of “sexual penetration” in terms of section 1 were inconsistent with the Constitution.<sup>192</sup> These sections are “invalid to the extent that it:

- a) Criminalises consensual sexual penetration between adolescents aged 12-16;

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<sup>182</sup> *ibid* para 125.

<sup>183</sup> Act 32 of 2007. Herein referred to as the Sexual Offences Act.

<sup>184</sup> *ibid* para 2.

<sup>185</sup> *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* (73300/10) (2013) ZAGPPHC 1 (4 January 2013).

<sup>186</sup> In terms of section 10 of the Constitution.

<sup>187</sup> In terms of section 14 of the Constitution.

<sup>188</sup> In terms of section 12(2) of the Constitution.

<sup>189</sup> In terms of section 28(2) of the Constitution.

<sup>190</sup> *ibid* at para 27.

<sup>191</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

<sup>192</sup> *ibid* para 27.

- b) Criminalise consensual sexual penetration with an adolescent aged 16-18 (A) with another child (B) who is younger than 16-years old and is two years or less younger than adolescent A”<sup>193</sup>

The High Court remedied the above by amending section 15 to state that “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 eighteen years old and B is two years or less younger than A at the time of such acts”.<sup>194</sup>

In terms of section 16, the court held that it had the same repercussions as section 15 except that it dealt with consensual sexual violation. The High court remedied the above defect by amending section 16 to read that “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”.<sup>195</sup>

In analysing the High court’s judgment, the judgment was insufficient and left many problems unresolved. For example, section 54 is interlinked with the impugned provisions and there has been no guidance to all persons, especially health care providers, in relation to their duty to report. The alarming question is ‘do health care providers report minors who are engaging in consensual sexual activity even through the impugned provisions have been decriminalised’? Some authors are of the view that the duty to report falls away, after the impugned provisions have been decriminalised<sup>196</sup>, while others are of the view that a health practitioners duty to report still remains in situations of non-consensual sexual activity between minors or adults and exploitative underage consensual sexual activity<sup>197</sup>. Through research it has been found that consensual sexual activity between minors should not be reported to the police unless it was non-consensual or sexual activity between minors younger than 12.

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<sup>193</sup> *ibid* para 27.

<sup>194</sup> Section 15 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

<sup>195</sup> Section 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

<sup>196</sup> McQuoid-Mason (note 95 above; 11).

<sup>197</sup> Strode (note 92 above; 45-46).

## 2.5 Arguments before the Constitutional Court

### *Constitutional Court<sup>198</sup> submissions*

Sections 15 and 16 of the Sexual Offences Act had a negative impact on children as it exposed them to the harsh criminal justice system for engaging in ‘consensual sexual conduct’ which is developmentally normal for adolescents.<sup>199</sup>

The above submission was found to be correct because how can one say that an adolescent between the ages of 12-15 were not mature enough to make decisions about sexual activity but on the other hand state that they are mature enough to be dragged through the criminal justice system. Adolescents are just innocent individuals who are being “kids” by being curious about their bodies and wanting to explore their sexuality, which is completely normal.

“Justice Alliance of South Africa (JASA) alleges that allowing sexual penetration between children is not in the best interests of the child because children are unable to give informed consent. The freedom to engage in a prospectively perilous activity (such as sexual penetration) in circumstances where the capacity for informed consent is absent is not a freedom that the law should recognise”.<sup>200</sup>

Through intensive research it should be noted that the above submission is incorrect because adolescents are autonomous<sup>201</sup> individuals who can make their own decision if they have sufficient maturity to understand the consequences of their actions. How can we recognise this submission if the legislature doesn’t know themselves if adolescents are mature enough because on one hand they are criminalising consensual sexual activity between minors in terms of the Sexual Offences Act while on the other hand the Choice on Termination of Pregnancy Act allows all minors to consent to a termination without her parental or guardian consent.

The second and third amici stated that sections 15 and 16 violate all girls’ right to equality because it indirectly discriminates against them on the ground of sex. Furthermore, “the right of girls to

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<sup>198</sup> *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* (2013) ZACC 35; 2014 (2) SA 168 (CC); 2013 (12) BCLR 1429 (CC).

<sup>199</sup> *ibid* at para 28.

<sup>200</sup> *ibid* at para 35.

<sup>201</sup> Stevens (note 87 above; 52).

access health care services in terms of section 27 of the Constitution and reproductive health care is violated”.<sup>202</sup>

In terms of the above statement, impugned provisions do infringe upon minors, more specifically girl’s rights to reproductive health, this goes back to section 54 which deals with the duty to report.

## 2.6 Judgement

In terms of section 28 (3) of our Constitution a child is defined as “any person under the age of 18 however for the purposes of sections 15 and 16 of the Sexual Offences Act a ‘child’ is defined as ‘a person 12 years or older but younger than 16 years’”.<sup>203</sup> In this judgement Khampepe J, first began by looking at the meaning of sections 15 and 16.<sup>204</sup> Section 15(1) creates “the offence of statutory rape in relation to ‘sexual penetration’”.<sup>205</sup> “Sexual penetration is defined as an act which causes penetration to any extent by the genital organs of one person, any other part of the body of one person or any object, including the body of an animal or the genital organs of an animal into or beyond the genital organs, anus or mouth of another person”.<sup>206</sup>

One can interpret that statutory rape occurs if an:

“(a) adult or child (who is 16 years or older) engages in consensual sexual penetration with an adolescent; or (b) where adolescents engages in consensual sexual penetration with each other”.<sup>207</sup> “In the case of (b) both the adolescents will be guilty of statutory rape”.<sup>208</sup> And on the contrary section 16(1) creates the offence of statutory sexual assault in relation to the commission of “sexual violation” however it has the same repercussion as section 15.<sup>209</sup> Sexual violation means the “direct or indirect contact between the genital organs, anus, any body part or an animal, any object, or mouth of one person, which includes some forms of masturbation by another person, petting, kissing and hugging”.<sup>210</sup>

In analysing the above we can see that the legislature opted for a more conservative and paternalist approach when they drafted sections 15 and 16 of the Sexual Offences Act. They failed to take

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<sup>202</sup> *ibid* at para 36.

<sup>203</sup> *ibid* at para 15.

<sup>204</sup> *ibid* at para 19.

<sup>205</sup> *ibid* at para 20.

<sup>206</sup> Section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

<sup>207</sup> *ibid* at para 21.

<sup>208</sup> *ibid* at para 21.

<sup>209</sup> *ibid* at para 22.

<sup>210</sup> Section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

into account that adolescents are autonomous beings and they have a right to their bodily integrity, which means that they can make their own decisions regarding their bodies. Therefore, to criminalise such consensual acts will be a violation of a child's right not to be punished in a cruel inhuman manner.<sup>211</sup>

When a child is charged with section 16 which deals with sexual assault, the “close-in age” defence can be used.<sup>212</sup> A child who is charged in this circumstance can use the close-in-age as a valid defence, provided that they are both adolescents and the age difference between them are not more than two years at the time of the offence. In essence if there is a more than two year age gap between the adolescents (if a 12-year old and a 15-year old) there would be no valid defence and both adolescents will be prosecuted.<sup>213</sup>

In analysing the above, the close-in age gap as a defence was nonsensical. The reason for the statement above is, what makes it okay for a “two-year age gap”? If two minors are engaging in consensual acts with each other and there is a more than two-year age gap between them, both adolescents will be prosecuted for engaging in a developmentally normal act so why must they be punished because of the age gap between them? If the legislature wants to punish minors for engaging in consensual acts with a more than two-year age gap, then they should impose some form of punishment on all minors and not just categorise them.

### **2.6.1 The rights of children**

The court then moved on to look at the rights of children. In terms of the Constitution there are no limitation on rights, and everyone is entitled to the same rights, including children. Therefore children should not be subject to a limitation on their right to privacy and dignity.<sup>214</sup> Judge Khampepe decided in this case, that the light in which children's rights should be determined and he stated that children are bearers of all human rights. He further stated that if a child's right is limited there must be a fundamental reason for such limitation such as he/she are not developmentally ready.<sup>215</sup> The courts duty thereafter was to determine “whether the limitation is reasonable and justifiable in an open and democratic society”.<sup>216</sup>

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<sup>211</sup> In terms of section 12(1) (e) of the Constitution.

<sup>212</sup> Section 56(2) (b) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

<sup>213</sup> *ibid* at para 24.

<sup>214</sup> *ibid* at para 38.

<sup>215</sup> *ibid* at para 39.

<sup>216</sup> *ibid* at para 39.

In analysing the above, it is evident that it was not reasonable and justifiable to limit children's rights to bodily and psychological integrity and privacy. In determining whether such limitation was reasonable and justifiable, one must apply section 36(1) of the Constitution which contains the following factors: *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. Therefore, by criminalising consensual sexual activity between adolescents "limits their right to bodily and psychological integrity and privacy by denying them freedom of choice to explore their sexuality"<sup>217</sup>. Furthermore, such limitation was not reasonable and justifiable as the nature of the limitation will lead to a child being psychologically harmed by being prosecuted at such a young age for engaging in consensual sexual activity.<sup>218</sup> In circumstances where a child is not developmentally ready, would be when he/she does not understand the consequences for his/her actions and where they are not mature enough to make those tough decisions.

In the case of *S v M (Centre for Child La as Amicus Curiae)*<sup>219</sup>, the court stated that children are holders of their own rights and they are not an extension of their parents.<sup>220</sup>

The submissions made in the case above are correct because when a child is born he/she is entitled to their own rights which are entrenched in our Constitution and they do not derive their rights through their parents.

Each child is the bearer of their own rights, they are distinct individuals with their own personality, who has a right to develop, play, laugh, love and explore their imagination, to feel sorrow, to feel pain and to understand themselves and their bodies.<sup>221</sup>

Children between the ages of 12-16 reach physiological sexual maturity. They go through major changes in their bodies and maturity during the transit into adulthood.<sup>222</sup> The applicants relied on reports compiled by the "late Professor Alan Flisher, a child psychiatrist and Ms Anik Gevers, a clinical psychologist which dealt with sexual development of children and the potential impact of

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<sup>217</sup> McQuoid-Mason (note 93 above; 75).

<sup>218</sup> Ibid at para 75.

<sup>219</sup> [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) (*S v M*).

<sup>220</sup> *S v M* at para 18.

<sup>221</sup> *S v M* at para 18-19.

<sup>222</sup> ibid at para 44.

sections 15 and 16 of the Sexual Offences Act has on adolescents”.<sup>223</sup> They state in the report that it is developmentally normal for children to “engage in some form of sexual activity, ranging from kissing to masturbation to intercourse”.<sup>224</sup> The most important factor during this transit is that children are supported and guided by their parents and their parents are guiding them to make healthy choices.

In critiquing the above, Flisher’s and Gevers’s submissions are correct as they state in their report it is developmentally normal for adolescents to engage in sexual behavior. Developmentally normal sexual behavior ranges from kissing, “light petting (“touching each other’s upper body, under clothes or with no clothes”), heavy petting (“touching each other’s private parts, under clothes or with no clothes”), oral sex (“contact between the mouth and the penis, vagina, or anus), vaginal sex (“contact with someone during which the penis enters the vagina”), and anal sex (“contact with someone during which the penis enters the anus or back passage”)<sup>225</sup>. Adolescents are going through puberty and hormonal changes which increases their curiosity levels to sexually experiment with each other. Lastly parents or guardians play an important role in their child’s development by educating and teaching their children about sexual activity. When a parent is opened about sex, children feel more comfortable talking to their parents about issues they are faced with. Section 7 (1) of the Children’s Act<sup>226</sup> states that there is a need to protect a 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 behavior therefore from the above we can see that parents are the holder of this right and must protect their children at all costs.

“The data reviewed by Flisher and Gevers state that the majority of South African adolescents between the ages of 12 and 16 years are engaging in a variety of sexual behaviours as they begin to explore their sexuality”.<sup>227</sup> They have further stated that “it is not unusual or unhealthy for adolescents to engage in sexual behaviours as they begin to learn about their sexuality and become

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<sup>223</sup> ibid at para 43.

<sup>224</sup> ibid at para 45.

<sup>225</sup> ibid at para 45.

<sup>226</sup> 38 of 2005.

<sup>227</sup> ibid at para 46.

mature”.<sup>228</sup> Finally, they are of the view that sections 15 and 16 have a negative impact on children as it affects adolescent’s social and psychological development. Children thereafter feel shame, embarrassment, anger and regret and have a negative attitude to sexual relations after being subject to the impugned provisions.<sup>229</sup> The effect the impugned provisions would have on adolescents is that they would “avoid seeking help or being opened about sexual issues with adults and it would not achieve the purpose which it was created for which was, to deter the damaging effects linked with premature sexual behaviour”.<sup>230</sup>

In analysing the above it is evident that sections 15 and 16 will had a negative impact on adolescents as it criminalised consensual sexual activity between adolescents. The impugned sections violate the best interest of the child principle as children if “caught” engaging in sexual activity will be dragged through the criminal justice system. Children will be required to expose the most intimate aspects of their lives to a police officer, an investigating officer and a prosecutor which is in violation with the Constitutional right to privacy and dignity. Lastly children will be impacted greatly, in terms of their social status by their peers in school and other individuals.

Judge Khampepe moved from this general position to examine whether sections 15 and 16 of the Sexual Offences Act infringes sections 10, 14 and 28(2) of the Constitution.<sup>231</sup> In other words whether they violated a child’s rights to human dignity, privacy and the best interest of the child’s principle.

## 2.6.2 Constitutional rights of children

### ***2.6.2.1 Human dignity***

The Constitution provides that “everyone has inherent dignity and the right to have their dignity respected and protected”<sup>232</sup>. “Dignity recognises the inherent worth of all individuals, including children”.<sup>233</sup> Adolescent’s rights are of paramount importance and are not dependant of their parents.<sup>234</sup> Khampepe J held that the impugned provisions clearly infringed on

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<sup>228</sup> *ibid* at para 46.

<sup>229</sup> *ibid* at para 47.

<sup>230</sup> *ibid* at para 47.

<sup>231</sup> *ibid* at para 49.

<sup>232</sup> In terms of section 10 of the Constitution.

<sup>233</sup> *ibid* at para 52.

<sup>234</sup> *S v M* at para 18.

adolescents human dignity by stigmatising consensual sexual conduct.<sup>235</sup> “If one’s consensual sexual choices are not respected by society, but are criminalised, one’s innate sense of self-worth will inevitably be diminished”.<sup>236</sup>

In analysing the above Khampepe J is correct. In this instance to limit an adolescent’s right to dignity by imposing the impugned provisions will have a negative impact on them, for example all their class mates will know that they have been arrested, they will feel humiliated, shunned and labelled at school by other pupils for engaging in developmentally normal activities.

The criminalisation in terms of section 15 and 16 were so broad that they include activities which are developmentally normal for adolescents. This impugned provision inflicts a state of disgrace, shame and embarrassment on adolescents which negatively impacts on their self-worth and how they are seen in society. A good example of public humiliation is the “Jules High School”<sup>237</sup> case. “In this case two boys had sexual intercourse with a girl. All three children were investigated and subsequently prosecuted under section 15 of the Sexual Offences Act”.<sup>238</sup> “The two boys were arrested outside the school and their peers were aware that they had been arrested. The media had dubbed them as ‘gang rapists’. The boys were deeply ashamed and traumatised and so were their families. The NDPP decided to prosecute the girl as well for sneaking out of school to engage in consensual sexual intercourse with the boys.”<sup>239</sup> All of the above events which occurred lead to the shaming and stigmatisation of adolescents.

In analysing the above, the Jules High School case was just appalling as all three of these adolescents had to be dragged through the criminal justice system, they had been labelled by media and they were the talk of the town for engaging in consensual sexual activity. What had happened in this case violated their right to dignity and privacy because on one hand the boys were labelled as ‘rapists’ and on the other hand the girl was victimised in this whole situation when this was not the case. Furthermore, this negatively impacts on the boys as well as no one will want to be ‘friends’ or associate with a rapist in school or in society generally. It has been

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<sup>235</sup> ibid at para 55.

<sup>236</sup> ibid at para 55.

<sup>237</sup> ibid at para 56.

<sup>238</sup> ibid at para 56.

<sup>239</sup> ibid at para 56.

found that the humiliation these children went through was appalling and instead of judging and labelling them we should protect them and not allow them to be subjected to such stress. Lastly to put the cherry on the top, all of them were prosecuted for engaging in consensual sexual activity. The impugned sections do not deter children from engaging in sexual activity because children will have sex whether or not it is criminalised, therefore we should be more open about the teenage epidemic and talk about sex and guide adolescents to make the right choices regarding sex.

The above criminalisation was heightened by the fact that section 41 of the Sexual Offences Act requires the name of any person who has been prosecuted in terms of section 15 and 16 to be entered into the Register.<sup>240</sup> When adolescents are entered into the Register it has an adverse impact on them, for example a person entered into the Register “may not be employed to work with a child, may not hold any position which places him or her in authority, supervision or care of a child; and may not become a foster parent or an adoptive parent”.<sup>241</sup> The purpose of this section was to protect children however sections 15 and 16 makes it impossible to achieve this goal. Furthermore, to prevent adolescents from communicating with other adolescents in the future because they engaged in consensual sexual conduct, which is developmentally normal, infringes on his/her right to dignity.

In analysing the above, the intention of section 41 was to protect adolescents from predatory adults yet adolescent’s names have been added to the Register for engaging in consensual sexual activity. In this instance the impugned sections make adolescents the victim and the predator. The impugned section and section 41 is clearly in conflict with each other because on one hand it was created to protect children and on the other it makes them the predator. In normal circumstances any adult who engages in sexual activity with a minor will be prosecuted and his/her name will be added on the National Register but by the implication of sections 15 and 16 adolescents engaging in ‘consensual sexual’ activity will also be added to the Register. The implications of section 41 on children was harsh because the adolescent did not ‘assault’, ‘rape’ or ‘statutory violate’ another adolescent. Adolescents in this instances are both consenting to the sexual conduct they engaging in and should not be punished to the extent that

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<sup>240</sup> *ibid* at para 57.

<sup>241</sup> Section 41(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

they would not be able to interact with other minors when they become adults because they have been registered as a sex offender.

### **2.6.2.2 Privacy**

The court then moved on to look at the right to privacy. Everyone has the right to privacy as it is entrenched in our Constitution.<sup>242</sup> In the case of *Bernstein and Others v Bester and Others NNO*<sup>243</sup> the court held that the right to privacy deals with a person's 'inner sanctum'.<sup>244</sup> This inner sanctum deals with a person's family life, sexual experiences and home environment.<sup>245</sup> In the *National Coalition*<sup>246</sup> the court held that, we all have a right to different spheres of relationships without the outside interference of communities. They further held that if two parties have consensual sexual relations without harming one another, it would be an invasion of their privacy if there is interference from the outside community.<sup>247</sup>

The court held that the same principle as the *National Coalition* case should apply to adolescents because sections 15 and 16 violates adolescents most intimate sphere of their relationship, thereby violating their right to privacy.<sup>248</sup> This violation is expanded to not only police officers, prosecutors and judicial officers but to all third parties because section 54 of the Sexual Offences Act obliges them to report sexual conduct between minors.<sup>249</sup> In analysing the above it is evident that sections 15 and 16 violates adolescent's right to privacy. Adolescent's right to privacy was being violated by their most personal information being made public. In these circumstances we should look at it from a child's perspective where they share their most intimate parts of their lives with their health care practitioner therefore by a practitioner reporting adolescents to the police violates their right to privacy and breaks the doctor patient trust. This in turn leaves adolescents in a very vulnerable position where they will shy away from seeking help. It is submitted by McQuoid- Mason that to report sexually

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<sup>242</sup> In terms of section 14 of the Constitution.

<sup>243</sup> [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) (*Bernstein v Bester*) at para 67.

<sup>244</sup> *ibid* at para 59.

<sup>245</sup> *ibid* at para 59.

<sup>246</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) (*National Coalition*).

<sup>247</sup> *ibid* at para 32.

<sup>248</sup> *ibid* at para 60.

<sup>249</sup> *ibid* at para 60.

active adolescents violates their right to privacy.<sup>250</sup> Lastly the impugned sections destroys any prospect of confidentiality through the duty to report.

The court further held that “sections 15 and 16 of the Sexual Offences Act prohibits consensual intimate relationships and, accordingly, intrude into the core of adolescents’ privacy”.<sup>251</sup> In analysing the above it is evident that the impugned sections does violate an adolescent’s right to privacy, in that they are being prosecuted for engaging in consensual sexual activity which is the most intimate part of their life. These adolescents are being dragged to court for engaging in acts which are developmentally normal and having their most intimate parts of their relationship disclosed to police officers, prosecutors and judicial officers, thereby violating the most fundamental right in our Constitution.

### ***2.2.6.3 The best interest of children***

The court went on to look at a ‘child’s best interest’. The Constitution states that “a child’s best interest are of paramount importance in every matter concerning the child”<sup>252</sup> The court suggested that section 28(2) plays two major roles. The first role is that it is a guiding principle in all cases dealing with children and secondly it is a standard against which any provision or conduct can be tested, which has a negative impact on children.<sup>253</sup> The court held that the ‘best interest of the child’ principle should be applied in all instances and what is bad for one child will be bad for all children.<sup>254</sup> Therefore if it is proved that exposing children to the criminal justice system for engaging in consensual sexual conduct has a negative impact on them then sections 15 and 16 of the Sexual Offences Act will be contrary to section 28(2) of the Constitution.<sup>255</sup>

It is evident that the impugned sections violate the best interest of the child principle as criminalising consensual sexual conduct between minors was not in their best interest as they are engaging in acts which are developmentally normal for their age. Secondly exposing adolescents to the criminal justice system will have a mental and psychological effect on them

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<sup>250</sup> Strode (note 92 above; 45)

<sup>251</sup> *ibid* at para 63.

<sup>252</sup> In terms of section 28(2) of the Constitution.

<sup>253</sup> *ibid* at para 69.

<sup>254</sup> *ibid* at para 71.

<sup>255</sup> *ibid* at para 71.

as they will be questioned about their sexual relations with the other person and forced to disclose their past personal affairs many people, which in turn is not in the best interest of the child.

The impugned sections caused more harm to adolescents than helping them by “undermining support structures, preventing adolescents from seeking help and potentially driving adolescent sexual behaviour underground”<sup>256</sup>. Adolescents will further not trust any third party or not seek any help from parents/ counsellors regarding sexual relations as they will be scared of being reported in terms of section 54 of the Sexual Offences Act.<sup>257</sup> Section 54<sup>258</sup> creates a rupture in family life by creating distrust between parents and children as children are afraid to speak to their parents about their problem.<sup>259</sup>

In analysing the above it was evident that the impugned sections harms adolescents because it does not create a safe environment for children to confide in their doctors, parents, counsellors and teachers about their sexual issues. Adolescents were afraid because they will be reported to the police for engaging in consensual sexual relationships. Instead of allowing our youth to be afraid, we should provide them with guidance and help that they require because if we fail to do this adolescent’s will seek back-street abortions, there would be an increase in teenage pregnancies, STD’s and HIV which would not be in the best-interest of the child.

The respondents held that it was in the NDPPs discretion to prosecute an adolescent, which is dependent on the circumstance. The court held that prosecutorial discretion cannot save an unconstitutional provision.<sup>260</sup> Therefore, any possibility of an adolescent being prosecuted was an infringement of the best interest of child principle which will in turn affect adolescents right to privacy and human dignity.<sup>261</sup>

In reality we can ascertain that criminal liability imposed by the impugned sections could lead to imprisonment or diversion procedures.<sup>262</sup> In both these instances the best-interest of the child

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<sup>256</sup> *ibid* at para 72.

<sup>257</sup> *ibid* at para 73.

<sup>258</sup> Act 32 of 2007.

<sup>259</sup> *ibid* at para 73.

<sup>260</sup> *ibid* at para 76.

<sup>261</sup> *ibid* at para 76.

<sup>262</sup> D J McQuoid-Mason ‘ The Teddy Bear Clinic Constitutional Court case: Sexual conduct between adolescent consenting children aged under 16 years decriminalised and a moratorium on the reporting duties of doctors and others’ (2014), 104(4) SAMJ 275.

principle was infringed upon as adolescents are arrested and forced to interact with the investigating officer and the magistrate and further they have to disclose their intimate affairs with all parties to the investigation.

The court disagrees with the respondent's argument that it is not irrational to prosecute both parties as it leads to equal treatment. The "impugned provisions are amplified by the mandatory prosecution of both parties".<sup>263</sup> The court was of the opinion that prosecuting the younger child in these circumstances, along with the older child is irrational as section 56(2) (b)<sup>264</sup> was created to protect younger children.

Khampepe J was of the opinion that the impugned sections are contrary to the best-interest principle because these sections are created to protect adolescents but in fact they had an opposite impact.<sup>265</sup> She further states that it was irrational to think that adolescents do not have the capacity to make decisions about their sexual relations and on the other hand they are mature enough to be dragged through the criminal justice system.<sup>266</sup>

In analysing the above, Khampepe J is correct. The legislature did not think carefully before they drafted the impugned sections as they want adolescents to face criminal sanctions for acts which are developmentally normal. The question was how can adolescents be mature enough to go through criminal proceedings but not mature enough to made decisions about their sexual conduct? Children are not mature enough to be dragged through the criminal justice system, if they are, it would have a severe impact on their lives and they will view 'sexual conduct' in a negative light and they would not want to revisit the nightmare they have been through ever again. Instead of criminalising such conduct and trying to deter adolescents from engaging in consensual acts, we should educate them on healthy safe sexual conduct.

After finding that the sections did in fact violate children's rights the court moved on to examine whether this could be justified in terms of section 36 of the Constitution. The court began by looking at the importance of limiting a right which is entrenched in our Constitution.

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<sup>263</sup> *ibid* at para 77.

<sup>264</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, deals with the close-in-age gap.

<sup>265</sup> *ibid* at para 79.

<sup>266</sup> *ibid* at para 79.

### 2.6.3 Limitation analysis

#### *2.6.3.1 The importance of the purpose of the limitation*

Judge Khampepe accepted the underlying purpose of the prohibition which was to discourage adolescents from engaging in premature consensual sexual behaviour and to spare adolescents the harm related with sexual intercourse.<sup>267</sup>

In analysing the above it should be noted that adolescents will engage in consensual sexual activity whether it was criminalised or not. We should approach the pandemic by not emotionally scaring adolescents from not engaging in sexual conduct for the rest of their lives but we should make them more aware of the consequences attached to sexual conduct so that they can make the right choices.

#### *2.6.3.2 Nature and extent of the limitation*

The respondents stated that the Legislature intended to protect adolescents from the overwhelming effects of “unwanted pregnancies and contraction of sexually transmitted diseases”.<sup>268</sup> However the court stated that this defence was not justifiable to validate sections 15 and 16 of the Sexual Offences Act and no evidence has been brought to court to demonstrate that the impugned sections will deter adolescents from engaging in consensual sexual conduct. Instead of the impugned provisions deterring sexual conduct it will have the opposite effect by driving sexual intimacy underground, far from guidance which is due to a purely defiant nature of the teenage behavior system.<sup>269</sup> In the above instance adolescents will not feel comfortable discussing his/her sexual conduct with their parents or caregiver.<sup>270</sup>

Flisher and Gevers concluded that the impugned provisions lead to unhealthy, risky sexual behaviour.<sup>271</sup> Furthermore, “Flisher and Gevers indicated that caregivers and institutions are disempowered in dealing with adolescents because they cannot promote behaviour that

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<sup>267</sup> *ibid* at para 81.

<sup>268</sup> *ibid* at para 86.

<sup>269</sup> *ibid* at para 89.

<sup>270</sup> *ibid* at para 89.

<sup>271</sup> *ibid* at para 90.

the provisions have deemed illegal and further because, in the course of attempting to provide guidance and assistance, they may well be told intimate information which they will be obliged to report to the authorities”.<sup>272</sup>

The above ambit falls within section 54 of the Sexual Offences Act which the court failed to discuss. We will deal with the duty to report in the next chapter. What are health professionals’ position now that the impugned provisions have been decriminalised? Do they have a duty to report such consensual sexual conduct to the police or does that duty fall away?

Furthermore, the impugned provisions had a negative impact on adolescents in instances where two adolescents consents to consensual sexual conduct, which could lead to rape.<sup>273</sup> For example “if a child of 12 consented to kissing another child of 15, but was subsequently raped by the 15-year old, then, if the 12-year old reported the instance of rape to the police, he or she could be prosecuted for the initial consensual kiss (in terms of section 16 of the Act)”.<sup>274</sup> In circumstances mentioned above adolescents will be discouraged from reporting rape, out of “the fear of them being investigated and prosecuted for consensual violations they have committed”.<sup>275</sup>

The legislature or court should provide some guidelines regarding circumstances like these. In the circumstance above both parties may be prosecuted because firstly there is more than a two-year age gap between the adolescents. The younger of the two should not be prosecuted as he/she is too young to understand the repercussions of his/her action and further they have just been a victim of rape, and now the legislature wants to prosecute them for engaging in ‘consensual activities’. The legislature should relax the two-year age gap defence in these circumstances to allow parties like the 12 year-old to come forward and instances of report rape without there being any consequences to them.

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<sup>272</sup> *ibid* at para 91.

<sup>273</sup> *ibid* at para 93.

<sup>274</sup> *ibid* at para 93.

<sup>275</sup> *ibid* at para 93.

### 2.6.3.3 *Less restrictive means*

The court has held that there are “less restrictive means of achieving the purpose of the impugned provisions”<sup>276</sup>. “Thus, in relation to the purposes of preventing adolescents from suffering psychological harm, contracting sexually transmitted diseases and becoming pregnant, the impugned provisions are clearly and impermissibly over-inclusive”.<sup>277</sup> The court was of the view that by imposing criminal sanctions to deter adolescents from engaging in consensual sexual activity and using that as a means to prevent teenage pregnancy could never be constitutionally sound.<sup>278</sup>

The courts submissions are correct as such harsh sanctions to deter adolescents from engaging in consensual sexual conduct were strident. The use of criminal sanction to deter consensual sexual activity so that it could prevent teenage pregnancies could never be constitutionally sound because on one hand legislature has acknowledged that adolescents are engaging in sexual activities by allowing female children to consent to the termination of pregnancy in terms of the Choice of Termination of Pregnancy Act and on the other hand they want to punish them for engaging in such activity.

Khampepe J held that there are other means the state can use that does not involve criminalisation such as creating an environment where adolescents can discuss sex and sexual health with their parents and which will lead to a positive influence on adolescents sexual behaviour.<sup>279</sup> Furthermore, “sex education has been found to be more effective than abstinence only or no sex education by delaying sexual intercourse, deduction of multiple sexual partners and reduction of pregnancies”<sup>280</sup>.

In analysing the above, it is evident that by creating a safe environment where adolescents can discuss their sexual encounters will have a positive impact on them. For example, adolescents would not be afraid to go to doctors for an abortion, if they know that it is a safe place where they can discuss all their sexual issues and have an abortion without being reported to the police. Education, health talks and seminars should be added to school’s

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<sup>276</sup> *ibid* at para 95.

<sup>277</sup> *ibid* at para 97.

<sup>278</sup> *ibid* at para 97.

<sup>279</sup> *ibid* at para 98.

<sup>280</sup> *ibid* at para 99.

curriculum to educate adolescents about the consequences of having sexual intercourse, HIV and STI. If adolescents are aware of these factors they will abstain as they are now aware of the harsh responsibilities that comes with engaging in sexual relations with one another.

Accordingly the court held that, “the limitations cannot be justified in terms of section 36 of the Constitution and sections 15 and 16 are unconstitutional insofar as they impose criminal liability on adolescents for engaging in consensual sexual conduct”<sup>281</sup>.

## 2.7 Outcome

The court in the *Teddy Bear* case held that “sections 15 and 16 of the Sexual Offences Act are inconsistent with the Constitution to the extent that it criminalises consensual sexual activity between adolescents”.<sup>282</sup>

## 2.8 Remedy

The court then went on to set out the remedy of this case. The court held that there is no reading-in to the sections which can change the meaning of the impugned sections and which “would meet the requirements of section 36 of the Constitution”.<sup>283</sup>

The court further held that severance and reading-in was not appropriate as the impugned provisions serve another purpose which was that it “imposes criminal liability on an adult for engaging in sexual conduct with a consenting adolescent”.<sup>284</sup> Furthermore sections 15 and 16 were interlinked with other sections and to sever or read-in to these sections will have unplanned penalties with regard to the whole purpose of the Act.<sup>285</sup> The court declared that sections 15 and 16 be suspended for 18 months to allow Parliament to remedy the defects.<sup>286</sup> Khampepe J orders a “moratorium on all investigations into, arrest of and criminal and ancillary proceedings against adolescents, pending Parliament’s remedy”.<sup>287</sup>

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<sup>281</sup> *ibid* at para 101.

<sup>282</sup> *ibid* at para 102.

<sup>283</sup> *ibid* at para 104.

<sup>284</sup> *ibid* at para 107.

<sup>285</sup> *ibid* at para 108.

<sup>286</sup> *ibid* at para 110.

<sup>287</sup> *ibid* at para 111.

The moratorium also suspends the reporting obligation in terms of section 54 of the Sexual Offences Act.

It was evident that the moratorium would have a positive impact on adolescent's lives as they will not be scrutinised and prosecuted for engaging in consensual sexual activity with one another. The court here suspended the reporting obligation for consensual sexual activity however health care providers still have to report an adolescent who is engaging in sexual activity with a 16-17-year-old or an adult.

The court further ordered that the Minister must take appropriate measures to safeguard that the conviction and sentence of any adolescents that arose from sections 15 and 16 be removed<sup>288</sup> and to remove adolescent's names from the Register. The removal of adolescents name from the Register ensures that adolescents to not suffer the unconstitutional consequences of having their names on it.<sup>289</sup>

In analysing this case, Stevens view is correct<sup>290</sup> and his view. Stevens states that this judgment will "open the doors to sexual immorality between adolescents which would in turn increase the risk of pregnancies, sexually transmitted diseases and even HIV"<sup>291</sup>. It was found that, instead of punishing adolescents for engaging in consensual sexual activity, we should all come together and try and make a difference in society by hosting sex education talks for the public, ensure that adolescents know where they can receive contraceptive and get free counselling about their sexual relation and lastly promote safe sex to decrease the number of pregnancies, sexually transmitted diseases and HIV. The reality children are engaging in sexual activity so instead of shaming/shunning them we should make them feel more comfortable about talking about their sexual problems so we as adults can guide and protect the youth as that is our duty.

## 2.9 Conclusion

In conclusion the above judgment held that sections 15 and 16 are unconstitutional and invalid as they infringed on adolescents right to dignity, privacy and the 'best interest of

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<sup>288</sup> *ibid* at para 112.

<sup>289</sup> *ibid* at para 112.

<sup>290</sup> Stevens (note 87 above; 54).

<sup>291</sup> *ibid* 54.

the child's' principle. The court further held that in terms of section 36 of the Constitution such limitation on children's rights are not justifiable in an open and democratic society.<sup>292</sup> In this case the court states that it is nonsensical to think that adolescents do not have the capacity to make choices about their sexual activities on one hand and say that they can face the criminal justice system on the other.<sup>293</sup> The court further took a stance and agreed with the decision of *S v M* by stating that adolescents are bearers of their own rights and hence they make their own decisions regarding their bodies.<sup>294</sup> Further to the above is the fact that the applicant provided substantial evidence to prove to the court that the impugned sections infringed on adolescents rights, while the respondents did not provide any evidence or expert opinions as to why such a limitation on children's rights are justifiable in an open and democratic society. In this case the applicants proved their case while the respondents failed to do so. The court declared a moratorium on all investigations and prosecutions in terms of the impugned sections and declared that the impugned sections were invalid for a period of 18 months.<sup>295</sup> The court gave Parliament 18 months to remedy the defects of sections 15 and 16 of the Sexual Offences Act. Parliament then published the 2015 Sexual Offences Act Bill which amended the impugned sections. The amendments to the impugned section will be discussed in detail in the next chapter.

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<sup>292</sup> *ibid* at para 101.

<sup>293</sup> *ibid* at para 79.

<sup>294</sup> *ibid* at para 18 & 40.

<sup>295</sup> *ibid* at para 117.

## Chapter 3: Law reform following the *Teddy Bear* case: The Amendment of sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) in 2015

### 3.1 Introduction

The *Teddy Bear clinic* case has had a major impact on the amendment of sections 15 and 16 of the Sexual Offences Act. The outcome of the Constitutional Court ruling was that Parliament had to reform sections 15 and 16 of the Sexual Offences Act to bring it in line with the Constitution. As a result parliament implemented the Criminal Law (Sexual Offences and Related Matters) Amendment Act 5 of 2015 (herein referred to as the 2015 Sexual Offences Amendment Act).<sup>296</sup>

This chapter explores the amendments made to the impugned sections as set out in the 2015 Sexual Offences Act. We explore and explain each of these amendments and the effect of it. Further we look at the similarities and the differences between the 2007 Sexual Offences Act and the 2015 Sexual Offences Act.

### 3.2 Changes to the Sexual Offences

In terms of 2007 SOA a “Child” was defined in section 1(1)<sup>297</sup> as:

- a) a person under the age of 18 years; or
- b) with reference to sections 15 and 16, a person 12 years or older but under the age of 16, and ‘children’ has a corresponding meaning.

It is important to note that the definition of a child has not changed but is still relevant, as it provides the parameters of the amendments as it enables us to understand who they apply to.

Section 15 was amended as follows:

‘**S15**<sup>298</sup> (1) A person (“A”) who commits an act of sexual penetration with a child (“B”) who is 12 years of age or older but under the age of 16 years 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 A, at the time of the alleged commission of such an act, was –

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<sup>296</sup> Moulton (note 32; 5).

<sup>297</sup> Sexual Offences Act 32 of 2007.

<sup>298</sup> Sexual Offences Act 5 of 2015.

(a) 12 years of age or older but under the age of 16 years; or  
(b) either 16 or 17 years of age and the age difference between A and B was not more than two years.

(2)(a) The institution of a prosecution for an offence referred to in subsection (1) must be authorised in writing by the Director of Public Prosecutions if A was either 16 or 17 years of age at the time of the alleged commission of the offence and the age difference between A and B was more than two years.

(b) The Director of Public Prosecutions concerned may delegate his or her power to decide whether a prosecution should be instituted or not.

Section 16 has been amended in the following manner:

**S16<sup>299</sup>** (1) A person (“A”) who commits an act of sexual violation with a child (“B”) who is 12 years of age or older but under the age of 16 years 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 A, at the time of the alleged commission of such an act, was –

(a) 12 years of age or older but under the age of 16 years; or

(b) either 16 or 17 years of age and the age difference between A and B was not more than two years.

(2)(a) The institution of a prosecution for an offence referred to in subsection (1) must be authorised in writing by the relevant Director of Public Prosecutions if A was either 16 or 17 years of age at the time of the alleged commission of the offence and the age difference between A and B was more than two years;

(b) The Director of Public Prosecutions concerned may delegate his or her power to decide whether a prosecution in terms of this section should be instituted or not.

### 3.3 Discussion of the amendments

There are various key amendments that were made to sections 15 and 16 of the 2015 Sexual Offences Act. Firstly, it is no longer a criminal offence for adolescence aged 12-15 to engage in consensual sexual activity with another adolescent of the same age.<sup>300</sup> Adolescents aged 12-15 years old can now engage in consensual sexual sex or activities with each other. Furthermore it

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<sup>299</sup> Sexual Offences Act 5 of 2015.

<sup>300</sup> Stevens (note 57 above; 20).

will not be a criminal offence for adolescents aged 12-15 and 16-17 to engage in consensual sexual activity provided that there is not more than a two year age gap between them.<sup>301</sup> Secondly, the “close in age” defence is incorporated in terms of section 15, even though it does not operate as a defence because this section now allows adolescents aged 12-15 to engage in consensual sexual activity with adolescents aged 16-17 provided there is not more than a 2-year age gap between them.<sup>302</sup> It should be noted that previously adolescents aged 16 and 17 had to be prosecuted for engaging in sexual activities with adolescents aged 12-15. Thirdly, with the amendment the Director of Public Prosecutions now has the discretion to prosecute 16 and 17 year olds where there is a more than 2-year age gap between them and other adolescents.<sup>303</sup> Fourthly, parliament has not changed the position pertaining to adults having consensual sex with adolescents, in such circumstances the adult will be prosecuted.<sup>304</sup>

With regard to the amendments to the law dealing with sexual violation (section 16), it should be noted that this includes a variety of acts such as kissing, mutual masturbation, touching of genital organs, breasts or any part of the body which results in sexual stimulation.<sup>305</sup> This definition of the crime has not changed through the amendments. Sexual violation is no longer a crime provided that both adolescents are between the ages of 12-15 or 16-17 and there is not more than two year age gap between them.<sup>306</sup> An adolescent aged 16 or 17 can be prosecuted in terms of section 16, if there is a more than two year age gap between the two adolescents engaging in consensual sexual activity.

In light of the above it can be noted that South Africa now has a progressive legal frame work which now allows adolescents to engage in consensual sexual activity.<sup>307</sup> When one interprets the newly amended sections 15 and 16 of the 2015 Sexual Offences Amendment Act it can be noted that Parliament resolved the criminalisation of consensual sexual activity by bring these sections

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<sup>301</sup> *ibid* 20.

<sup>302</sup> *ibid* 20.

<sup>303</sup> *ibid* 21.

<sup>304</sup> *ibid* 21.

<sup>305</sup> Sexual Offences Act 32 of 2007.

<sup>306</sup> Bhamjee (note 88 above; 257).

<sup>307</sup> *ibid* 256.

in line with the *Teddy Bear clinic* Constitutional Court judgement.<sup>308</sup> Furthermore Parliament ensured that even though they are decriminalising consensual sexual activity between adolescents aged 12-15 years old, they still ensured that there is a prohibition of other perpetrators engaging in sexual activity with adolescents.<sup>309</sup> Lastly despite the fact that adolescents aged 16 and 17 did not form part of the *Teddy Bear clinic* judgement, Parliament addressed these categories of adolescents which states that they will not be prosecuted for engaging in consensual sexual activity with adolescents aged 12-15 provided there is not more than two year age gap.<sup>310</sup>

In general the critical point of the amendments of sections 15 and 16 is that the Director of Public Prosecutions has the discretion to decide whether or not an adolescent is to be prosecuted if there is a more than 2-year age gap.

Whilst previously the 2007 SOA aimed at protecting minors from perpetrators, they did not take into account that sex and sexuality are not always forced but rather a developmentally normal process that adolescents go through.<sup>311</sup>

There are many similarities between the 2007 SOA and the 2015 SOA. The similarities are as follows: the age to consent to sexual activity remains at 16, children under the age of 12 does not have capacity to consent to sexual activities; section 54 remains unchanged which places an obligation on all persons to report sexual activity between children and an adult to the police; adults or an older person (where there is a more than two year age gap) who have sex with children will be committing a criminal offence.<sup>312</sup>

On the other hand there are two main differences between the “old and new” laws. Firstly consensual sexual activities between adolescents aged 12-15 have been decriminalised. This means that sexual activity between adolescents are no longer a criminal offence. The new law introduces a new era where children will not feel victimised for engaging in activities which are developmentally normal. When one looks at the spectrum of the new law we have to bear in mind that an adolescent may still be prosecuted for engaging in consensual sexual activity if there is a

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<sup>308</sup> P Mahery ‘The 2015 Sexual Offences Amendment Act: Laudable amendments in line with the *Teddy Bear clinic* case’ (2015) 8 (2) SAJBL 5.

<sup>309</sup> *ibid* 5.

<sup>310</sup> Stevens (note 57 above; 24).

<sup>311</sup> R Songca & M Karels ‘The Impact of Legislation on Childhood Sexuality In South Africa’ (2016) OBITER 229.

<sup>312</sup> Bhamjee (note 88 above; 257).

more than 2-year age gap between them, as it would be seen as a criminal offence.<sup>313</sup> For example an adolescent aged 12 can engage in sexual activity with an adolescent aged 12,13 and 14, this will not be a criminal offence, however if an adolescent aged 12 engages in sexual relations with another adolescent aged 15 and 16 it will be a criminal offence and the older of the two will be prosecuted.<sup>314</sup>

Secondly “the 2-year age gap has been expanded to include sexual violations”.<sup>315</sup> This means that a 16-17 year old can engage in consensual sexual activity with adolescents aged 12-15 provided there are not more than 2-year age gap between them. The above amendment is in line with the *Teddy Bear clinic* case as adolescents between the ages of 15-17 fall within the same peer group as they complete High School together (grades 10-12) and such relations should not be criminalised.<sup>316</sup> The above amendment protects adolescents aged 16-17 from being prosecuted as they are still seen as minors in terms of the law as long as there are not more than 2-year age gap between the two adolescents.<sup>317</sup>

Thirdly the “close in age gap” which was only previous existed in section 16 is now incorporated in terms of sections 15, although it does not operate as a defence.<sup>318</sup> This means that adolescents aged 16-17 who engage in consensual sexual activity with adolescents aged 12-15 with a more than 2-year age gap between them can be prosecuted in terms of section 15.<sup>319</sup>

### 3.4 Conclusion

In conclusion the *Teddy Bear clinic* case has paved way for adolescent’s freedom of sexuality and this is in turn in line with the Constitution which entrenches the best interest of the child principle. What we can grasp from this amendments is that adolescents are a vulnerable group in society which needs to be protected at all costs. In analysing the above, Parliament has taken a step forward in opening up societies eyes by showing them that adolescents go through sexual development which is normal and it should be accepted by everyone. Furthermore adolescents should not be subject to disgrace and stigma for engaging in consensual sexual activity as they have rights which

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<sup>313</sup> *ibid* 257.

<sup>314</sup> *ibid* 257.

<sup>315</sup> *ibid* 257.

<sup>316</sup> *ibid* 257.

<sup>317</sup> *ibid* 257.

<sup>318</sup> Stevens (note 57 above; 20).

<sup>319</sup> *ibid* 21.

need to be upheld and that legislature is supporting adolescents by decriminalising consensual sexual activity.

## Chapter 4: Conclusions and recommendations

South Africa is a diverse country which created many rights for adolescents. From the various laws we have been through throughout this dissertation it can be held that adolescents are individual autonomous beings who have the same amount of rights as adults. Previously the law wanted to punish adolescents for engaging in consensual sexual activity however since the *Teddy Bear clinic* judgement this stance has changed. The legislature amended sections 15 and 16 which intended to punish adolescents for developmentally normal behavior.

Sections 15 and 16 no longer criminalizes consensual sexual activity between minors aged 12-15 provided there is no more than two years age gap between them. ‘Sexual rights’ of adolescents are which has now been brought to light by the *Teddy Bear clinic* judgement is far reaching and will impact on the way in which parents, schools and caregivers engage with this issue.<sup>320</sup>

In the *Teddy Bear clinic* judgement the court looked at children’s rights in conjunction with the impugned sections. The court held that the impugned sections are unconstitutional and invalid as they infringe on children’s right to human dignity, privacy and the ‘best interest of the child’ principle.<sup>321</sup> From the outset the court had to ‘determine whether it is constitutionally correct to subject adolescents to the criminal justice system for engaging in consensual sexual activity with other adolescents their age’.<sup>322</sup>

The applicants in this case alleged that sections 15 and 16 of the Sexual Offences Act infringed on adolescents right to human dignity, privacy, psychological integrity and the best interest of the child principle.<sup>323</sup> Khampepe J held that an adolescent’s right to human dignity is clearly infringed by the impugned sections as criminalizing consensual sexual intercourse is a form of stigmatization which is humiliating and intrusive.<sup>324</sup> She further held that an adolescents innate of self-worth will diminished as it targets adolescent’s dignity.<sup>325</sup> The court further held that an adolescent’s human

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<sup>320</sup> Z Essack, J Toohey & A Strode ‘Reflecting on adolescents’ evolving sexual and reproductive health rights: canvassing the opinion of social workers in KwaZulu-Natal, South Africa (2016) 24:27, *Reproductive Health Matters* 196.

<sup>321</sup> *ibid* at para 82.

<sup>322</sup> *ibid* at para 3.

<sup>323</sup> *ibid* at para 29.

<sup>324</sup> *ibid* at para 55.

<sup>325</sup> *ibid* at para 55.

dignity is further infringed by their names being entered into the Register once convicted in terms of sections 15 and 16 of the Sexual Offences Act.<sup>326</sup>

The court further looked at the right to privacy. The court held that sections 15 and 16 infringed on an adolescents right to privacy as their most intimate personal relationships are invaded by police officials, prosecutors and judicial officers as they are prosecuted for engaging in consensual sexual sex or activities with other adolescents aged 12-15 years old.<sup>327</sup>

The court then proceeded to examine the child's best interest in terms of section 28(2) of the Constitution in conjunction with the impugned sections. The court held that the impugned sections infringed on a child's best interest as it destroys adolescents support structures and prevents adolescents from seeking help.<sup>328</sup> Khampepe J further held that adolescents in these circumstances will refrain and be afraid to communicate with parents and counsellors.<sup>329</sup> Lastly the court held that exposing adolescents to the criminal justice system is not in their best interest therefore the impugned sections has the effect of harming adolescents instead of protecting them.<sup>330</sup>

In light of the above, the court conducted a thorough analysis of children's rights in conjunction with sections 15 and 16 of the Sexual Offences Act. The court then applied section 36 of the Constitution to determine if the limitation of sections 15 and 16 of the Sexual Offences Act is justifiable in an open and democratic society. The court concluded that the limitation imposed by the impugned sections are unconstitutional as it imposes criminal liability on adolescents for engaging in consensual sexual sex or activities with other adolescents ages 12-15 years old.<sup>331</sup>

The court lastly gave Parliament 18 months to remedy the defects of sections 15 and 16 of the Sexual Offences Act.<sup>332</sup> The court further placed a "moratorium on all investigations, arrests and criminal proceedings against adolescents in terms of the impugned sections until Parliament remedies the defects of the statute".<sup>333</sup> The court held that all reporting obligations in terms of section 54 of the Sexual Offences Act should be placed on hold.<sup>334</sup> Khampepe J further held that

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<sup>326</sup> *ibid* at para 57.

<sup>327</sup> *ibid* at para 60.

<sup>328</sup> *ibid* at para 72.

<sup>329</sup> *ibid* at para 73.

<sup>330</sup> *ibid* at para 76 &79.

<sup>331</sup> *ibid* at para 101.

<sup>332</sup> *ibid* at para 110.

<sup>333</sup> *ibid* at para 111.

<sup>334</sup> *ibid* at para 111.

the Minister should remove the conviction and sentencing of any adolescent who has been convicted in terms of sections 15 and 16 of the SOA and further remove their names from the Register.<sup>335</sup>

Following the *Teddy Bear clinic* judgement, Parliament published 2015 Sexual Offences Act which contained the amendments made to the impugned sections. The first amendment made was that it is no longer an offence for adolescents aged 12-15 years old to engage in consensual sexual sex or activates with other adolescents.<sup>336</sup> Further to the above it would not be a criminal offence for a 12-15 year old to engage in consensual sexual sex or activities with another adolescent aged 16-17 provided that there is a no more than two year age gap between them.<sup>337</sup> Secondly it should be noted that the close in age gap defense is now incorporated in sections 15 of the 2015 SOA. Thirdly the Director of Public Prosecutions has the discretion to prosecute 16-17 year olds who engage in sexual activities with other adolescents with a more than two year age gap.<sup>338</sup> Fourthly, parliament has not changed the position pertaining to adults having consensual sex with adolescents, in such circumstances the adult will be prosecuted.<sup>339</sup>

In light of the above ruling and outcomes of the *Teddy Bear clinic* case the following recommendations should be taken into account:

#### **4.1. Education and educators**

Sex education, STI and pregnancy prevention programmes are important where adolescents engage in consensual sexual activity.<sup>340</sup> The information provided to adolescents about sex should have an effect which delays their sexual intercourse.<sup>341</sup> Sex education should include the use of condoms and other contraceptives as well as the imitation and practice of safe sex, as well as the implications of unsafe sex.<sup>342</sup> Furthermore for adolescents already engaging in sexual activity they

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<sup>335</sup> *ibid* at para 112.

<sup>336</sup> Stevens (note 57 above; 20).

<sup>337</sup> *ibid* 20.

<sup>338</sup> *ibid* 21.

<sup>339</sup> *ibid* 21.

<sup>340</sup> Kluge J, MBChB, Dip Obs 'Sex education in adolescents –an opportunity for HIV and pregnancy prevention' (2006) 10(1) Professional Nursing Today 24.

<sup>341</sup> *ibid* 26.

<sup>342</sup> *ibid* 26.

should be informed about their sexual health and facilities which are provided to them by the department.<sup>343</sup>

Sex education should be incorporated into school curriculum so that adolescents can understand sex from a young age. If sex education is implemented at a young age, adolescents become more aware about sex and how to make the right choices, which will in turn delay them from engaging in sexual intercourse at a young age. Furthermore it allows adolescents to be opened with their educators and ask questions about sex. This removes the barrier of adolescents being afraid of speaking to adults about their sexual experiences and provides them with an opportunity to seek help and guidance from their educators.

Educators play a vital role in an adolescent's life as they are engaging with them on a daily basis. In most instances adolescents and educators develop a bond of trust thereby allowing adolescents to be opened with their educators about their sexual problems or curiosity. Educators can then guide and help adolescents to overcome their problem by assisting them with the information they require and the facilities they should go to for help.

#### **4.2. Health care providers**

Health care providers should use the following guideline when they report adolescents to the police for engaging in consensual sexual activity. In relation to adolescents under the age of 12, all sexual activity is regarded as rape.<sup>344</sup> If consent was given between adolescents engaging in consensual sexual activity under the age of 12, this is still illegal and must be reported to police authorities.<sup>345</sup> Adolescents engaging in consensual sexual activity between the ages of 12-15 should not be reported as it has been decriminalized in terms of sections 15 and 16 of the 2015 SOA. If a 15 year old and a 17 year old engage in consensual sexual activity this should not be reported as there is a 2-year age gap between them.

However if a 12 or 13 year old engages in consensual sexual activity with a 16 year old, health care providers must report these adolescents to police officials as there is a more than 2-year age gap therefore it is a statutory crime of rape or sexual violation. The same would apply to adolescents aged 12, 13, or 14 and a 17 year old, health care providers must report them to police

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<sup>343</sup> *ibid* 26.

<sup>344</sup> Bhamjee (note 88 above; 257).

<sup>345</sup> *ibid* 258.

officials. Lastly all non-consensual sexual activity between any age group must be reported to police officials as it is a statutory crime of rape.

An education campaign needs to be held so that health care providers can properly exercise the law.<sup>346</sup> All service providers who are involved with adolescents on a daily basis dealing with these issues should be informed about the amendments of the Sexual Offences Act.<sup>347</sup> They should be made aware of the age to consent to sex and the fact that adolescents between the ages of 12-15 can engage in consensual sexual activity as it is no longer a criminal offence. “The Department of Health guidelines on ethics in health research should be amended to reflect the changes in criminal law”.<sup>348</sup>

Moult and Muller set out the following recommendation’s to assist adolescent’s access sexual and reproductive health services and to ensure that health care providers are equipped with the knowledge to assist adolescents.

- 1) Better training of healthcare providers on the legal context in which they provide sexual and reproductive health services.<sup>349</sup> In many instances health care providers are too busy at work as they are short-staffed and overburdened with the amount of work they have which makes it impossible for them to go for training.<sup>350</sup>
- 2) Since the amendment of sections 15 and 16 of the Sexual Offences Act we need to ensure that the newly amended laws are promoted to all service providers.<sup>351</sup> We need to ensure that the law is translated to all health care providers so that they are equipped to deal with situations of sexual exploitation as well as consensual sexual activity which is developmentally normal.

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<sup>346</sup> Mahery (note 84 above; 28).

<sup>347</sup> Bhamjee (note 88 above; 259).

<sup>348</sup> *ibid* 259.

<sup>349</sup> Moult (note 32 above;5).

<sup>350</sup> *ibid* 5.

<sup>351</sup> *ibid* 6.

- 3) Health care providers play a critical role in law reform as legislature must take into account the way in which services are office.<sup>352</sup> This is important as health care providers enforce the legislation which is drafted.<sup>353</sup>
- 4) There are many websites health care providers can access to gain knowledge of the newly amended laws.<sup>354</sup> Healthcare providers should also make an effort to gain such knowledge through research and investigations into the law.<sup>355</sup>

It is submitted that the following recommendations should be used as a guideline for all health care providers when dealing with adolescents on a daily basis. Girls who are seeking an abortion between the ages of 12-16 must be aware (including the health care providers) that in terms of the Choice of Termination of Pregnancy Act there is no minimum age or parental consent needed.<sup>356</sup> In these circumstances health care providers must be more understanding and comforting toward these adolescents and should provide them with counselling in a non-judgmental way.<sup>357</sup>

Secondly in terms of the Sexual Offences Act, adolescents can legally consent to sexual activity at the age of 16. Adolescents under the age of 12 must be reported to the police as they are engaging in illegal activities.<sup>358</sup> Furthermore non-consensual sexual activity with adolescents regardless of their age must be reported to the police.<sup>359</sup> Health care providers should be cautious to not make the disclosure of their partner's age and voluntariness of their relationship a condition to access termination of pregnancy.<sup>360</sup> If health care providers are concerned they should try and counsel the adolescent or refer them to a social worker.<sup>361</sup>

In terms of the Constitution<sup>362</sup> section 27(1) (a) states that everyone has the right to access health care, including sexual and reproductive health care. In these circumstances health care providers must counsel teenagers on contraceptive options and provide them with access to such

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<sup>352</sup> *ibid* 6.

<sup>353</sup> *ibid* 6.

<sup>354</sup> *ibid* 6.

<sup>355</sup> *ibid* 6.

<sup>356</sup> *ibid* 6.

<sup>357</sup> *ibid* 6.

<sup>358</sup> *ibid* 6.

<sup>359</sup> *ibid* 6.

<sup>360</sup> *ibid* 6.

<sup>361</sup> *ibid* 6.

<sup>362</sup> Constitution of the Republic of South Africa of 1996.

contraceptives.<sup>363</sup> Health care providers are also required to guide and counsel adolescents aged 12-16 on safer sex and how to protect themselves from HIV, sexually transmitted diseases and unwanted pregnancies.<sup>364</sup>

In relation to social workers it should be noted that social workers understanding of the law and rights are imperative, as they engage with adolescents on a daily basis. They place a vital role in adolescent's lives as they are the link between the law and adolescents as they promote SRHR.<sup>365</sup> They provide an access point to adolescents as they provide them with access to SRHR through schools, health care facilities and service offices.<sup>366</sup> A barrier which needs to be worked on by community members are the fact that communication about sex and sexuality with adolescents is regarded as taboo.<sup>367</sup> It is found that in certain communities discussions about sex between younger and older people are prohibited outside certain cultural contexts.<sup>368</sup>

Essack *et al* are of the view that “personal values of health care providers may affect the accessibility, uptake and quality of service they provide to adolescents”.<sup>369</sup> From their study it should be noted that social workers have a more conservative community values about adolescent sexuality than the reality of life.<sup>370</sup> Secondly in this study it has been reported that social workers have limited knowledge on SRHR for children which will create a barrier in them accessing the services offered to them by law.<sup>371</sup>

### **4.3. Law reform**

In order to address the mandatory reporting problems discussed in the previous chapter, legislature needs to amend section 54(1) to read as follows:

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<sup>363</sup> *ibid* 6.

<sup>364</sup> *ibid* 6.

<sup>365</sup> *ibid* 200.

<sup>366</sup> *ibid* 200.

<sup>367</sup> *ibid* 201.

<sup>368</sup> *ibid* 201.

<sup>369</sup> *ibid* 201.

<sup>370</sup> *ibid* 201.

<sup>371</sup> *ibid* 201-202.

## **S54 Obligation to report commission of sexual offences against children or persons who are mentally disabled**

(1) “(a) A person who has knowledge that a sexual offence has been committed against a child must report such knowledge immediately to a police official”.<sup>372</sup> This subsection would not apply in the following instances:

- (i) it is a section 15 or 16 offences;
- (ii) it has been consensual between both parties aged 12-15;
- (iii) there is not more than 2-year age gap between them;
- (iv) there is no evidence or indications that the adolescents has been sexually abused or violated.

The above amendment will ensure that health care providers do not have to report adolescents to police officials unless there has been sexual abuse or violation. Secondly it will break the barrier between health care providers and adolescents where adolescents would not be afraid to seek help from health care providers.

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<sup>372</sup> Sexual Offences Act

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