

## RESEARCH

# Reporting underage consensual sex after the Teddy Bear case: A different perspective

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Doctors and researchers face a complex dilemma regarding the mandatory reporting of consensual underage sex, because of contradictions between the Children's Act and the Sexual Offences Act. When providing underage children with sexual and reproductive health services, they have had to decide whether to provide these confidentially, in terms of the Children's Act, or thereafter report the consensual but illegal sexual behaviour to the police, in terms of the Sexual Offences Act. The recent *Teddy Bear Clinic for Abused Children, and Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN) v. Minister of Justice and Constitutional Development* case addressed whether consensual underage sex ought to be a criminal offence and thus reported. The court held that aspects of sections 15 and 16 of the Sexual Offences Act infringed on the constitutional rights of adolescents (aged 12 - 15 years) by proscribing many consensual sexual activities. McQuoid-Mason has described this case in detail. He submits that following the judgement, doctors are no longer under a reporting obligation in relation to consensual underage sex. We respectfully disagree. This article critiques McQuoid-Mason's approach, sets out our views on the mandatory reporting obligations after the *Teddy Bear* case and concludes with some comments on the judgement's implications for researchers and medical practitioners.

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In the previous issue of the *SAJBL*, McQuoid-Mason discussed the recent *Teddy Bear Clinic for Abused Children, and Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN) v. Minister of Justice and Constitutional Development* case,<sup>[1]</sup> in the article '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?'<sup>[2]</sup> He submits that, following the judgement, doctors are no longer obliged to report consensual underage sex. We respectfully disagree. Our article critiques his approach and proposes an alternative interpretation of the judgement. Finally, it suggests a more nuanced reporting approach for doctors and researchers in the post-*Teddy Bear* era.

In the last few years many doctors and researchers have faced a complex dilemma regarding the mandatory reporting of consensual underage sex.<sup>[3]</sup> On the one hand, the Children's Act<sup>[4]</sup> provides that children from the age of 12 are entitled, without parental consent, to access a range of sexual and reproductive health services such as contraceptives, HIV testing and treatment for sexually transmitted infections.<sup>[5]</sup> However, until recently, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the 'Sexual Offences Act')<sup>[6]</sup> provided that sex under the age of 16, even if consensual, was a criminal offence.<sup>[6]</sup>

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>[6]</sup> Accordingly, this placed an obligation on all service providers, including doctors, nurses and health researchers, to report consensual underage sex or sexual activity.<sup>[3]</sup> This broad reporting obligation meant, for example, that

any healthcare provider assisting an adolescent (under the age of 16) with a termination of pregnancy would be obligated to report that a sexual offence had occurred (i.e. consensual sexual penetration) even though this could have the unintended consequence of undermining the adolescent's rights in terms of the Choice of Termination of Pregnancy Act.<sup>[7]</sup>

Given that many researchers and healthcare providers could, intentionally or by inference, become aware of a child's sexual activity (because they lawfully asked adolescents questions about their sexual activity, identified sexually transmitted diseases, or provided HIV testing, pregnancy services or access to contraceptives) they had to decide how to respond to underage sex or sexual activity and its accompanying mandatory reporting requirements. They could either provide children with confidential sexual and reproductive health services, thus complying with the Children's Act but ignoring the Sexual Offences Act, or they could comply with the criminal law and report to such behavior to the police, thus breaching the doctor/patient relationship and adversely affecting the researcher/participant relationship, as well as undermining a child's sexual and reproductive rights according to legislation such as the Children's Act.<sup>[3]</sup>

These provisions, and their implications for both health researchers and providers, have led to considerable debate. For example, McQuoid-Mason<sup>[8]</sup> argues that the duty to report sexually active adolescents is unconstitutional, as it encroaches on the best interests of the child and limits the child's constitutional right to privacy. Based on similar arguments, other authors proposed ways of mitigating this overly broad mandatory reporting requirement. Strode and Slack<sup>[3]</sup> suggest that only 'exploitative' underage consensual sex should be reported, while Bhana *et al.*<sup>[9]</sup> 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.

Against this backdrop, the outcome of the recent *Teddy Bear Clinic* is significant, as it addressed whether consensual underage sex ought to be criminal offence and thus reported.

### McQuoid-Mason's recommended approach

McQuoid-Mason refers to his earlier work, in which he argued that, although doctors were under a legal duty to report underage sex, this duty 'may be unconstitutional if it violates the constitutional "best interests of the child" principle, and unreasonably and unjustifiably limits the constitutional rights of children to bodily and psychological integrity and privacy.'<sup>[8]</sup> Furthermore, he had earlier argued that this duty undermined the purpose of other sexual and reproductive rights granted by the Children's and Choice of Termination of Pregnancy Acts.<sup>[7]</sup>

He submits that although the *Teddy Bear* case declared Sections 15 and 16 of the Sexual Offences Act (which criminalise underage consensual sex and sexual activity) to be unconstitutional, it left open the issue of the mandatory reporting of underage consensual sexual intercourse.<sup>[2]</sup> Nevertheless, he submits that as underage sex has been decriminalised, the duty to report such conduct falls away as children are no longer committing a sexual offence.<sup>[2]</sup>

Accordingly, McQuoid-Mason states that the only remaining reporting obligation is to report sexual abuse in accordance with the Children's Act.<sup>[2]</sup>

McQuoid-Mason concludes that although the Constitutional Court has yet to confirm this decision, doctors would be justified in not reporting consensual underage sex because (i) the High Court has judged the criminalisation of such conduct 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>[1]</sup>

### Critique of the McQuoid-Mason approach

It is submitted that McQuoid-Mason's argument fails to recognise the nuances of the approach taken by Justice Rabie in the *Teddy Bear* case. Firstly, it does not recognise that even post the *Teddy Bear* case, there are certain forms of consensual sexual activity with children that remain illegal. These include sex between an adult (a person over 18) and an adolescent (aged 12 - 15). In a society with high levels of intergenerational sex,<sup>[10]</sup> it is possible that many healthcare workers or researchers would become aware that a sexual offence is being committed against a child if they ask them questions about their sexual partner. Likewise, not all forms of peer sex are legal. 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.

Secondly, Justice Rabie specifically found that there is no need to address the constitutionality of Section 54(1)(a) of the Sexual Offences Act dealing with the mandatory reporting of sexual offences against children, as he had already found that Sections 15 and 16 were inconsistent with the Constitution (paragraph 121).<sup>[11]</sup> This means that these sections will remain in place for the foreseeable future.

### An alternative approach

We submit that there are a number of mandatory reporting implications for healthcare providers and researchers working with adolescents following the *Teddy Bear* case.

Firstly, the case has eased some of the reporting burdens, and researchers and healthcare providers are no longer automatically required to report underage sex. In the past, if an adolescent aged 12 - 15 declared that they were sexually active or indicated such through their actions, for example, if they tested positive for herpes, the mandatory reporting requirements were triggered. Following the *Teddy Bear* case this is no longer the situation, as 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.

Secondly, the decision facilitates access to sexual and reproductive health services for 12 - 15-year-olds. 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. This was a key problem with the provisions in the Sexual Offences Act, as pointed out by McQuoid-Mason.<sup>[2,8]</sup>

Thirdly, we submit that the judgment is narrow in its scope. 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
- Under the age of 12.

Resultantly, the judgment raises many reporting complexities: Firstly, many adolescents (12 - 17) may disclose that they are sexually involved with persons 18 years and older. Secondly, younger adolescents (12 - 15) may reveal sexual involvement with adolescent partners who are older by more than 2 years, for example, a 13-year-old with a 16-year-old. Thirdly, older adolescents (16 - 17) may inform healthcare workers that they are sexually involved with children who are younger by more than 2 years.

If researchers or doctors report sex or sexual activity in this context, it may well have the same harmful consequences that were identified in the *Teddy Bear* case. For example, adolescents, particularly girls, will be dragged into the criminal justice system as they will have to give evidence against their older partner, who faces a criminal record and being entered onto the sexual offenders register. This may inadvertently place adolescents at risk of negative consequences, such as domestic violence, and will undermine the trust within both therapeutic and research relationships.

Therefore, even these more relaxed provisions provide ethical challenges: both researchers and healthcare providers are still under a legal duty to report consensual underage sex in certain circumstances and they have not been accorded any discretion in this regard. This is particularly problematic in settings where intergenerational sex or sex between partners of different ages is a social reality. Accordingly, we assert that even after the *Teddy Bear* case, a more nuanced approach may be required.

## Conclusion

Addressing underage consensual sex is a key public health issue. The *Teddy Bear* case is significant as the court recognised that adolescents aged 12 - 15 have a right to engage in 'healthy sexual behaviour' (paragraph 107).<sup>11</sup> Thus, for the first time, a court recognised that the disparate approaches to adolescent sexuality in the Sexual Offences Act and Children's Act were not in the best interests of children. It is argued that this is the first step towards developing a more coherent approach to adolescent sexuality which has both public health and human rights benefits.

However, doctors and researchers are still left with a reporting dilemma where the child is under the age of 12; or where a 12 - 15-year-old is having consensual sex with a much older partner; where a 16 - 17-year-old is having consensual sex with a partner more than 2 years younger; or where the child is having sex with a person over 18. Further debate is required on this issue, and must consider either (i) law reform to limit the nature of the mandatory reporting obligations, or alter them to give service providers some discretion in determining when reporting a consensual sexual offence would be in the best interests of the child (aged 12 - 15); Or (ii) a constitutional challenge attacking the excessive broadness of these mandatory reporting obligations.

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**McQuoid-Mason responds:** I have no problem with most of this article, as it confirms what I have written. I also have no issue with most of the 'critique', save as to say, as I mentioned in my original paper, that as the Constitutional Court still has to confirm the invalidation of certain provisions of the Sexual Offences Act, and they are therefore still in place. In the meantime, health practitioners should be guided by the Constitutional 'best interests of the child' principle, when deciding whether or not to report an offence involving children under the Act.

This does not mean that they must never report such offences – if it is 'in the best interests of the child', they must comply with the law and report them. Guidelines for what is 'in the best interests of the child' are spelled out in some detail in the *Children's Act*<sup>11</sup> and my earlier article<sup>12</sup> referred to by the authors. While it is a pity that the authors do not explain what a 'more nuanced approach' may be, I have no issue with their conclusions about the need for guidelines for reporting, and perhaps a Constitutional challenge regarding the reporting obligations. My article was intended to give some interim guidance to health professionals who are daily confronted by the dilemmas described above, and my suggestion is that we rely on the 'best interests of the child' provisions in the *Children's Act* and the Constitution to guide our actions.

Meanwhile, on 3 October 2013, the Constitutional Court ruled in the follow-up *Teddy Bear Clinic* appeal case (*The Teddy Bear Clinic for Abused Children and RAPCAN and others v. Minister of Justice and National Director of Public Prosecutions*).<sup>13</sup> The Court held that:

- Sections 15 and 16 of the Sexual Offences Act were invalid to the extent that they impose criminal liability for sexual offences on children under 16 years of age
- the declaration of invalidity is suspended for a period of 18 months from the date of the judgment, to allow Parliament to correct the defects
- from the date of the judgment there is a moratorium on all investigations into, arrests of, prosecutions of, and criminal and ancillary proceedings regarding such Section 15 and 16 offences – including the duty to report such consensual sexual conduct between children under 16 years of age under Section 54 of the Act (*Teddy Bear Clinic* case para. 111) – pending Parliament's correction of the Act
- any convictions or diversion orders made as a result of such offences committed by children under 16 years of age in terms of Sections 15 and 16 of the Act shall be expunged from the National Register for Sex Offenders.

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