

# Opinion Editorial

## Decriminalising Consensual Sex: Reflections on recent court victory by Teddy Bear Clinic for Abused Children

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### Introduction

**“Sex between 12 and 16 okay”**. (The Star – January 16, 2013) The front page headline following Judge Pierre Rabie announcement on the January 15 2013, where he found that criminalising consensual sexual acts between children under the age of 16 was unconstitutional.

The children’s sector celebrated whilst the public expressed outrage, Debates ignited around the country on twitter, the radio and in newspapers, many believing that the ruling encouraged children to engage in consensual sex without any legal consequences.

### What does the law say?

Three sections of the Sexual Offences and Related Matters Amendment Act 32 of 2007 were challenged. Section 15 of the Act, refers to penetration “despite” consent. Section 16 refers to sexual violation “despite” consent, which means that both parties are guilty of a criminal offence to be prosecuted in a court of law. Sexual violation includes kissing, petting and penetrative sex. The third section of the Act which was challenged is Section 56(2), which criminalises consensual sex between 12-16 year- olds.

More specifically these sections of the law were challenged:

- Section 15 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (“the Act”) – titled “Acts of consensual sexual penetration with certain children (statutory rape)”;
- Section 16 of the Act – titled “Acts of consensual sexual violation with certain children (statutory sexual assault)”;
- Section 56(2) of the Act – dealing with defences in respect of sections 15 and 16 of the Act.

### Why the lawsuit?

In November 2010, an incident at Jules High School which resulted in 3 children being prosecuted by the National Prosecuting authority for engaging in consensual sex caused a huge outcry in the children’s sector. Throughout this criminal process these children were traumatised by being on public display and dragged through the justice system in the midst of a media frenzy

Further to this incident, The Teddy Bear Clinic for Abused Children (TTBC), who offer a diversion programme for young sex offenders, had found that children who were being prosecuted for

engaging in consensual sex were being treated in the same way as sexual offenders by the justice system in accordance with the Sexual Offences Act.

TTBC found that despite the fact that children were often diverted into a special programme once a decision to prosecute has been made the alternative option did not avoid the secondary trauma these children would experience throughout this process. They found that before the child is admitted to a diversion programme he or she would be exposed to an arrest, required to provide detailed statements about their sexual activities, questioned by police and other authorities and may even be detained in police cells, all of which are emotionally traumatising events.

In response to this, TTBC, in partnership with Rapcan, launched an application to the high court challenging sections 15 and 16 of the Child Justice Act as being unconstitutional. The Centre for Child Law acting for the applicants brought the case before Judge Rabie in 2012.

Following Judge Rabie's judgement, the first stage of the application brought by TTBC and Rapcan is now concluded. The next step is to present the case to the constitutional court, which is the only entity to have the power to amend laws, should they be considered in contravention to the constitution of South Africa.

### Why challenge these laws?

Despite the obvious trauma that children do experience whilst going through the judicial process the provisions are also in contravention to our constitution, Section 12(2) of the Constitution provides:

*“Everyone has the right to bodily and psychological integrity, which includes the right-*

*(a) to make decisions concerning reproduction;*

*(b) to security in and control over their body”.*

and

*“A child's best interests are of paramount importance in every matter concerning the child.”*

In addition these sections of the Sexual Offences Act directly contradict the Children's Act, more specifically section 134 which provides that no person may refuse to sell or provide condoms to a child over the age of 12 years. Contraceptives can be provided on request by a child if the child is at least 12 years of age and has been physically examined.

Under the Children's Act, children are entitled to confidentiality but the Sexual Offences Act contradicts this, since a person who knows that a sexual offence is being committed in terms of section 15 (consensual sexual intercourse) has a duty to report it to the police.

The contradictions in these laws and traumatic effects on children are obvious and serve not only to confuse the legal system but more importantly immobilise practitioners in the field.

### Why the controversy?

Most people, including the media misinterpreted the outcome believing that young teenagers were now encouraged to engage in consensual sexual activities. This is clearly not the case the

applicants in the court case merely want to protect our children from the trauma of engaging in the criminal justice system on such intimately personal issues.

Some people wanted the law to restrict sexual behaviour of young children, whilst others understood the ramifications of the laws and celebrated with the children's sector. The debate that ensued became a moral one.

The question that was asked is: "Who is responsible for containing the sexual behaviour of young adolescents?" Some church groups and parents are demanding that the law act as a deterrent, a punishment meant to frighten children into delaying sexual exploration, others lay the burden squarely at the feet of parents.

The fact is that we know that the law does not act as a deterrent more especially with children who are known to be inquisitive by nature. Instead of curbing their behaviour, experts agree, that this law would only serve to form an environment of secrecy, which would render them vulnerable as they to hide what they are doing. Instead of seeking contraceptives and advice they would engage in the high risk behaviour without the avenues they need to protect themselves.

## Conclusion

The questions we should be asking is: "Why are children engaging in sexual activities at such a young age? What are the parents doing to educate their children about sex and the risks inherent in engaging in sex before they are emotionally mature enough to understand their actions? What role is the media playing in children's awareness of sex at such a young age and how does a parent manage the effects the media has on their children? Do we really want the law to step in when our children engage in high risk sexual behaviour?"

It is not criminal to engage in consensual sex at any age, it is a moral issue. And whilst we can agree that sex before the age of 16 is potentially psychologically damaging to the child we cannot rely on the law to act on behalf of parents in such intimate moral concerns.

In my view this victory should be celebrated by everyone in South Africa. We need to understand that the law cannot be used as a disciplinary measure to curb intimate relations between consenting individuals, albeit they are children. So instead of pointing fingers and being outraged at the laws being challenged, maybe we should go back in time, revisit the way parenting practices have changed over the years and the dire adverse effects these are having on how we raise our children.

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