

BRIEFING PAPER

CENTER
FOR
REPRODUCTIVE
RIGHTS



CRIMINALIZING ADOLESCENCE

A Call to Reform the
Sexual Offences Act

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The period of adolescence is “characterized by rapid physical, cognitive, and social changes, including sexual and reproductive maturation, gradually building up capacity to assume adult behaviours and roles, which involves new responsibilities requiring new knowledge and skills. It is a dynamic transition period marked by opportunities, and while adolescents are in general a healthy population group, it also poses new challenges to health and development due to their relative vulnerability and pressure from society, including peers, to adopt health risk behaviours. These challenges include developing individual identity and dealing with one’s sexuality. Adolescence is also generally a period characterized by positive changes, prompted by the significant capacity of adolescents to learn rapidly, to experience new and diverse situations, to develop and use critical thinking, to familiarize with freedom, be creative, and to socialize.”

United Nations Committee on the Rights of the Child, General Comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child, (33rd Sess., 2003), U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (2008).

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II. GLOSSARY

ASRH Adolescents' Sexual and Reproductive Health

ASRH Policy Adolescents' Sexual and Reproductive Health Policy

AYFS Policy National Guidelines for the Provision of Adolescent and Youth-Friendly Services

CSE Comprehensive Sexuality Education

DPP Director of Public Prosecutions

HIV Human Immunodeficiency Virus

KDHS Kenya Demographic and Health Survey

NCAJ National Council for the Administration of Justice

SRH Sexual and Reproductive Health

SRM Senior Resident Magistrate

SOA Sexual Offences Act

STI Sexually Transmissible Infections

WHO World Health Organization

III. DEFINITION OF TERMS

Adolescents: Persons aged between 10 and 19 years.

Adolescent minors: Adolescents who have not attained the age of 18 years.

Noncoercive and nonexploitative sexual conduct among adolescents: Refers to sexual conduct that is performed out of desire, voluntarily and with consent, without force, duress, or compulsion, either direct or implied. Any exploitative sexual conduct is inherently nonconsensual. Silence and/or physical passivity (physical or verbal) does not constitute consent.

Evolving capacities: The Committee on the Rights of the Child defines this as an enabling principle that addresses the process of maturation and learning through which children progressively acquire competencies, understanding,¹ and increasing levels of agency to take responsibility and exercise their rights.

Best interests of the child: The child's right to have his or her best interests assessed and taken into account as a primary consideration in all actions or decisions that concern him or her, in both the public and private spheres.²

IV. INTRODUCTION

a. Background

In 2006, the Kenyan Parliament enacted the Sexual Offences Act (SOA) with the singular goal of ensuring accountability for sexual violence which was pervasive. At the time, actors working on women's and children's rights felt that existing legislation was inadequate in enabling survivors of sexual violence to access justice and in punishing perpetrators. The SOA provides a comprehensive framework for preventing and addressing sexual violence.³ It intended to provide protection to vulnerable groups, including children, by prescribing stiff penalties in offences against them, and introduced the concept of mandatory minimum sentences, which at the time stakeholders felt would act as a deterrent to sexual violence.

The enactment of the SOA was accompanied by high expectations regarding a reduction in cases of sexual violence, including those perpetrated against children. While there is no comprehensive study to date that confirms whether this has been or is being achieved, there is information that indicates that the application of the SOA has resulted in unanticipated consequences. A 2016 audit of the criminal justice system established that sexual offences (defilement) made up about a third of the cases that magistrates in the Children's courts handled between 2013 and 2014.⁴ Unfortunately, the data is not disaggregated into the number of cases that relate to minor-to-minor noncoercive and nonexploitative sexual conduct and minor-to-minor sexual violence. Other consequences include imprisonment of adolescents due to the conflation of all adolescent sexual activity with sexual violence.⁵

While laws and courts rightfully seek to protect minors against sexual abuse and meet the critical need to address the inexcusably high prevalence of sexual abuse against children, criminalizing consensual conduct between adolescents does not reach this aim and is often based on wrongful stereotypes about adolescents' being unable to make decisions; as such, not only do laws and courts not reach their purported aim of protecting children, but they can also be harmful to adolescent health and development.

Concerned with cases of imprisonment of adolescents, in 2016, the National Council for the Administration of Justice (NCAJ) commissioned a study whose aim was to establish the number of adolescents affected by the implementation of the SOA. The study found that adolescents were being imprisoned for engaging in noncoercive and nonexploitative sexual conduct with one another.⁶ Following this study, in recognition of the unjust consequences of the application of the SOA against adolescents and its impact on adolescent development, the NCAJ proposed, among other proposals, to amend the law on sexual offences by lowering the age of consent to sex.⁷ To date, the law has not been amended.

This briefing paper builds on the findings of the NCAJ by providing a human rights analysis of laws in Kenya that criminalize sexual conduct among adolescents. The paper also examines select court cases involving minor-to-minor sexual conduct. Criminalization of noncoercive and nonexploitative adolescent sexual conduct is incongruent with developmentally normative sexual practices among adolescents; undermines access to essential reproductive health services, contrary to government priorities in the Adolescent Sexual

and Reproductive Health Policy (ASRH Policy); is incompatible with other legislation, such as the Children Act and the principle of the “best interests of the child”; and is inconsistent with constitutional rights afforded to adolescents in Kenya.

b. Context

Adolescents constitute 24 percent of the population in Kenya.⁸ They face numerous challenges that impede their health and have a negative impact on their development, including sexual and gender-based violence, teenage pregnancy,⁹ HIV/STI, harmful practices (such as female genital mutilation), and drug and substance abuse.¹⁰ These challenges are compounded by their inability to access sexual and reproductive health information and services.

In Kenya, 23 percent of adolescents have an unmet need for family planning, indicating that although they are sexually active and wish to delay childbearing, they are not using any method of contraception, thereby increasing their risk of unintended pregnancy.¹¹ “About 15 percent of girls between the ages of 15 and 19 in Kenya have had a birth, and 3 (sic) percent are pregnant with their first child.”¹² Adolescent girls from lower income levels are more likely than their wealthier counterparts to have begun childbearing, as are adolescents who do not complete primary or secondary school.¹³ This demonstrates that early childbearing is primarily an socio-economic issue. It can pose unique risks to adolescents, since deaths during pregnancy and childbirth (maternal deaths) are the leading cause of death for adolescent girls globally.¹⁴ Early childbearing also contributes to school dropouts,¹⁵ which in turn limits girls’ future economic prospects.

As the World Health Organization (WHO) has recognized, access to sexual and reproductive health and rights (SRHR) and services is critical to the facilitation of healthy adolescent development.¹⁶ The ASRH Policy notes that “as children grow into adolescence, they need different types of health services. They must have access to reproductive health information and services to avoid unplanned pregnancies and to prevent sexually transmitted infections, including HIV—all of which can undermine educational opportunities, especially for girls.”¹⁷

The 2014 Kenya Demographic and Health Survey (KDHS) found that slightly more than half of Kenyans have sexual debut by age 18.¹⁸ The KDHS also found that 15 percent of women aged 20 to 49 first had sexual intercourse by age 15, and 50 percent had by age 18, while 22 percent of men aged 20 to 49 first had sexual intercourse by age 15, and 56 percent had by age 18. This indicates that many adolescents engage in sex before the age of majority (which in Kenya is 18 years).¹⁹ While a portion of this includes coerced sex, many adolescents also have consensual sexual intercourse among themselves as part of a common phase during this period of life which includes experimentation and curiosity to understand their sexuality.

Adolescents involved in noncoercive and nonexploitative sex with one another before the age of majority expose themselves to the threat of criminal sanctions under the SOA. This is because the SOA does not make any distinction between sex between adolescent minors and sexual acts between adolescent minors and adults — all of which are classified and/or have been interpreted as criminal offences. The SOA also does not make any distinction between noncoercive and nonexploitative and coercive and exploitative sexual conduct between minors. This differs from the ASRH Policy, which recognizes that adolescents have sexual and reproductive rights, which includes the ability to exercise those rights by accessing reproductive health information and services. Conflicts between the legal and policy positions therefore impose barriers that make it difficult for adolescents to effectively access sexual and reproductive health services and rights.

c. Statement of the Problem

Adolescents are unable to comprehensively realize their sexual and reproductive rights in Kenya. This is partly because the SOA criminalizes all sexual acts including noncoercive and nonexploitative sexual conduct between adolescents. The problem is exacerbated by judicial decisions that, while acknowledging the discomfort of sentencing adolescents who have engaged in noncoercive and nonexploitative sexual conduct, affirm the position of the law.²⁰

Criminalization of noncoercive and nonexploitative sexual conduct between adolescent minors creates numerous challenges. For example, the law:

- Punishes them for what is a natural part of development²¹ and stigmatizes adolescent sexual conduct, that is, sexual activity with peers, in which both parties desire to have sex without coercion or force.
- Results in adolescent males being imprisoned and, in some cases, ending up with a permanent criminal record for engaging in consensual sexual conduct with other adolescents²². While the male adolescents are imprisoned, some of their female partners bear other consequences of the sexual conduct, namely unintended pregnancies due to lack of access to SRH services and information including on safe abortion.
- Deters and hinders access to comprehensive SRH services by fueling the stigmas and myths surrounding adolescent sexuality. As recognized by the WHO, “An adolescent’s decision to go to a health service for sexual health care or advice is likely to be influenced by whether they will get into trouble with parents or guardians, or even with the law, in places where sexual activity under a certain age ... is against the law.”²³ Where culture and social norms prohibit underage sex, adolescents may fear seeking health services even when they have reproductive health needs, such as an unwanted pregnancy or an infection in their genital area.²⁴
- Unjustifiably limits the human rights of adolescents. Adolescents are recognized to have the same rights as adults, as well as special protections given their age. The principle of limitation of rights has been applied wrongly by many countries, including Kenya, to prevent adolescents from accessing sexual and reproductive health care and exercising their rights. Unreasonably restricting access to fundamental rights, including access to sexual and reproductive health information and services, leaves adolescents vulnerable to early and unwanted pregnancies, sexually transmissible infections, and more.
- Is not in the best interests of the child, as per the points raised above, and is in violation of the Constitution and international human rights principles.

d. Methodology and Focus of the Briefing Paper

This briefing paper was developed through significant legal and policy research; consultations with lawyers²⁵ and the public; and interviews with key informants, including service providers, adolescents,²⁶ and others who have experienced the impact of the SOA and its related policies.

The briefing paper focuses on mutually consensual, noncoercive and nonexploitative sexual engagement between adolescents, which has been defined in the earlier sections of the paper and aims to contribute to a better understanding of the harm that the criminalization of sexual conduct among adolescents has on those engaging in noncoercive and nonexploitative sexual conduct with other adolescents. It also makes recommendations for a harmonized approach to both law and policy in line with the Constitution.

The protection of adolescents, including ensuring their ability to exercise their dignity and privacy, is the primary motivating factor for the recommendations made in this briefing paper. These recommendations seek to guarantee that adolescents can exercise their reproductive rights and access SRH services without fear of prosecution for engaging in noncoercive and nonexploitative sexual conduct, and without fear of confidentiality breaches and the stigmatizing impact of the mere existence of the criminal provision. The recommendations draw a strict line to support adolescent dignity and privacy while protecting them from harm, including the harms of child marriage, sexual coercion and exploitation, and other forms of abuse.²⁷

e. Challenges and Limitations

Although the Judiciary has information on the number of pending cases under the SOA²⁸, they are not disaggregated by type of offence, age, gender of offender, nor complainant. The information is therefore not comprehensive. It was not possible to get information from prisons and probation on the number of child offenders found guilty under the SOA and serving sentences in their facilities.

V. UNDERSTANDING ADOLESCENCE AND ADOLESCENT SEXUAL DEVELOPMENT

In addressing noncoercive and nonexploitative sexual conduct between adolescents, it is important to consider this issue from the perspective of the physical, emotional and social changes that happen during adolescence. Adolescence begins at the onset of puberty, “which is a landmark in the development of sexuality”.²⁹ Scholars writing on adolescent sexual development have noted that though the period of adolescence is viewed as a transitional phase, it is a continuation of sexual development, which occurs throughout the life cycle and peaks during this period.³⁰

Adolescents will continue to explore their sexuality during this transitional phase and will be in danger if they continue to do so without education and access to reproductive health services. Cultural practices, social norms, and laws stigmatizing adolescent sexuality, criminalizing sexual conduct, and limiting access to information on sex and sexuality during this crucial development stage can have a negative impact on adolescent development.³¹

VI. REVIEW OF THE RELEVANT LEGAL AND POLICY FRAMEWORK ON ADOLESCENT SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS

a. The Sexual Offences Act

The SOA criminalizes sexual acts with adolescent minors through the crimes of defilement, attempted defilement and indecent act with a child or adult. Section 8 (1) of the SOA defines defilement as “an act which causes penetration with a child”. The penalty for the act is life imprisonment if the child is 11 years or younger, 20 years if the child is aged 12 to 15, and if the child is aged 16 to 18, the minimum sentence that can be imposed is 15 years. In conformity with the Constitution, the Convention on the Rights of the Child, and the Children Act, the SOA defines a child as anyone under the age of 18.³²

The SOA specifies that defilement applies to everyone, including a minor, who has had sexual intercourse with his or her peers.³³ Section 8 (7) specifically outlines the terms for the criminal prosecution of minors who have engaged in sexual intercourse with other minors. Under the section, minors charged with offences under the SOA may, upon conviction, be sentenced according to the provisions of the Borstal Institutions Act and the Children Act. Under the Borstal Institutions Act, a child offender may be committed to a Borstal Institution³⁴ for up to three years. The Children Act explicitly excludes imprisonment³⁵ as a form of punishment and instead provides alternative forms of punishment, such as probation, rehabilitation, counseling, and others.³⁶ It is not clear how counselling for children in conflict with the law has been incorporated in the judicial system. The jurisprudence examined in later sections of this paper demonstrates that imprisonment has been preferred upon a finding of guilt being made, despite the option not being included as a form of punishment under the Children Act and the Borstal Institutions Act. This may partly be attributed to the fact that Section 8 (7) of the SOA is couched in discretionary terms, meaning that judicial officers are not required to comply with this provision and may instead send adolescents to prison.

Attempted defilement is prohibited under Section 9 of the SOA. The penalty is ten years in prison. This provision can be applied against minors who engage in noncoercive and nonexploitative sexual conduct. It is also illegal under Section 11 of the SOA for minors to engage in indecent acts with one another.³⁷ Indecent acts are those which cause “any contact between any part of the body of a person with the genital organs, breasts, or buttocks of another”.³⁸ The minimum penalty prescribed for the offence is ten years,³⁹ though the court has the discretion to sentence the offender under the provisions of the Borstal Institutions Act and the Children Act.⁴⁰

While the SOA does not define capacity, a minor is explicitly included in the category of persons incapable of appreciating the nature of an act which causes the offence.⁴¹ The proposition therefore, is that they are legally precluded from consenting to any sexual conduct, including noncoercive and nonexploitative sexual conduct with their peers.

b. The Children Act

The Act outlines the principle of the best interests of the child, which is recognized in the Constitution, in connection with actions taken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies. In doing this, the Act recognizes the principle as a critical procedural consideration in processes and decisions of the foregoing institutions. The Act also acknowledges that the

principle is critical to the realization of an outcome that “(a) safeguards and promotes the rights and welfare of the child; (b) conserves and promotes the welfare of the child; (c) secures for the child such guidance and correction as is necessary for the welfare of the child and in the public interest”.

As constructed, the provisions on the best interests of the child are in conformity with the interpretive guidance provided by the Committee on the Rights of the Child, which considers the principle as:

1. A substantive right — it establishes an obligation on behalf of the State, which is directly applicable (self-executing) and can be invoked before a court.
2. A fundamental interpretative legal principle — meaning that where a legal provision is open to more than one interpretation, the one that better advances the child’s best interests should be chosen.
3. A rule of procedure — meaning that when rendering decisions affecting a child or group of children (or all children, as an aggregate), the authorities must take an assessment of the positive and negative effects on the child/children.

States should explain how decisions respect this right, the criteria used to reach the decision, and how the child’s best interests have been weighed against other considerations. “The best interests of the child” is a complex and contextual determination that must be made on a case-by-case basis, but its interpretation should be guided by the realization of the full range of children’s rights (e.g., life, survival and development, nondiscrimination and health).

The criminalization of noncoercive and nonexploitative sexual conduct between minors without exception violates the best interests of the child provision set out in the Constitution, the Children Act and the CRC. The Committee urges states to avoid criminalizing adolescents of similar ages for factually consensual and non-exploitative sexual activity⁴² and notes that it is in the children’s best interests to create laws and policies that facilitate their growth and development.⁴³

c. The National ASRH Policy and the National Guidelines for Provision of Adolescent Youth-Friendly Services

There is a sharp misalignment between the provisions of the SOA and policy frameworks. While the SOA criminalizes all sexual conduct between adolescent minors, the ASRH Policy acknowledges the importance of enhancing their sexual and reproductive health status to enable them to realize their full potential. The policy’s focus is on promoting an enabling legal and sociocultural environment for the provision of SRH information and services for adolescents as well as enhancing equitable access to high-quality, efficient and effective adolescent-friendly SRH information and services. The ASRH Policy specifically promotes adolescents’ SRHR, including access to information, comprehensive sexuality education (CSE), and the reduction of early and unintended pregnancies.⁴⁴

The policy further aims to facilitate revision, where appropriate, of age and sex-related restrictions that prevent adolescents from accessing full HIV and SRH services; to guarantee the provision of information and services to prevent early and unintended pregnancies, including a wide range of contraceptive methods; and to facilitate adolescent-friendly SRH services.⁴⁵ In doing this, the ASRH Policy acknowledges that adolescents engage in sexual conduct that is not exploitative or coercive.

Additionally, the National Guidelines for Provision of Adolescent and Youth-Friendly Services in Kenya (AYFS Policy), developed as part of the ASRH Policy, recognize that health services for adolescents and youth should (1) guarantee privacy and confidentiality; (2) promote autonomy so adolescents can consent to their own treatment and care; (3) provide information and support to enable adolescents make free and

informed decisions about their care; and (4) ensure access to sexual and reproductive health services, such as contraception, comprehensive post-rape care, and HIV-screening and treatment.⁴⁶ The recognition of adolescent autonomy, as noted earlier, is not in congruence with the SOA.

Implementation of the ASRH Policy, and the AYFS Policy is unclear and there are no publicly available documents to determine the current state of policy application.

The express criminalization of noncoercive and nonexploitative sexual conduct between adolescent minors is problematic because it fuels the stigma⁴⁷ and myths surrounding adolescent sexuality, which is likely to affect the ability of this age group to access comprehensive SRH information, and services. Criminalization also creates confusion on the treatment of this age group by the criminal justice system.

VII. IMPACT

a. Criminalization of All Sexual Conduct Among Adolescents is Discriminatory and Undermines the Right to Health

The Constitution contains protections on equality, health, and information, among others, that advance the SRH of adolescents. Specifically, Article 27 prohibits discrimination on numerous grounds, including age and gender.⁴⁸ The right to equality and nondiscrimination is fundamental to the realization of all human rights, and the State is required to ensure that discrimination does not undermine the realization of children's rights.⁴⁹ Article 43 (1) outlines the right to health, including reproductive health services, while Article 53 (1) (c) explicitly provides for the right to health of children (including adolescents who are minors). The Constitution therefore affirms that adolescents have an inherent right to health, including reproductive health. This therefore means they are entitled to access reproductive health information and services without experiencing discrimination.

However, criminalization of noncoercive and nonexploitative sexual conduct under the SOA creates the impression in the minds of adolescent minors that they are not entitled to access reproductive health information and services. Although the law imposes no obligation on health providers to report children engaging in sexual conduct with each other, it creates confusion about the legality of offering reproductive health information and services to adolescent minors to presumably engage or continue engaging in an "illegal act". Health care providers may therefore be apprehensive about offering services to adolescent minors without parental authorization. This resulting differentiation of adolescents' reproductive health entitlements is discriminatory.

On this issue, the Committee on the Rights of the Child notes that "adolescence itself can be a source of discrimination. During this period, adolescents may be treated as dangerous or hostile, incarcerated, exploited, or exposed to violence as a direct consequence of their status. Paradoxically, they are also often treated as incompetent and incapable of making decisions about their lives."⁵⁰ The Committee urges states to ensure that adolescents enjoy equal protection of the law and encourages countries to put in place appropriate measures to reduce conditions that could result in direct or indirect discrimination of adolescents on any ground.⁵¹

b. Discretion in Sentencing Under the SOA Conflicts with the Children Act, Exposes Children in Conflict with the Law to Threat of Imprisonment, and Violates the Right of Access to Justice

As indicated earlier, adolescent minors who engage in noncoercive and nonexploitative sexual conduct should not be criminalized. However, in cases where adolescent minors are prosecuted for exploitative and coercive sexual conduct, and when they are found guilty, the procedures and punishment as set forth in the SOA do not conform with the Children Act, other relevant laws, and applicable human rights principles and standards. Sections 184–194 of the Children Act stipulates the procedure to be followed during processes involving children in conflict with the law. For instance, according to the Children Act, the forum for the resolution of such cases is the Children’s Court.⁵² Our research shows that there have been instances of children being tried in regular courts for offences under the SOA.⁵³ When there is a finding of guilt, the Children Act stipulates that imprisonment shall not be an option.⁵⁴ Instead, the Act proposes alternative forms of punishment and rehabilitation, including counseling, discharge, probation, and community service.⁵⁵

The case of DOB⁵⁶

In 2018, DOB was a 16-year-old Form Three student living in a village in the Western part of Kenya. He had a 14-year-old girlfriend – YB, also from the same village. The fact of their relationship was well known to their neighbours, parents and relatives. According to DOB and his mother, both minors had several sexual encounters with each other. In the same year, DOB was accused of defiling YB by her grandmother. He was arrested, charged and sentenced to serve 20 years in prison – the maximum penalty. Despite being a minor, he was processed as an adult – court records erroneously indicated that he was 19 years of age at the time of commission of the offence. His birth certificate; however, shows that he was 17 years old. Nobody ascertained his age during the entire trial. DOB is serving time in Kodiaga Prison, one of the toughest prisons in the country for an egregious procedural omission.

The Committee on the Rights of the Child has recognized in General Comment 10 that the incarceration and criminalization of juveniles should be used only as a last resort, when all other methods to deter unwanted conduct have failed. Additionally, States are urged to ensure that alternatives to imprisonment are established to encourage child delinquents’ successful reintegration into society.⁵⁷ General Comment 10 also obligates states to ensure that supportive programs such as foster care, counselling, probation, and educational services are established and available to children in violation of the law in order to support them through the legal process and ensure their rights are respected and realized.⁵⁸

By making the invocation of the Children Act during sentencing discretionary⁵⁹ and, in effect, making imprisonment the preferred form of punishment, the SOA contravenes the Committee on the Rights of the Child’s guidance on State obligations under the Convention and the Constitution.⁶⁰ General Comment 10

outlines guidelines for juvenile justice and how to ensure that minors who have violated domestic laws still have their rights respected.⁶¹

Importantly, the Judiciary has identified this as an area of conflict and urged the government to revise this section of the SOA to incorporate protections for adolescents engaging in nonexploitative, noncoercive sexual conduct with one another. In *P.O.O. (A minor) v. Director of Public Prosecutions & the SRM, Mbita Law Courts* (2017), the Court in considering whether children had the capacity to consent to sex as well as what crime was committed when such an act occurred and who ought to be charged, opined: “I think these are children who need guidance and counselling rather than criminal penal sanctions. I really think this kind of situation should be reexamined by the criminal justice system.” This additional guidance from the Judiciary recognizes the lack of institutional mechanisms of support for adolescent minors who find themselves in purported violation of the SOA for engaging in conduct that is not harmful when mediated by education and services.

VIII. JUDICIAL PERSPECTIVES ON CRIMINALIZATION OF ADOLESCENT CONSENSUAL SEXUAL CONDUCT

Courts in Kenya have adopted different approaches when addressing the criminalization of all sexual conduct among adolescents and in doing so have considered three main issues:

1. Whether adolescents have the capacity to consent to sex with their peers;
2. Whether the provisions of the SOA (specifically Sections 8 and 11) are discriminatory against boys; and
3. Whether the criminalization of all sexual conduct between adolescents qualifies as a limitation of rights.

a. Whether Adolescents Can Consent to Sex with Their Peers

On the question of consent, some judges, in determining defilement charges involving sexual conduct between two adolescents, have expressed their discomfort with the criminalization of such conduct where there was demonstrated agreement on the part of both parties to engage in such conduct. In that regard, some judges have recognized that adolescents *may* have capacity to consent to sexual intercourse. In *P.O.O. (A minor) v. Director of Public Prosecutions & the SRM, Mbita Law Courts*, the petitioner challenged the continuation of defilement charges against him in the Mbita Law Courts. He contended, among other things, that the continued prosecution of the case was discriminatory and denied him equal rights and protection of the law. The court identified four issues for determination, including whether the petitioner’s constitutional right to be treated equally before the law was infringed on by the respondents, wherein the question of consent arose. The court noted that the conduct complained about demonstrated some element of agreement and expressed its concern about convicting minors who decide to “experiment” mutually when such cases are often brought against the boy by the girl’s parents after they find out she is pregnant.⁶² The court in that case agreed with the petitioner’s claim and quashed the charges filed before the magistrate’s court in Mbita.

Other courts have, however, supported the criminalization of adolescent consensual sexual conduct. In *CKW v. the AG and DPP*, where a minor convicted of defilement challenged Section 8 (1) of the SOA for conflicting with Article 27 (4) of the Constitution,⁶³ the court upheld the conviction, holding that minors have no legal capacity to consent to sexual intercourse, as they need protection from engaging in premature sexual conduct. The Court further noted that the criminalization of consensual sexual conduct was “aimed at achieving a worthy or important societal goal of protecting children from premature sexual conduct.”⁶⁴

The conflicting precedent on this issue contributes to a lack of legal clarity around what conduct is legally permissible as well as a lack of consistent understanding of the evidence behind adolescent consensual sexual conduct and what degree of discretion exists on behalf of judicial officers in applying the SOA.

b. Whether the Criminalization of All Sexual Conduct Between Adolescents Qualifies as a Justifiable Limitation of Rights

Courts have also been asked to decide on whether the criminalization of adolescent consensual sex amounts to a reasonable and justifiable limitation as set out in Article 24 (1) of the Constitution. Under the provision, “a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, taking into account all relevant factors, including:

1. The nature of the right or fundamental freedom;
2. The importance of the purpose of the limitation;
3. The nature and extent of the limitation;
4. The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedom of others; and
5. The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.”⁶⁵

The matter of limitation of rights was raised by the Director of Public Prosecutions (DPP) in the *CKW* case. In it, the DPP argued that the rights the petitioner was fighting for did not fall within the four rights that cannot be limited under Article 25 of the Constitution⁶⁶ and could therefore be lawfully limited. In other words, the DPP contended that the criminalization of noncoercive and nonexploitative sexual conduct between adolescent minors was a lawful limitation. The brief facts of the case were that the petitioner, who was 16 at the time of the commission of the offence, was accused of defilement after it was established that he engaged in sexual intercourse with a 17-year-old girl, whom he contended was his girlfriend. He was convicted of the offence of defilement contrary to Section 8 (1) as read together with Section 8 (4) of the SOA in the Chief Magistrate’s Court, Eldoret, in Criminal Case No. 1901 of 2013. He filed a constitutional petition in the High Court in which he sought a substantive declaration “that sections 8 (1) and 11 (1) of the Sexual Offences Act are invalid, to the extent that they criminalize consensual sexual relationships between adolescents.”⁶⁷

The Court considered the South African case of *Teddy Bear Clinic for Abused Children and Another v. Minister of Justice and Constitutional Development and Another* and highlighted that the South African Court held that the fundamental rights of children may be limited by legitimate reasons, such as to protect them from harm. The Court cited the testimony of two South African experts in child psychology who testified that when adolescents are left to themselves to sort out their sexuality issues, they tend to engage in risky behaviour due to poor decision-making and power imbalances within the sexual relationships.

The Kenyan Court's ruling was greatly influenced by this expert testimony and did not adopt the reasoning of the South African Court, which relied on well-established evidence that demonstrated sexual conduct by adolescents is normal, and that punishing developmentally normal sexual expression is degrading to the adolescent. The judge in the *CKW* case went on to find that "the limitation of the right of the adolescent to engage in consensual sex was therefore justified."⁶⁸ The court did not expound on how the limitation was reasonable and justifiable and/or met the test established in Article 24 (1).

While the judge in the *CKW* case found the precedent in the *Teddy Bear* case to be inapplicable, it is quite relevant to the circumstances of the *CKW* case. The *Teddy Bear* case is discussed in detail in the next section. Regarding the specific question of limitation in the *CKW* case; however, although the court found that the objective of criminalizing noncoercive and nonexploitative sexual conduct among adolescent minors was to *protect them from risky behaviour*, it did not comprehensively address the question of whether restricting adolescent sexual conduct is a legitimate reason for criminalizing adolescent SRHR.

Rather than protect adolescents from risky behaviour, the criminalization of consensual sexual conduct among adolescents has denied adolescents critical information that they need to make healthy decisions about their sexual and reproductive health. This is in part because criminalization sends the message that the conduct is unlawful/illegal, stigmatizing adolescents and driving them away from the health care system, as well as having a chilling effect on health providers who in turn interpret the law strictly and may not be inclined to provide information, to avoid criminal liability.

c. Whether the Provisions of Sections 8 and 11 of the SOA Are Discriminatory on Grounds of Age and Sex

Courts have held the view that Sections 8 (1) and 11 (1) of the SOA do not discriminate against minors and have opined that it is in the enforcement of the law that discrimination becomes apparent. This position was affirmed in the earlier referred to case of *CKW v. the AG and DPP*, in which Justice Ochieng stated as follows: "In Kenya, the law does not distinguish between the girl and the boy, in section 8 of the Sexual Offences Act. ... The discriminatory application of a law if it is established is wrong. But such a conduct by the person who exercises it does not render the law itself discriminatory. I share these sentiments to the extent that the law is not discriminatory; rather, its application is what may be discriminatory."

The precedent established in the *CKW* case was reiterated in the case of *G.O. v. Republic, Criminal Appeal No. 155 of 2016*, in which the High Court in Siaya overturned the conviction of a 15-year-old boy who was found guilty of "defiling" a 17-year-old girl.⁶⁹ The Court determined that the guilty verdict was illegal and contrary to the Children Act, the Kenyan Constitution, and the SOA.⁷⁰ While the decision was grounded in the fact that the minor was charged as an adult, the Court also found that apportioning blame only to the male child amounted to discrimination and stated that "the appellant was discriminated against on the basis of sex in that he was arrested and charged instead of the prosecution charging both the complainant and the appellant for the offence of defilement."⁷¹ Similar sentiments regarding discriminatory application of the law were expressed by the court in the case of *P.O.O. (A minor) v. DPP and the SRM, Mbita Law Courts*, where the court found "that the appellant was discriminated against on the basis of sex in that he was charged alone but in reality, they both needed protection against sexual activities."

While courts have not substantively addressed the question of discrimination on grounds of age, there is a strong argument that Sections 8 (1), 9 (1), and 11 (1) of the SOA impose an unreasonable and unjustifiable differentiation of adolescent minors who engage in noncoercive and nonexploitative sexual

conduct, which leads to discrimination based on age. The proposal made variously to charge both parties involved in minor-to-minor sex would not cure the deficiencies in the law, rather, it would perpetuate discrimination against adolescent minors engaging in acts that are a normal aspect of human development.

The courts in these cases failed to address the discrimination inherent in a law that criminalizes noncoercive and nonexploitative sexual conduct between adolescents as well as the resulting discrimination manifesting in adolescent minors of both sexes' being denied access to constitutionally guaranteed sexual and reproductive health information and services. It also contributes to adolescents' feeling like they cannot exercise their reproductive rights for fear of facing criminal charges if their conduct is reported. All this is fueled by stigma, which, as indicated in earlier sections of the paper, is a direct consequence of criminalization of adolescent sexual conduct.

As has been demonstrated, the decisions discussed in this section have not resolved the tension between the criminal law and adolescents' right to access sexual and reproductive health services, and have, in some cases, resulted in conflicting precedent. This presents real challenges to the realization of ASRHR and access to justice by those caught up in situations involving consensual sexual relations.

“Where to draw the line for what is elsewhere referred to as statutory rape is a matter that calls for serious and open discussion.... A candid national conversation on this sensitive yet important issue implicating the challenges of maturing, morality, autonomy, protection of children and the need for proportionality is long overdue. Our prisons are teeming with young men serving lengthy sentences for having had sexual intercourse with adolescent girls whose consent has been held to be immaterial because they were under 18 years. The wisdom and justice of this unfolding tragedy calls for serious interrogation.”

Court of Appeal, Nairobi, in Eliud Waweru Wambui V. Republic, Criminal Appeal No. 102 of 2016

IX. COMPARATIVE LAW AND JURISPRUDENCE

Courts have grappled with striking the balance between protecting adolescents from sexual coercion and violence and creating an environment where adolescents can explore their sexuality in a safe, healthy and informed manner. The jurisprudence on this issue is limited, but some fairly recent cases from South Africa, Peru and Rwanda provide useful lessons.

a. South Africa

In 2013, the Constitutional Court of South Africa struck down Sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, which criminalized consensual sexual activities between minors of certain ages,⁷² in recognition of the harm that the law inflicted on adolescents. The acts criminalized were those involving minors aged 12 to 15 years and those between minors above age 16 and those below that age, regardless of consent. The Court also declared unconstitutional the provisions of Section 56 (2) (b), which imposed a reporting requirement on individuals who became aware of the commission of acts under Sections 15 and 16.

In finding Sections 15 and 16 unconstitutional, the Court held that the provisions criminalized adolescent consent to such a broad extent that it infringed upon their fundamental rights. The Court further held that the criminalization of sexual conduct between two adolescents under the age of 16 was unconstitutional because it inhibited the natural development of adolescents into adulthood.⁷³ On the matter of noncoercive and nonexploitative sexual conduct's being part of development, the Court considered the evidence that "[t]he majority of South African adolescents between the ages of 12 and 16 are engaging in a variety of sexual behaviors as they begin to explore their sexuality. Sexual experiences during adolescence, in the context of some form of intimate relationship, are not only developmentally significant, they are also developmentally normative."⁷⁴

The Court recognized that the law "constitute[d] a deep encroachment on the rights to human dignity and privacy, as well as the best interests [of the child] principle."⁷⁵ In reaching this decision, the Court examined the underlying justifications of such laws and recognized that they are rooted in stereotypes about the proper conduct of adolescents and their inability to make healthy decisions about their sexual activity. The Court further found it "fundamentally irrational to state that adolescents do not have the capacity to make choices about their sexual activity and yet in the same breath to contend that they have the capacity to be held criminally liable for such choices."⁷⁶ The Court held that adolescents have the same rights protections as adults, making clear that any differences in treatment of adolescents must be justified,⁷⁷ and further recognized the role that the law can have in stigmatizing adolescents and perpetuating stereotypes, which have a grave impact on adolescents' physical and mental health.

South Africa implemented the judgment by decriminalizing consensual sex between adolescents who are 16 or 17 years when their partners are at most two years apart in age.⁷⁸ The legislature introduced a close-in-age defense to protect such adolescents from penal sanctions.⁷⁹ Parliament also exempted minors aged 12 to 16 years from prosecution once it was established that their sexual conduct was consensual.⁸⁰

b. Peru

Other jurisdictions outside Africa have recognized the relationship between adolescents' ability to develop and their right to consent to noncoercive and nonexploitative sexual conduct. In Peru, the Constitutional Court ruled that a complete prohibition on all sexual conduct between adolescents was unconstitutional.⁸¹

In 2012, the Constitutional Court of Peru heard a case challenging the constitutionality of Article 1 of Law No. 28704, which modified Article 173(3) of the Peruvian Penal Code to criminalize all sexual conduct between and with adolescents, including noncoercive, nonexploitative, consensual sexual conduct between two adolescents.⁸² The petitioners argued that the law infringed on adolescents' fundamental rights, including their rights to development, equality and nondiscrimination, access to information, health, and a private life, and requested that the Court create an exemption to the law for adolescents between 14 and 18 years old who are engaging in consensual sexual conduct.⁸³ The Court agreed with the argument that this criminalization without a close-in-age exception for consensual conduct restricts adolescent development and prevents them from realizing their right to development under Sections 15 and 16 of the Peruvian Constitution.⁸⁴ The Court noted that this exemption is specifically for consensual sexual conduct, and that "violent" conduct would still be criminalized in the manner pursuant to the law.⁸⁵ Therefore, the Constitutional Court in Peru held that the law was unconstitutional as it related to cases of consensual sexual conduct between adolescents between the ages of 14 and 18 years.

c. Rwanda

In 2018, Rwanda passed a new Penal Code that decriminalizes consensual sex among adolescents who are at least 14 years. Article 133 of the new Penal Code provides that:

"If child defilement is committed between children aged at least fourteen (14) years without violence or threats, no penalty is pronounced. However, if a child aged fourteen (14) years but who is not yet eighteen (18) years commits child defilement on a child under fourteen (14) years, he/she is punished in accordance with the provisions of Article 54 of this Law."

The use of the term "defilement" in relation to the decriminalized acts may stigmatize adolescents exempted from sanction since the term is associated with a criminal offence and/or wrongdoing. Nonetheless, the amendment will go a long way toward minimizing harm suffered by adolescents.

X. ADVANCING ADOLESCENT SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS WHILE ENSURING THEIR PROTECTION

The blanket criminalization of adolescent consensual sexual intercourse reflects a punitive rather than evidence-based approach to exercising rights, and inevitably makes adolescents concerned about raising the topic of their sexuality with anyone—especially adults who they believe may report them to the police. The SOA effectively tells adolescents that engaging in consensual sexual intercourse with another adolescent is not only bad but criminal.

Laws and policies that criminalize adolescent sexual conduct increase the already strong stigma around adolescent sexuality and may have a chilling effect on their access to sexual and reproductive health services. Adolescents whose consensual sexual behaviour is deemed a criminal offence may try to hide it from health workers and others for fear of being stigmatized, reported to the authorities, arrested, and prosecuted.⁸⁶ This may deter adolescent minors from using health services, resulting in serious health problems such as untreated sexually transmissible infections, early pregnancy, and unsafe abortions.⁸⁷ “Evidence shows that for adolescents, increased access to modern contraception, and particularly emergency contraception, protects them from negative health outcomes and does not lead to unwanted sexual intercourse, unprotected intercourse, decreases in condom use, increased STIs, or increased pregnancy rates.”⁸⁸ Laws criminalizing consensual adolescent sexual conduct may also increase their vulnerability to unwanted pregnancy and to child marriage. Therefore, criminalization under the SOA inhibits adolescents from realizing their rights, increases risks to their health, and hinders their development.

It is therefore imperative that the SOA be amended to ensure that it does not continue to impose barriers to ASRHR. It is important to note that revising legislation to ensure that it supports adolescent development does not water down the protections accorded to adolescents. The proposal to amend the SOA unequivocally does not imply a repeal of child marriage laws or any protections against violence, abuse, or exploitation, which should be strongly enforced by the State, in addition to ensuring there are effective policies and programs in place to prevent such crimes. This will guarantee that the best interests of the child are upheld to protect him or her from abuse and to ensure the natural progression of adolescent development.

XI. RECOMMENDATIONS

It is clear from the foregoing that the criminalization of noncoercive and nonexploitative sex among adolescents is not in their best interests, does not accord with the Constitution or with existing policy frameworks on ASRHR, and is counterproductive to the realization of adolescents' reproductive health and rights. This briefing paper recommends that:

The National Assembly

- Decriminalize noncoercive and nonexploitative sexual conduct among adolescent minors.
- Introduce a close-in-age exception to Sections 8 (1), 9 (1), and 11 (1) of the SOA to protect adolescents whose ages are not far apart from prosecution, if they engage in prima facie consensual, noncoercive and nonexploitative sexual conduct with one another.

The Power of Mercy Advisory Committee

- Review cases of minors found guilty of engaging in noncoercive and nonexploitative sexual conduct with one another and those of young adults convicted for engaging in noncoercive and nonexploitative sexual conduct with minors and recommend their immediate release and the expunging of their criminal records.

The Chief Justice

- Establish practice guidelines on children in conflict with the law under the SOA including clear guidance on court mandated rehabilitation and counselling. Establish a monitoring and evaluation framework to assess its effectiveness.
- Establish a multiagency taskforce to review cases involving noncoercive nonexploitative minor-to-minor sex with a view to ordering their review or pardon and the expunging of names of affected minors from the sex offenders register or criminal records, as may apply.
- Ensure adolescents in conflict with the SOA have access to effective legal representation.
- Ensure collection of comprehensive and disaggregated data on offences under the SOA including by age, gender, and nature of offence.

Judicial Training Institute

- Integrate reproductive rights and adolescent's sexual and reproductive health and rights issues in the JTI curriculum and undertake continuous training of judicial officers.

National Gender and Equality Commission

- Ensure that effective remedies are available for adolescents who have been wrongly prosecuted and imprisoned under the SOA.

National Council on the Administration of Justice

- Conduct a nationwide study on the treatment of children in conflict with the SOA by the criminal justice system and make appropriate recommendations that comply with the principles of the best interests of the child.
- Develop a policy on diversion of child offenders from the criminal justice system.

Director of Public Prosecutions (DPP)

- Immediately cease from prosecuting adolescents who participate in noncoercive and nonexploitative sexual conduct with one another.
- Until the law is amended to decriminalize noncoercive and nonexploitative sexual conduct between adolescents, develop prosecutorial guidelines to address cases of adolescents in conflict with the SOA and those reportedly engaging in consensual sex. The guidelines should include the following:
 - a) Clarify that where there is prima facie evidence that the minors were involved in noncoercive and nonexploitative sexual conduct, such cases should not be prosecuted.
 - b) Where such cases in (a) above are submitted to the DPP for guidance, require the police to file a report on their observations, in the memo forwarding the file to the DPP.
 - c) Define the criteria to be used to evaluate whether cases should be prosecuted, noting, however, that the criteria should be flexible enough to ensure that cases are analyzed on their own merit. The analysis will seek to establish capacity regarding:
 - i) Whether the minors appreciated the nature of the act.
 - ii) The circumstances surrounding the reported act.
 - d) If the evaluation reveals noncoercive and nonexploitative acts, require that an assessment of the children be undertaken by the children's officer and a comprehensive report, to inform not opening charges against the minor or minors, be filed with the DPP.
 - e) If the files from the police reveal coercive acts, divert such children away from the criminal justice system and into rehabilitation and other programs.
- Disseminate and provide training on these prosecutorial guidelines to all public prosecutors.
- Ensure that prosecutors are trained on sexual and reproductive health and rights and the processing of children under the SOA.

Ministry of Health

- Ensure the establishment of comprehensive adolescent and youth-friendly services that respect the confidentiality and privacy of adolescents and are devoid of stigma.
- Strengthen the community health model to make it accessible by integrating an adolescent and youth component and developing an accountable framework for the recruitment and remuneration of community health workers.
- Establish a clear directive on adolescent minors' access to sexual and reproductive health services that takes into consideration their privacy, confidentiality and evolving capacity, as per international human rights obligations.

Ministry of Education

- Adopt and implement curricula on age-appropriate comprehensive sexuality education, including information about issues of violence, that is provided throughout schooling.
- Undertake public education campaigns on sexuality to reach out-of-school adolescents.

XII. ENDNOTES

- ¹ Committee on the Rights of the Child, *General Comment No. 12: The right of the child to be heard*, (51st Sess. 2009), para. 84, U.N. Doc. CRC/C/GC/12.
- ² Committee on the Rights of the Child, *General Comment No. 14: On the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, (62nd Sess. 2013), para. 1, U.N. Doc. CRC/C/GC/14 [hereinafter CRC, *Gen. Comment No. 14*].
- ³ Sexual Offences Act, No. 3 (2006) (Kenya).
- ⁴ NATIONAL COUNCIL FOR THE ADMINISTRATION OF JUSTICE (NCAJ), CRIMINAL JUSTICE SYSTEM IN KENYA: AN AUDIT, 135-136 (2016), available at <https://www.judiciary.go.ke/download/an-audit-on-criminal-justice-system-in-kenya-report/> [hereinafter CRIMINAL JUSTICE AUDIT (2016)]
- ⁵ *Supra* note 3, §8, §11, §43(4)(f) (Section 8 and 11 read together with section 43 (4) (f) of the SOA do not envisage a situation where minors can provide consent to sexual activity including that involving their peers).
- ⁶ P.O.O. (A minor) v. Director of Public Prosecutions, Senior Resident Magistrate of the Mbita Law Courts, (2017) (Kenya) [hereinafter P.O.O. v. DPP].
- ⁷ CRIMINAL JUSTICE AUDIT (2016), *Supra* note 4, at 178.
- ⁸ KENYA NATIONAL BUREAU OF STATISTICS, KENYA NATIONAL HOUSING AND POPULATION CENSUS (2009), available at <https://www.knbs.or.ke/kenya-population-and-housing-census-2009>.
- ⁹ NATIONAL COUNCIL FOR POPULATION AND DEVELOPMENT, 2015 NATIONAL ADOLESCENT AND YOUTH SURVEY, 22-23 (2015), available at <http://www.ncpd.go.ke/wp-content/uploads/2016/11/2015-National-Adolescents-and-Youth-Survey-Preliminary-Report.pdf>.
- ¹⁰ REPUBLIC OF KENYA, MINISTRY OF HEALTH, NATIONAL ADOLESCENT SEXUAL AND REPRODUCTIVE HEALTH POLICY, 9-15 (2015), available at https://www.popcouncil.org/uploads/pdfs/2015STEPUP_KenyaNationalAdolSRHPolicy.pdf. [hereinafter ADOLESCENT SRH POLICY (2015)]
- ¹¹ REPUBLIC OF KENYA, DEMOGRAPHIC AND HEALTH SURVEY: KENYA, Table 7.12, (2014), available at <https://dhsprogram.com/pubs/pdf/FR308/FR308.pdf> [hereinafter DEMOGRAPHIC SURVEY (2014)].
- ¹² *Id.* at 78.
- ¹³ *Id.* at 34.
- ¹⁴ World Health Organization, *Adolescent pregnancy* (2018), available at <http://www.who.int/mediacentre/factsheets/fs364/en/>.
- ¹⁵ *Id.*
- ¹⁶ World Health Organization, *Sexual and Reproductive Health: Addressing the Sexual and Reproductive Health Needs of Adolescents* (2018), available at <http://www.who.int/reproductivehealth/topics/adolescence/background/en/>.
- ¹⁷ REPUBLIC OF KENYA, NATIONAL COUNCIL FOR POPULATION AND DEVELOPMENT, HOW DEMOGRAPHIC CHANGE CAN SPUR DEVELOPMENT IN KENYA (2014), available at <http://www.ncpd.go.ke/wp-content/uploads/2016/11/Policy-Brief-44-Demographic-Dividend-English-Final.pdf>.
- ¹⁸ DEMOGRAPHIC SURVEY (2014), *supra* note 11, Table 4.5 Age at First Sexual Intercourse.
- ¹⁹ *Id.*
- ²⁰ See, e.g., P.O.O. v. DPP, *supra* note 6.
- ²¹ Kar, Sujita Kumar et al., *Understanding Normal Development of Adolescent Sexuality: A Bumpy Ride*, 70 JOURNAL OF HUMAN REPRODUCTIVE SCIENCES 4 (2015) (during adolescence, an individual's need for intimacy and lovemaking with opposite gender increases. Adolescents explore different appropriate ways to express the love and intimacy."); Committee on the Rights of the Child, *General Comment No. 20: On the implementation of the rights of the child during adolescence*, para. 11, U.N. Doc. CRC/C/GC/20 (2016) [hereinafter CRC, *Gen. Comment No. 20*].
- ²² See, e.g., P.O.O. v. DPP, *supra* note 6.

- ²³ WORLD HEALTH ORGANIZATION ET AL., SEXUAL HEALTH, HUMAN RIGHTS, AND THE LAW, 19 (2015), *available at* http://apps.who.int/iris/bitstream/handle/10665/175556/9789241564984_eng.pdf;jsessionid=2854B737ED602436A644F72BEFCD9C00?sequence=1. [hereinafter SEXUAL HEALTH, HUMAN RIGHTS, AND THE LAW (2015)]
- ²⁴ *Id.* at 19.
- ²⁵ Center for Reproductive Rights, Consultation Meetings: Impact of the SOA and Related Policies (October & November 2017), *detailed minutes on file with the Center for Reproductive Rights and FIDA Kenya*.
- ²⁶ Center for Reproductive Rights, Focus Group Discussions: Kibra & Dandora (2017), *on file with the Center for Reproductive Rights and FIDA Kenya*.
- ²⁷ See Part VIII: Advancing Adolescent Sexual and Reproductive Health and Rights While Ensuring Their Protection.
- ²⁸ In 2016, these cases were 10, 307. JUDICIARY, CASE CENSUS AND INSTITUTIONAL CAPACITY SURVEY, 61 (2016)
- ²⁹ Kar, Sujita Kumar et al., *Understanding normal development of adolescent sexuality: A bumpy ride*, 70 JOURNAL OF HUMAN REPRODUCTIVE SCIENCES 4 (2015).
- ³⁰ Eli Coleman, *Promoting Sexual Health and Responsible Sexual Behaviour*, 1 THE JOURNAL OF SEX RESEARCH 39, 10-14 (2002).
- ³¹ SEXUAL HEALTH, HUMAN RIGHTS, AND THE LAW (2015), *Supra* note 23 at 19.
- ³² Sexual Offences Act, No. 3 (2006) (Kenya) §2(1).
- ³³ *Id.* §8(7).
- ³⁴ Borstal Institutions Act (2012) (Kenya) Cap. 92 §6; (Borstal institutions are reformatory institutions where youthful offenders are sent and offered training. Only two such institutions exist in Kenya — Shikutsa and Shimo la Tewa. They admit offenders aged between 15 and 18 years). It is important to note that Borstal Institutions are, strictly speaking, places of detention and interviews with actors in the child justice sector established that plans were in place to abolish these institutions to bring Kenya into conformity with international standards on treatment of children in conflict with the law.
- ³⁵ Children Act No. 8 (2001) (Kenya) §190(1).
- ³⁶ *Id.* §191(1).
- ³⁷ Sexual Offences Act, No. 3 (2006) (Kenya) §6.
- ³⁸ *Id.* §2.
- ³⁹ *Id.* §11(1).
- ⁴⁰ *Id.* §11(4).
- ⁴¹ *Id.* §43(4) (f).
- ⁴² CRC, *Gen. Comment No. 20*, *supra* note 21, para 40
- ⁴³ CRC, *Gen. Comment No. 14*, *supra* note 2, para 42.
- ⁴⁴ ADOLESCENT SRH POLICY (2015) *supra* note 10.
- ⁴⁵ *Id.* at 18.
- ⁴⁶ REPUBLIC OF KENYA, MINISTRY OF HEALTH, NATIONAL GUIDELINES FOR PROVISION OF ADOLESCENT YOUTH-FRIENDLY SERVICES (YFS) IN KENYA (2016), *available at* <http://csakenya.org/wp-content/uploads/2016/10/National-guidelines-for-provision-of-youth-friendly-services.pdf>.

- ⁴⁷ See HEALTH POLICY PLUS, HELD BACK BY FEAR: HOW STIGMA & DISCRIMINATION KEEP ADOLESCENTS FROM ACCESSING SEXUAL AND REPRODUCTIVE HEALTH INFORMATION AND SERVICES (2016) available at http://www.healthpolicyplus.com/ns/pubs/2112-3193_TanzaniaHeldBackbyFearFinal.pdf (“Stigma often targets those who transgress—or who are perceived to transgress—social norms governing appropriate behavior. Stigmatized individuals and groups, in turn, may be subject to discrimination. It is active at many levels of the society — individual, family, community, schools and health facilities. At the facility level, it manifests through shaming, scolding, excessive questioning by health care providers and sometimes refusal of services.”).
- ⁴⁸ KENYA CONSTITUTION, 2010, art. 27.
- ⁴⁹ CRC Committee, *General Comment 15: On the right of the child to the enjoyment of the highest attainable standard of health* (art. 24), (62nd Sess. 2013), para. 8-9, U.N. Doc. CRC/C/GC/15 [hereinafter CRC, *Gen. Comment No. 15*].
- ⁵⁰ CRC, *Gen. Comment No. 20, supra* note 21, at 7, para. 21.
- ⁵¹ *Id.*
- ⁵² Children Act No. 8 (2001) (Kenya) §184.
- ⁵³ Interview with Key Informant working within the criminal justice sector, held in October 2018, *on file with the Center for Reproductive Rights*, referring to experience in Prison and Probation department; see also *P.O.O. v. DPP, supra* note 6.
- ⁵⁴ Children Act No. 8 (2001) (Kenya) §190(1).
- ⁵⁵ *Id.* §191.
- ⁵⁶ Interviews with DOB, his mother and neighbors undertaken in July 2019, *on file with the Center for Reproductive Rights*
- ⁵⁷ Committee on the Rights of the Child, *General Comment No. 10: Children’s rights in juvenile justice* (44th Sess. 2007), arts. 37-40, U.N. Doc. CRC/C/GC/10 [hereinafter CRC, *Gen. Comment No. 10*] (“Children in conflict with the law, including child recidivists, have the right to be treated in ways that promote their reintegration and the child’s assuming a constructive role in society... The arrest, detention or imprisonment of a child may be used only as a measure of last resort.”); CRC Committee, *Gen. Comment No. 15, supra* note 49, para. 56.
- ⁵⁸ *Id.* para. 23.
- ⁵⁹ Sexual Offences Act, No. 3 (2006) (Kenya) §8(7) & §11(4).
- ⁶⁰ CONSTITUTION OF KENYA (2010), art. 53(1)(f).
- ⁶¹ CRC, *Gen. Comment No. 10, supra* note 57.
- ⁶² See, e.g., *P.O.O. v. DPP, supra* note 6, para. 31.
- ⁶³ *CKW v. the Honourable Attorney General and Director of Public Prosecution* (2014) (Kenya); CONSTITUTION OF KENYA (2010), art. 27(4) (the provision sets out grounds against which discrimination will not be allowed; they include age); Sexual Offences Act, No. 3 (2006) (Kenya) §8(1).
- ⁶⁴ *Id.* para. 96b (2014) (Kenya).
- ⁶⁵ CONSTITUTION OF KENYA (2010), art. 24(1).
- ⁶⁶ *Id.* art. 25.
- ⁶⁷ *Supra* note 63, para. 2 (2014) (Kenya).
- ⁶⁸ CENTER FOR REPRODUCTIVE RIGHTS ET AL., LEGAL GROUNDS III: REPRODUCTIVE AND SEXUAL RIGHTS IN SUB-SAHARAN AFRICAN COURTS, 42 (2017) [hereinafter LEGAL GROUNDS III (2017)] *referencing* *CKW v. the Honourable Attorney General and Director of Public Prosecution* (2014) (Kenya).

- ⁶⁹ G.O. v. Republic of Kenya, Criminal Appeal No. 155 (2016) (Kenya).
- ⁷⁰ *Id.* at 11 (“I find no justification of the trial court in imposing a sentence against the appellant to serve 15 years for an offence of defiling a girl who was older than the appellant as she was 17 years.”).
- ⁷¹ *Id.*
- ⁷² LEGAL GROUNDS III (2017) *supra* note 68, at 45, referencing *Teddy Bear Clinic for Abused Children and Another v. Minister of Justice and Constitutional Development and Another* 2013 (1) SA (ZAGPPHC) (S. Afr.).
- ⁷³ *Teddy Bear Clinic for Abused Children and Another v. Minister of Justice and Constitutional Development and Another* 2013 (1) SA 35 (ZAGPPHC) (S. Afr.). available at <http://saflii.org/za/cases/ZAGPPHC/2013/1.html> para 111.
- ⁷⁴ *The Teddy Bear Clinic for Abused Children Case and RAPCAN and Others v. Minister of Justice and National Director of Public Prosecutions* 2013 12 CCT 13 ZACC (S. Afr.) available at <http://www.saflii.org/za/cases/ZACC/2013/35.html> para. 46.
- ⁷⁵ *Id.* para. 82.
- ⁷⁶ *Id.* para. 79.
- ⁷⁷ *Id.* para. 52 (For example, the Court noted, “Dignity recognizes the inherent worth of all individuals (including children) as members of our society as well as the value of the choices that they make. It compromises the deeply personal understanding we have of ourselves, our worth as individuals and our worth in our material and social context. This Court has found that children’s dignity rights are of special importance and are not dependent on the rights of their parents...”).
- ⁷⁸ UNFPA, HARMONIZING THE LEGAL ENVIRONMENT FOR ADOLESCENT SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS, 11 (2017), available at https://reliefweb.int/sites/reliefweb.int/files/resources/2017-08-Laws%20and%20Policies-Digital_0.pdf (“South Africa: Consensual acts among adolescents are decriminalized as long as the age difference is not more than two years.”).
- ⁷⁹ *Id.*
- ⁸⁰ Tebogo Monama, *New Child Sex Law Aims to Protect*, IOL (2015), available at <https://www.iol.co.za/news/politics/new-child-sex-law-aims-to-protect-1889270>.
- ⁸¹ 00008-2012-PI/TC, Tribunal Constitucional, Dec. 12, 2012 (Peru), available at <http://www.tc.gob.pe/jurisprudencia/2013/00008-2012-AI.pdf>.
- ⁸² *Id.*
- ⁸³ *Id.*
- ⁸⁴ *Id.*
- ⁸⁵ *Id.* para. 114.
- ⁸⁶ Eszter Kismödi et al., *Advancing sexual health through human rights: The role of the law* 10 GLOBAL PUBLIC HEALTH 2, 252–267 (2015), available at <http://doi.org/10.1080/17441692.2014.986175>.
- ⁸⁷ *Id.*
- ⁸⁸ SEXUAL HEALTH, HUMAN RIGHTS, AND THE LAW, *supra* note 23 at 13

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