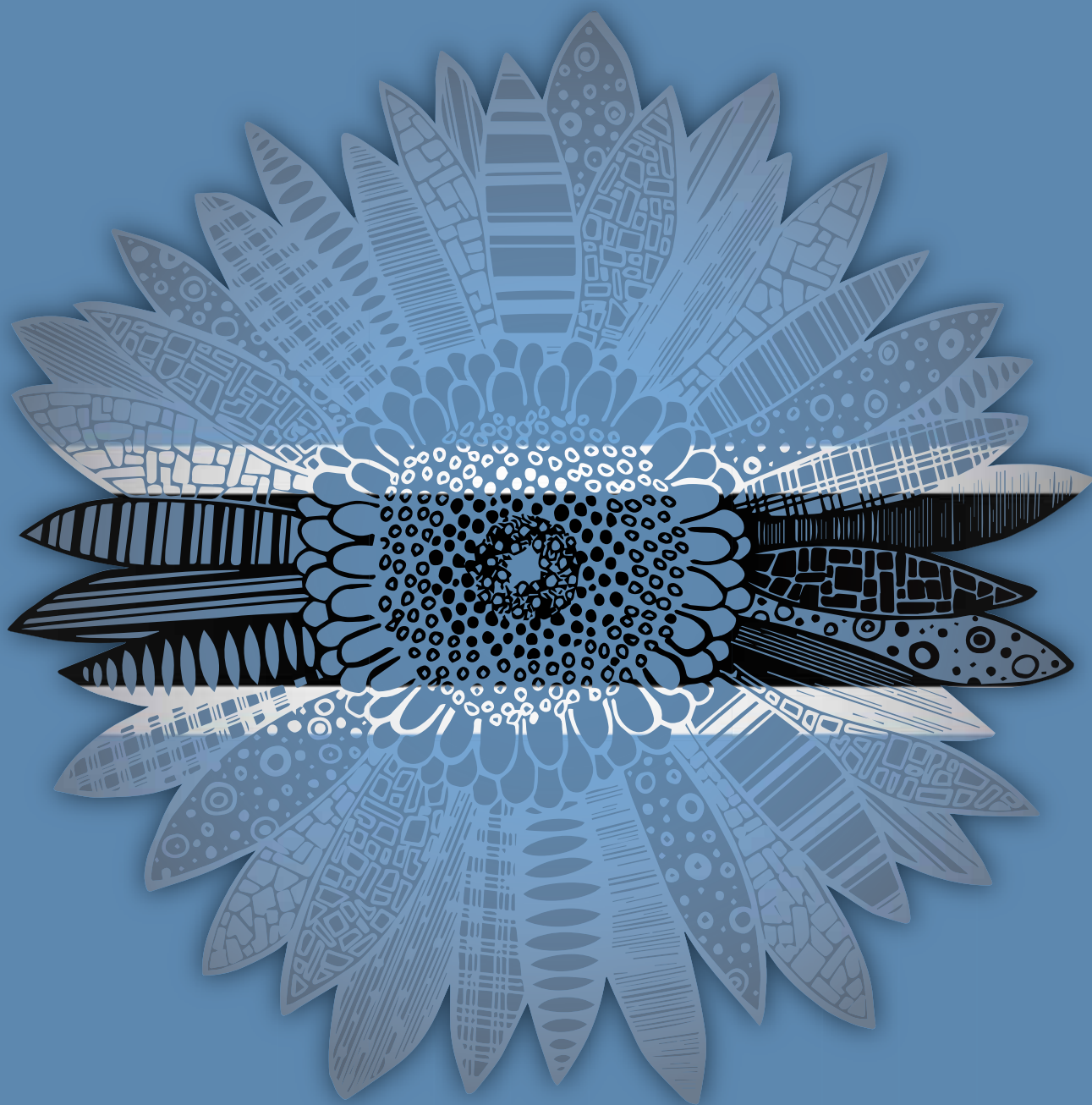


# AGE OF CONSENT: LEGAL REVIEW BOTSWANA COUNTRY REPORT



## FOREWORD

There is one barrier to health access and a major impediment to national and regional development across the globe that could be removed within a few days if only the policy decisions would be made. The removal of this barrier would promote gender equality, help end child marriage, reduce teenage pregnancy and girl dropout rates from secondary school, lower HIV incidence rates, and achieve the prerequisite for the demographic dividend. Let me explain.

As the Sustainable Development Goals (SDGs) become the world's compass towards development and a better life for all people on the planet, sub-Saharan Africa faces a potential demographic disaster that could undermine many of the SDGs.

Many sub-Saharan countries have some of the highest fertility rates in the world which, if unaltered, will see those countries' population, rising from 17 million to 43 million by 2050. Another country's population that is currently at 27 million will more than double to 65 million by 2050, with yet another going from 53 million to 137 million. Not one of these countries will have reached the population turnaround required as an inescapable prerequisite for achieving a demographic dividend by 2050.

With increases like these on the same available land area, with the same or less access to drinking water, potentially less arable land available due to global warming, and services and GDP increasing at a far slower rate than population, it will be impossible to achieve the SDGs and improbable to even maintain the human development index achieved thus far by 2017. These are not scenarios or 'maybes'. This is the inevitable future of the region unless something significant, such as the fertility rates, changes. Slowing and reversing population acceleration is essential to development in sub-Saharan Africa.

And yet, the world has a dark and shameful history of 'population control', legislating women's rights to decide on having children away and forcing and coercing sterilisation. These restrictions on agency and autonomy have no place in a democratic, sustainable development world in the 21st century and the vast majority of nations achieving the demographic dividend have not resorted to such dark methods.

Increasing gender equality, keeping girls in safe schools for longer, reducing sexual and gender based violence, and increasing the sexual and reproductive health knowledge of young people are also factors. And of course, it is the increased access to modern contraceptives and women making choices about their own reproductive health that have turned the tide.

So this research report turns its attention to this access to modern contraceptive methods, as well as all other sexual and reproductive health (SRH) services. There are many barriers for adolescents around the globe - the majority of citizens in many countries - to access SRH services. Distance from services, lack of transport, lack of available commodities, poverty, inherited beliefs, harmful practices, and hostile staff attitudes can all be barriers to access. But only one barrier is self-inflicted by countries. And this barrier could disappear tomorrow, creating massive access for adolescents. It is the barrier of legal restrictions on adolescents' access to SRH. The majority of countries in the region have placed arbitrary legal barriers to adolescent access by creating policies or laws with a number of parental consent and other restrictions, preventing adolescents from initiating their own healthcare.

In some cases, these have been gradually added to laws or policies with well-intentioned reasons to protect adolescents. In many cases, however, they reflect an idealised view of what older people think younger people should or should not be doing. Primarily, these idealised views revolve around sex. Older people, sometimes forgetting their own youth, think that the best protection for younger people is to abstain from sex until they are, perhaps 16, or even 18. Reality is, in many cases different, and by ignoring reality and locking adolescents out of the health system when it comes to sexual and reproductive health and rights (SRHR), adults are doing irreparable damage to their children and other children, as well as directly contributing to a looming demographic disaster for their nation.

Because this seems so obvious, recent global guidelines have called on countries to examine their current policies and consider revising them to reduce age-related barriers to access and uptake of all SRH services. To assist in this process, the SRHR Africa Trust (SAT) in collaboration with the Thomson Reuters Foundation, 20 global law firms, and UNICEF, has reviewed Age of Consent laws in 22 countries: Botswana, Kenya, Ivory Coast, Malawi, Morocco, Nigeria, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe, Brazil, Jamaica, India, Indonesia, Thailand, Vietnam, Canada, United Kingdom, France, Sweden, and Ukraine. The range of countries was chosen to highlight a spread of geography, cultures, development status, nonachievement, in-transition and achievement of the demographic dividend, and adolescent health outcomes. In addition, SAT and UNICEF also undertook an Ethical, Cultural and Social review in nine countries (seven being from the 22 countries above, plus two others - Uganda and Philippines) to look at ethical cultural and social barriers impacting adolescent access to health and services including SRH services.

The data revealed some game-changing recommendations apparent to SAT:

1. Desexualise SRHR services and treat them as you would any other health system access;
2. Base both access and restriction decisions on child and adolescent development, competence and maturity to make decisions about their own health;
3. Do not make the age of sexual consent older than 16 years, and do not distinguish between young men and young women;
4. Have statutory rape provisions in place to protect adolescents from predatory adults;
5. Put 'close in age' exceptions to the age of sexual consent in place so that young adolescents having consensual sex with one another do not have to go to jail – a travesty affecting young men aged 13-16 years.

We offer this report and its insights to policymakers, legislators, development agencies, international cooperating partners, and activists wherever they may be. A thinking and action tool is currently being designed to accompany this report. If you wish to receive it or an electronic copy of this report, please send an e-mail to [ageofconsent@satregional.org](mailto:ageofconsent@satregional.org). Please also feel free to share ways in which you may have used this report or the action tool to create positive change with us and with one another.

Our hope is that these resources will create dialogue and action that will remove all legal barriers to adolescent access to SRH services and allow attention and resources to focus on the remaining and more intractable barriers.

Jonathan Gunthorp



Executive Director - SAT

## ACKNOWLEDGEMENT

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SAT is grateful to UNICEF for co-funding the review of the Age of Consent laws, policy frameworks, Ethical, Social and Cultural (ESC) impacts on sexual reproductive health and rights and HIV.

Last but not least, SAT thanks TrustLaw at the Thomson Reuters Foundation for their continued collaboration with SAT on health and rights and for brokering the partnerships between SAT and the law firms. TrustLaw is the Thomson Reuters Foundation's global pro bono legal programme, connecting law firms and corporate legal teams around the world with high impact NGOs and social enterprises working to create social and environmental change.

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# AGE OF CONSENT LEGAL REVIEW

# ACRONYMS

AIDS	Acquired Immune Deficiency Syndrome
ANC	Antenatal Care
ART	Antiretroviral Therapy
EHP	Essential Healthcare Package
GDP	Gross Domestic Product
HCT	HIV Counselling and Testing
HIV	Human Immunodeficiency Virus
HPV	Human Papillomavirus
MMC	Medical Male Circumcision
MPR	Multiple-perpetrator Rape
MSP	Multiple Sexual Partners
PLWHA	People Living with HIV/AIDS
PLWHIV	People Living with HIV
PEP	Post-exposure Prophylaxis
PrEP	Pre-exposure Prophylaxis
SRHS	Sexual and Reproductive Health Services
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNICEF	United Nations Children's Fund
UNFPA	United Nations Population Fund
WHO	World Health Organization
YFS	Youth-friendly Services

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## EXECUTIVE SUMMARY

The age at which sexual intercourse can take place is 16 years old and above for both males and females. This is an exception to the general rule that individuals under the age of 18 (the age of majority) are incapable of providing their legal consent. Sexual intercourse with a child under the age of 16 years is illegal, whether they have ostensibly consented (defilement) or not (rape). Gay sex is prohibited and criminalised.

Contraceptive services are accessible by adolescents and youths who may be as young as 10 years. There is an exception from the age of 10 years only in the event of rape, defilement or incest.

A child aged 16 years or over can consent to HIV testing. The law does not specifically address access to ART but, in practice, a child aged 16 or over who tests positive for HIV can consent to treatment. Persons under 16 years require parental consent to access HIV testing.

Post-exposure Prophylaxis (PEP) is available in Botswana. However, there are prohibitions in the provision of PEP, relating to the decision as to whether it should be administered. However, PEP is available to all ages with no Age of Consent is provided. In relation to Post-sexual exposure prophylaxis, where sexual intercourse is consensual, there is an absolute prohibition. However, the prohibition does not apply to victims of sexual violence.

Parental consent is required to provide PEP to a child aged under 18 years. The Botswana National HIV and AIDS Treatment Guidelines (2012). This law does not provide for an Age of Consent, so the default age of majority (18 years) applies. Pre-exposure Prophylaxis (PrEP) is prohibited in Botswana however, the 2008 law containing a prohibition on has been superseded by a law that does not mention PrEP, but the prohibition is viewed as continuing.

Abortion is permitted in limited circumstances. However, post-abortion care is provided for in the Policy Guidelines and Service Standards for Sexual and Reproductive Health. All pregnant women and their partners and pregnant adolescents/youths are eligible for ante-natal care.

The HPV vaccine is offered to girls in standards 5, 6 and 7 (or aged 9-13 years if they do not attend school). Access to HPV vaccine, cervical cancer screening and treatment is provided for under the following:

National Cervical Cancer Prevention Programme – Five-Year Comprehensive Prevention and Control Strategy (2012–16) as well as the Guidelines for HPV Supervisors Human Papillomavirus (HPV) Vaccination to Prevent Cervical Cancer. The legal age of majority (18 years) applies to young persons accessing the HPV vaccine, cancer screening and treatment. Accordingly, anyone younger than 18 years will require parental consent. School girls in standard 5,6 & 7, and girls aged from nine (9) years to thirteen (13) years who do not attend school fall within the target group for the HPV vaccination. The vaccination will be administered at schools and health facilities around the country.

## Chapter One: Introduction

The world's attention has moved beyond HIV and AIDS, yet it remains the leading killer of adolescents in Southern Africa, presenting a major impediment to healthy communities and a significant factor in the health and status of women and girls in the region.

According to Joint United Nations Programme on HIV/AIDS (UNAIDS) on prevention of HIV (2013), Eastern and Southern Africa is home to half the world's population living with HIV even if the region is only 5% of the world's population. Today the region continues to be the most infected and affected by the HIV/AIDS epidemic, with 48% of the world's new HIV infections among adults, 55% among children, and 48% of AIDS-related deaths.

Research conducted in many parts of the world shows that several legal and human rights barriers hinder access to, and uptake of, HIV services for adolescents. Key among these barriers are Age of Consent legislation and policies. Recent global guidelines have therefore explicitly called on countries to examine their current policies and consider revising them to reduce age-related barriers to access and uptake of the overall SRH services, HIV Counselling and Testing (HCT) and to linkages to prevention, treatment and care.

HIV is the most severe in the Southern Africa sub-region which includes Botswana, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia, and Zimbabwe, with each having an adult HIV prevalence of over 10%. UNAIDS reports that Swaziland have the highest HIV prevalence in the world (26.0%), followed by Botswana (23.4%).

In 2011, there was an estimated 1.2 million adolescents aged 10-19 years old living with HIV, more than half of all HIV positive adolescents globally. Eastern and Southern Africa now have 10.5 million children who have lost one or both parents to AIDS.

The risk of becoming infected with HIV is higher for girls and young women and currently, HIV prevalence among young women aged 15 - 24 years stands at 4.8%, which is two and a half times higher than among men of the same age. In Swaziland, 15% of young women are HIV positive, compared to 6.5% of young men.

The advocacy campaign 'All In To #EndAdolescentAIDS' was launched as a global platform for action and collaboration for social change in February 2015 by global leaders and civil society partners. This global agenda provides opportunities for ensuring that existing and new strategies and programmes on HIV prevention, treatment and care are effectively implemented to benefit young people. These include the 2012 guidance on Pre-exposure Oral Prophylaxis (PrEP) for serodiscordant couples, men and transgender women who have sex with men at high risk of HIV transmission, as well as the 2013 guidance for HCT and care for adolescents living with HIV and young key population policy briefs.

All In To #EndAdolescentAIDS works through four workstreams. As part of workstream 1, global partners have prioritised joint action to take stock of the current situation in countries with respect to Age of Consent for services including HIV prevention by carrying out a systematic desk review of Age of Consent laws and a mapping of the processes led and outcome of reforms undertaken by countries to address this barrier. Through the All In To #EndAdolescentAIDS, many agencies and global partners including the United Nations Development Programmes (UNDP), the Joint United Nations Programme on HIV/AIDS (UNAIDS), the PACT and AIDS Alliance have already initiated actions on data collection to inform their policy advocacy efforts at globally and specifically within the 25 focus countries. This review will inform the development of a source or toolkit for learning on this theme and capacity building of experts and policymakers worldwide.

### Why Age of Consent review?

Several global bodies, including UNICEF and WHO, are currently undertaking a number of initiatives to change the global guidelines with regard to adolescent access to a range of HIV prevention services, including Age of Consent and informed consent, confidentiality, availability, accessibility, and acceptability. Adherence and quality must inform these services.

The SRHR Africa Trust (SAT) in collaboration with UNICEF worked with participating local law firms, and a consultant to conduct the Age of Consent research. The three areas of the research included the following:

1. Age of Consent legal review
2. Ethical, Social, Cultural (ESC) desktop review
3. Youth attitudes survey

Therefore, the main goal of the project was to conduct research on “Age of Consent” laws, regulations, and policies, as well as ESC factors, in relation to adolescents. This entailed collecting country experiences to address Age of Consent laws / policies and ESC factors that serve as potential barriers to adolescents accessing SRH services, including HIV prevention, care and treatment. The research explored implications for expanding SRHR services and HTC in adolescents aged 10–19 years.

## Methodology

The Botswana legal review was prepared by SAT and is based on research conducted by Ndadi Law firm in Botswana. The legal review focuses on the laws and policy support around the Age of Consent in relation to the various aspects relating to SRHR. The review looks at all the relevant national laws (including nationally recognised customary or religious laws), regulations and policies exploring the ages for girls and boys separately where relevant, including where contradictions exist in laws, policies, and regulations on these issues exist.

The review specifically looked at the following:

1. Age of Consent to sexual intercourse including the age for statutory rape
2. Age of Consent to access modern contraceptives, with and without parental consent
3. Age of access to emergency contraceptives with and without parental consent
4. Policy framework and legislation enabling or disabling access to Pre-exposure Prophylaxis (PrEP) including Age of Consent, with and without parental consent
5. Policy framework and legislation enabling or disabling access to Post-exposure Prophylaxis (PEP) including Age of Consent, with and without parental consent
6. Policy framework and legislation enabling or disabling access to safe abortions and postabortion care including Age of Consent, with and without parental consent
7. Policy framework and legislation enabling or disabling access to Antenatal Care (ANC) including Age of Consent with and without parental consent
8. Policy framework and legislation enabling or disabling access to HPV vaccines and cervical cancer screening and treatment, including Age of Consent, with and without parental consent
9. Age of Consent to access HIV testing without parental consent.

## Chapter Two: Age of Consent to sexual intercourse

In Botswana the age at which sexual intercourse can take place is 16 years old and above for both males and females. This is an exception to the general rule that individuals under the age of 18 years (the age of majority) are incapable of providing their legal consent.

### Legislation of Age of Consent

**Section 49 of the Interpretation Act** provides that the age of majority means when a person has attained the age of 18 years.

**Section 147 of the Penal Code (CAP 08:01)** provides that sexual intercourse with a child under the age of 16 years old constitutes an offence and “on conviction shall be sentenced to a minimum term of 10 years’ imprisonment or to a maximum term of life imprisonment. This is known as the offence of ‘defilement.’

### Definition of statutory rape

Under the law of Botswana, rape occurs where the perpetrator has sexual intercourse with the victim without his/her consent. There is a statutory definition of rape in Botswana which was amended in 1998. The effect of this amendment was to make it gender neutral. The new section further broadens the scope of penetration which constitutes ‘rape.’

The offence of rape is distinct from the defence of defilement. Defilement occurs where a child under the age of 16 years ostensibly gives his/her consent to sexual intercourse, but that consent is invalid because, at that age, he/she is considered to be incapable of consenting to sexual intercourse.

### Legislation of policy framework on statutory rape

According to **Section 141 of the Penal Code**, Any person who has unlawful carnal knowledge of another person, or who causes the penetration of a sexual organ or instrument, of whatever nature, into the person of another for the purposes of sexual gratification, or who causes the penetration of another person’s sexual organ into his or her person, without the consent of such other person, or with such person’s consent if the consent is obtained by force or means of threats or intimidation of any kind, by fear of bodily harm, or by means of false pretenses as to the nature of the act, or, in the case of a married person, by impersonating that person’s spouse, is guilty of the offence termed rape.

Under **Section 147**, a child under the age of 16 years is considered to be incapable of consenting to sexual intercourse.

### Exceptions for gay sex

There are no exceptions as to the Age of Consent in relation to same-sex carnal knowledge, on the contrary, same-sex carnal knowledge is outlawed by the Penal code as sexual acts against the order of nature.

According to **Section 164(1)(a) of the Penal Code**, is stated that Any person who-

- a. has carnal knowledge of any person against the order of nature; [... ] is guilty of an offence and is liable to imprisonment for a term not exceeding seven years.

The attempt to engage in such acts are further outlawed under Section 165:

Any person who attempts to commit any of the offences specified in section 164 is guilty of an offence and is liable to imprisonment for a term not exceeding five years.

The court in **Kanane v State** confirmed that sexual activities between persons of the same gender are against the order of nature.

## Chapter Three: Access to contraception services and commodities

The youngest age an individual can access contraceptive services and commodities is 10 years old. In Botswana, Adolescent/ Youth Sexual and Reproductive Health Services are accessible without parental consent.

**Policy Guidelines and Service Standards for Sexual and Reproductive Health (2004)** devote Chapter 2 entirely to Adolescent/Youth Sexual and Reproductive Health, specifically addressing the services to be provided to this age range as the starting point in assisting the various target groups under the Policy. According to the Guidelines, “*for purposes of programming in Botswana the period adopted for adolescents and youth ranges from 10-24 years*. Therefore, the age range of 10-24 years old qualifies as ‘youth,’ who are eligible for Sexual and Reproductive Services.

According to the **General Policy Guidelines and Service Standards for Family Planning (2004)**, under Paragraph 3 it provides that *All persons of reproductive age regardless of age or marital status shall have the fundamental right to determine for themselves how many children to have and when to have them*. Under Paragraph 14, specifically, it provides that *Women and men in the reproductive age shall be eligible to use family planning methods without the consent of relatives or partner with the exception of sterilisation*.

*These guidelines are stated to be advisory (i.e., not binding). However, they have been interpreted by the Botswana courts to be binding on the State, but not on individuals. They, therefore, apply to the Botswana health service, which is responsible for providing contraceptive services.*

### Access to emergency contraceptives

Young person can access emergency contraception, the youngest being the age of 10 years old with room for exception. Emergency contraception is available in the event of rape, defilement or incest, but is not available in the context of consensual sexual intercourse where other contraception has failed or not been used.

### Legislation and policy framework

According to the **Policy Guidelines for Sexual and Reproductive Health (2004)**, specifically under **3.7.2**, in relation to Adolescents/ Youth, it is stated that ‘*Emergency Contraceptive methods shall be made available for use in case of unprotected sex, for example in case of rape, defilement and incest.*’ This is found under Chapter 3, which focuses on Family Planning. As previously mentioned, the guideline sets the youth bracket between 10-24 years old for the purposes of the provision of services under the Policy.

However, it has been argued that victims of sexual assaults and incest as young as 9 years old become pregnant, falling out of the age range stipulated. However, under Paragraph 14 of the **General Policy Guidelines and Service Standards for Family Planning (2004)**, it is stated that *women and men in the reproductive age shall be eligible to use family planning methods without the consent of relatives or partner with the exception of sterilisation*. It can be argued that this provides a window for such victims who are of reproductive age but under the age of 10 years old.

## Chapter Four: Age of Consent and HIV testing

Individuals who are 16 years old and over are able to consent to HIV testing. In practice the health authorities do not normally refuse to test young persons who request HIV testing if the counselor is satisfied that the young person is mature enough to fully understand his or her behaviour its consequences.

### Legislation and policy framework

**The Public Health Act (No. 23 of 2013) Section 105** states that consent must be provided for the testing. HIV testing may only be undertaken with the consent of the person or their parent (if they are under 16).

105(1) A person shall not conduct an HIV test in respect of another person, except –

- a. with the consent of that other person;
- b. if that other person is under the age of 16 years, with the consent, in the prescribed form, of the parent of that child.

The researchers (Ndadi Law firm) spoke with the **Permanent Secretary of the Ministry of Health** about the practice of testing persons under 16 years of age for HIV.

### Age to report HIV status directly to adolescents

HIV status will be directly reported to individuals who are 16 years old and over. Specifically, the law provides that the result will be provided to the person tested. However, in practice, where a parent has given consent to testing on behalf of his/her child, the results will be communicated to the parent.

### Legislation and policy framework

**Section 111(a) of the Public Health Act (No. 23 of 2013)** provides that HIV test results shall be provided to the person tested:

*As soon as possible after the result of an HIV test is obtained, the medical practitioner shall inform the tested person in person of that result.*

## Chapter Five: Age of Consent on Antiretroviral Therapy (ART)

As a way of exception to the general Age of Consent of 18 years (the age of majority), the Public Health Act provides that an individual aged 16 or over can consent to HIV testing. In practice, there is an assumption that an individual who is capable of giving his/her consent to testing is capable of consenting to treatment. For ethical reasons health authorities would not refuse treatment to anyone under the age of 16 who needs it.

According to the National Policy, once a patient is eligible for treatment, medication will be provided to all citizens, by the healthcare system, without distinction by, but not limited to, ethnicity, gender, age and religious or political affiliation. Therefore, the issue of parental consent falls away.

Botswana at present, has no legislation governing the provision of ART so this is governed by a policy. Botswana has made sure ART is available free of charge in the public healthcare system through the MASA programme. The government is making ART is available to all HIV positive persons irrespective of

**Legislation and policy and policy framework**

*Botswana's Policy Framework on combating HIV/AIDS is very extensive and consists of the National AIDS Policy which was first established in 1998. Over the years, it has been updated with the Draft National Policy on HIV/AIDS of 2005 and the National HIV and AIDS Policy of 2012 amongst other instruments. Botswana has also adopted the National Strategic Framework for HIV/AIDS which too has been updated over the years, with the latest one guiding the country's response to the epidemic for the period of 2014-2016. Institutions have additionally been set up to complement the efforts made under Policy development, these including the National AIDS Council (NAC), the National AIDS Coordinating Agency (NACA) as well as the numerous AIDS committees set up at district level around the country.*

*The MASA programme, which commenced in 2002, first introducing the treatment to hospitals in Gaborone, Francistown, Serowe and Maun. Botswana at present, has no legislation governing the provision of ART so this is governed by the **National Policy**.*

**Botswana government's Treat All campaign, August 2016 announcement:** [http://www.moh.gov.bw/news\\_events/treat\\_all.html](http://www.moh.gov.bw/news_events/treat_all.html)

**Handbook of Botswana 2016 Integrated HIV Clinical Care Guidelines:** <http://www.youblisher.com/p/1425120-HIV-Guidelines/>

**Section 49 of the Interpretation Act** provides that the age of majority means 'when a person has attained the age of 18 years.

Counsel spoke with the **Permanent Secretary of the Ministry of Health** about the practice of administering ART to persons under 18 years of age.

## Chapter Six: Age of Consent and access to Pre-exposure Prophylaxis (PrEP) and Post-exposure Prophylaxis (PEP)

### Prohibition on HIV Pre-exposure Prophylaxis (PrEP)

Botswana does not have a law in place to govern the provision of HIV Pre-exposure Prophylaxis (PrEP). However, as a matter of policy, PrEP is currently available on a private prescription and will be available free of charge in 2017.

### Young people's access PrEP

The general stance is that if a child is incapable of giving consent to the treatment (i.e., he/she is under the age of majority which is 18 years), this is left in the hands of its parent or legal guardian. The Public Health Act provides that an individual aged 16 or over can consent to HIV testing. In practice, there is an assumption that an individual who is capable of giving his/her consent to testing is capable of consenting to PrEP. For ethical reasons health authorities would not refuse treatment to anyone under the age of 16 who needs it.

### Legislation and policy frameworks

*There is no legislation on the provision of this service. However, policy guidelines allow PrEP to be provided to high-risk populations who fulfil certain criteria. The Handbook of Botswana 2016 Integrated HIV Clinical Care Guidelines: <http://www.youblisher.com/p/1425120-HIV-Guidelines>, provides the needed guidelines.*

### Post-exposure Prophylaxis (PEP)

PEP is available in Botswana. However, there are prohibitions in the provision of PEP, this relating to the decision as to whether it should be administered. However PEP is available to all ages. No Age of Consent is provided. In relation to Post-sexual exposure prophylaxis, where sexual intercourse is consensual, there is an absolute prohibition. However, the prohibition does not apply to victims of sexual violence.

There is no prohibition to access to PEP. The general stance is that if a child is incapable of giving consent to the treatment (i.e., he/she is under the age of majority which is 18 years), this is left in the hands of its parent or legal guardian. The Public Health Act provides that an individual aged 16 years or over can consent to HIV testing (see chapter on HIV testing). In practice, there is an assumption that an individual who is capable of giving his/her consent to testing is capable of consenting to PEP. For ethical reasons health authorities would not refuse treatment to anyone under the age of 16 years who needs it.

## Legislation and policy framework

The researchers spoke with the **Permanent Secretary of the Ministry of Health** about the practice of administering ART to persons under 18 years of age. Section 49 of the Interpretation Act provides that the age of majority means “when a person has attained the age of 18 years.

The Botswana National HIV and AIDS Treatment Guidelines (2012) provide the treatment guidelines on the provision of PEP. The guidelines do not specifically provide for the issue of Age of Consent. However, as elaborated under Chapter One, the default position is that a child under the age of 18 years is irrefutably incapable of giving any sort of consent. If a child is incapable of giving consent to the treatment, this is left in the hands of its parent or legal guardian. If these are absent, consent can be given by a medical practitioner who deems the treatment necessary.

**Handbook of Botswana 2016 Integrated HIV Clinical Care Guidelines:** <http://www.youblisher.com/p/1425120-HIV-Guidelines/>

**Section 49 of the Interpretation Act** provides that the age of majority means ‘when a person has attained the age of 18 years’.

## Chapter Seven: Age of Consent and access to safe abortions and /or post-abortion care

It is against the law to carry out an abortion in Botswana under the Penal Code of Botswana. Any person who carries out an abortion can be sentenced to a maximum of seven years' imprisonment. However, there are certain circumstances in which the law allows doctors to carry out an abortion within the first 16 weeks of pregnancy in the case of Pregnancy which:

- Arises from rape, defilement or incest;
- Puts the life of mother at risk or may cause harm to her physical or mental health;
- Would cause suffering to the unborn child or where the child would later develop a serious physical or mental abnormality.

The **Policy Guidelines and Service Standards for Sexual and Reproductive Health (2004)** also provide for post abortion care.

Despite the illegality of unsafe abortions, the Ministry of Health has set out guidelines and advice on medical difficulties that may be faced after unsafe abortions and an alert to visit healthcare facilities.

The legal age of majority 18 years applies to lawful abortions. Women under the age of 18 years would require parental consent in order to obtain a lawful abortion.

### Legislation and policy framework

According to **Section 160 of the Penal Code:**

1. *Any person who, with intent to procure a miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, is guilty of an offence and is liable to imprisonment for a term not exceeding seven years.*
2. *Notwithstanding the provisions of subsection (1), it shall not be an offence under this section if a pregnancy is terminated or an abortion is caused within the first 16 weeks of pregnancy, in the following circumstances and under the following conditions-*
  - a. *where the medical practitioner carrying out the operation is satisfied, by acceptable evidence, that the pregnancy is the result of rape, defilement or incest, and the termination or abortion is requested by the victim, or, where the victim lacks the capacity to make such request, by her next of kin or guardian or the person in loco parentis; or*
  - b. *where the continuance of the pregnancy would involve risk to the life of the pregnant woman or injury to her physical or mental health, and such woman consents to the termination or abortion, or, if she lacks the capacity to give such consent, it is given on her behalf by her next of kin or guardian or the person in loco parentis; or*
  - (c) *where established evidence shows that there is a substantial risk that, if the child were born, it would suffer from or later develop such serious physical or mental abnormality or disease as to be seriously handicapped, and the pregnant woman consents to the termination or abortion, or, if she lacks the capacity to give such consent, it is given on her behalf by her next of kin or guardian or the person in loco parentis.*

*Again, as this law is in the form of Legislation, it can only be amended by an Act of Parliament. In relation to the provision of Post Abortion Care, this is provided under Policy Therefore, this position may be altered by a change in Policy, the enactment of Legislation on this area or by Case law developed by the Judiciary.*

*The Policy framework in relation to the provision of Ante Natal Care is provided for under the Policy Guidelines for Sexual and Reproductive Health (2004) which states at 4.2.4 that 'All pregnant women and their partners and pregnant adolescents/Youth' are eligible for ante-natal care. This, like all youth services, is provided without the need for parental consent.*

***Policy Guidelines for Sexual and Reproductive Health (2004)*** states at 4.2.4 that 'All pregnant women and their partners and pregnant adolescents/Youth' are eligible for ante natal care.

***General Policy Guidelines and Service Standards for Family Planning (2004)***

*Paragraph 3 provides that All persons of reproductive age regardless of age or marital status shall have the fundamental right to determine for themselves how many children to have and when to have them.*

*Paragraph 14, specifically provides that 'Women and men in the reproductive age shall be eligible to use family planning methods without the consent of relatives or partner with the exception of sterilisation.*

## Chapter Eight: Age of Consent and access to HPV vaccine and cervical cancer screening and treatment

Access to Human Papillomavirus (HPV) vaccine, cervical cancer screening and treatment is provided for under the following: National Cervical Cancer Prevention Programme – Five-Year Comprehensive Prevention and Control Strategy (2012–16) as well as the Guidelines for HPV Supervisors Human Papillomavirus (HPV) Vaccination to Prevent Cervical Cancer.

School girls in standard 5, 6 & 7, and girls aged from nine (9) years to thirteen (13) years who do not attend school fall within the target group for the HPV vaccination. The vaccination will be administered at schools and health facilities around the country.

The legal age of majority 18 years applies to young persons' accessing the HPV vaccine, cancer screening and treatment. Accordingly, anyone younger than 18 years will require parental consent.

### **Legislation and policy framework on access to HPV vaccine, and cervical cancer screening** ***The Guidelines for HPV Supervisors Human Papillomavirus (HPV) Vaccination to Prevent Cervical Cancer***

#### ***National Cervical Cancer Prevention Programme – Five-Year Comprehensive Prevention and Control Strategy (2012–16)***

***Section 49 of the Interpretation Act*** provides that the age of majority means when a person has attained the age of 18 years.

***The Public Health Act (No. 23 of 2013) Section 105*** states that consent must be provided for the testing. HIV testing may only be undertaken with the consent of the person or their parent (if they are under 16 years).

*105(1) A person shall not conduct an HIV test in respect of another person, except –*

- a. with the consent of that other person;*
- b. if that other person is under the age of 16 years, with the consent, in the prescribed form, of the parent of that child.*

The researchers spoke with the **Permanent Secretary of the Ministry of Health** about the practice of testing persons under 16 years of age for HIV.

**Section 111 (a) of the Public Health Act (No. 23 of 2013)** provides that HIV test results shall be provided to the person tested: *As soon as possible after the result of an HIV test is obtained, the medical practitioner shall inform the tested person in person of that result.*

## Chapter Nine: Recommended intervention on legal and policy framework

Area	Category of regulation	Required intervention
Age of sexual intercourse	L	LR
Definition of statutory rape	L	LR
Exceptions on Age of Consent - For example 'gay sex'	L	LR
Young people's access to contraceptive services	P	LR
Young people's access to emergency contraceptives	P	LR
Policy framework and legislation on access to Antiretroviral Therapy (ART)	P L	LR NR PRP
Policy and legislation on young people's access to PEP	P	LR NR PRP
Prohibition on young people's accessing PEP where it is offered	L	LR NR PRP
Policy framework and on access to Antenatal Care (ANC)	P	Development of Case LR NR PRP
Policy framework & legislation on access to HPV vaccine and clinical cancer screening and treatment	P	LR NR PRP
Policy framework and/or legislation on access to safe abortions and/or postabortion care	P L	LR Development of Case Policy reform

Legislation



Policy



New regulations



Law Reform



Sign off to new practice and review of policy



## Chapter Nine: Recommended intervention on legal and policy framework (cont.)

Age of Consent to access HIV testing without parental consent	L	LR NR
Legal and policy framework on the Age of Consent HIV status will be reported directly to an adolescent	L	LR NR
Addressing various policy and legislation inconsistencies	N/A	N/A
Legislation enabling PEP use in the country	P	LR NR
Prohibition on HIV Pre-exposure Prophylaxis (PrEP), including Age of Consent, with and without parental consent	P	LR Development of Case Policy reform
Young people's access to PrEP	P	LR NR PRP
Legislation policy on Prep use in the country	L P	LR NR Ministerial sign off to new practice

Legislation



Policy



New regulations



Law Reform



Sign off to new practice and review of policy



# Annex

## KEY QUESTIONS FOR THE LEGAL REVIEW

1. At what age may sex between consenting individuals legally take place? (Age of Consent to sexual intercourse) Indicate if there are different ages for males and females?
2. Is there a definition of statutory rape? Please define.
3. Are there exceptions to question (1)? For example gay sex?
4. At what age may a young person access contraceptive services including contraceptive commodities? Please specify with and without parental consent if the answers are different.
5. May a young person access emergency contraceptives (e.g. the 'Morning-after pill') At what age? Please specify if there are different ages with and without parental consent.
6. policy framework and legislation enabling or disabling access to Antiretroviral Therapy (ART), including Age of Consent, with and without parental consent.
7. Specify whether there is any prohibition on HIV Post-exposure Prophylaxis (PEP), including Age of Consent with and without parental consent.
8. If there is no prohibition in question 7, would young people be legally able to access PEP if it was offered? At what ages? Please specify if there are different ages with and without parental consent.
9. Is there any legislation or policy specifically enabling PEP use in country? Please specify if it deals with Ages of Consent and give details.
10. Specify whether there is any prohibition on HIV Pre-exposure Prophylaxis (PrEP), including Age of Consent with and without parental consent.
11. If there is no prohibition in question 10, would young people be legally able to access PrEP was it offered? At what ages? Please specify if there are different ages with and without parental consent.
12. Is there any legislation or policy specifically enabling PrEP use in the country? Please specify if it deals with Ages of Consent and give details.
13. Please state whether there is policy framework and/or legislation enabling or disabling access to safe abortions and/or postabortion care, including Age of Consent, with and without parental consent.
14. policy framework and legislation enabling or disabling access to Antenatal Care (ANC), including Age of Consent with and without parental consent.
15. policy framework and legislation enabling or disabling access to HPV vaccines and cervical cancer screening and treatment, including Age of Consent, with and without parental consent.
16. What is the Age of Consent to access HIV testing without parental consent?
17. What is the Age of Consent at which the HIV status will be reported directly to an adolescent and legal/ policy requirements to report this status to her/his parents?
18. Please explain any inconsistencies between the answers above.



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