Harmonizing the Legal Environment for Adolescent Sexual and Reproductive Health and Rights

A review in 23 Countries in East and Southern Africa

SYP
Safeguard Young People
PROGRAMME

INTRODUCTION

What does it mean to harmonize the legal environment?

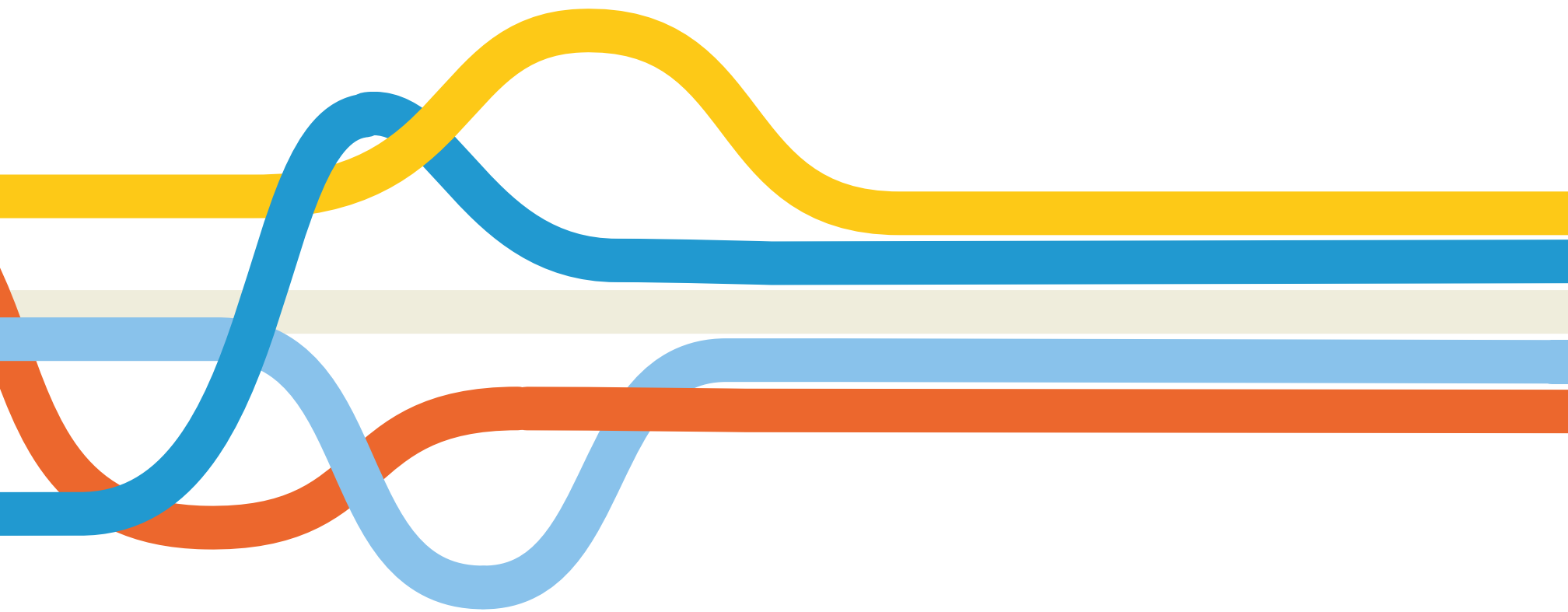
Harmonization of law and policies – or simply "harmonization" – is the process of creating common standards across the region in relation to the specific matters of adolescent sexual and reproductive health rights.

Each government has the primary responsibility for the regulation of most matters within their jurisdiction. Consequently, government has its own laws and policies. Harmonization aims to create consistency of laws, regulations, standards and practices in the region so that the same rules apply to all. The harmonization is based on international and regional conventions and commitments that governments in the region have already ratified or signed in the area of adolescent sexual and reproductive health and rights.

The study

The study reviews the laws, policies and other related sources in 23 countries in East and Southern Africa that create either impediments to, or an enabling environment for, adolescent sexual and reproductive health and rights. The intention of the study is to measure the legal provisions of countries in the region against the international and regional treaties and commitments. It also acts as a platform to advocate for a harmonization of not only domestic laws and policies, but also international and regional treaties and commitments.

Countries in the study included: Angola, Botswana, Burundi, Comoros, DR Congo, Ethiopia, Eritrea, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Seychelles, South Africa, South Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe.



1. AGE OF CONSENT TO SEXUAL ACTIVITY

Overview of findings

The majority of countries in East and Southern Africa do not have the minimum age of consent to sexual activity clearly set out in their legislations. This means the age of consent to sexual activity must be gleaned from a reading of sections that relate to criminal sexual activities. This makes it difficult for young people and the community at large to determine, with certainty, what the minimum legal age for sexual activity is.

In some of the study countries, where the age of consent is stated, they have lower age of consent for girls than boys.

Why should we set the age of consent to sexual activity?

Setting the age of consent to sexual activity at an appropriate level requires a balance of rights to protection and the recognition of evolving capacity and autonomy of adolescents and young people.

Clearly defining age of consent to sexual activity in the law, does not encourage sexual activity. If laws support access to adolescent sexual and reproductive health and rights, it can delay sexual debut by encouraging and enabling informed decision-making.

COUNTRIES	PROVISION FOR CSE			
	GIRLS	*Source:*	BOYS	*Source:*
Angola	**16**	*The Penal Code*	**18**	
Botswana	**16**	*The Penal Code does not expressly set out the age of consent. However, sex with girls under the age of 16 is criminalized*		*Not defined*
Burundi	**18**	*The law criminalizes rape of an adolescent under 18 by an adult, even with the consent of the adolescent*		*Not defined*
Comoros	**13**	*Comoros Constitution and Citizenship Laws Handbook*		*Not defined*
DRC	**14**	*2011 Human Rights Report: Democratic Republic of the Congo*	**18**	
Ethiopia	**18**	*The Criminal Code*	**18**	*The Criminal Code*
Eritrea		*Not defined*		*Not defined*
Kenya	**18**	*Sexual Offences Act*	**18**	*Sexual Offences Act*
Lesotho	**16**	*Sexual acts with a child under 16 is criminalized*	**16**	*Sexual acts with a child under 16 is criminalized*
Madagascar	**14**	*The Penal Code: Indecent assault of a girl under the age of 14 years is criminalized*		*Not defined*
Malawi	**16**	*The Penal Code: Sexual activity with a person under the age of 16 years is criminalized*	**16**	*The Penal Code: Sexual activity with a person under the age of 16 years is criminalized*
Mauritius	**16**	*Sexual intercourse with a person under 16 is criminalized*	**16**	*Sexual intercourse with a person under 16 is criminalized*
Mozambique	**18**	*The Penal Code: Female rape and engaging with sexual intercourse with a girl below the age of 18 years is criminalized*		*Not defined*
Namibia	**14**	*Combatting Rape Act*	**14**	*Combatting Rape Act*
Rwanda	**18**	*In terms of Law 27/2001: Sexual relations with a person under the age of 18 is criminalized*	**18**	*In terms of Law 27/2001: Sexual relations with a person under the age of 18 is criminalized*
Seychelles	**18**		**18**	
South Africa	**16**	*Sexual Offences and Related Matters Act of 2007*	**16**	*Sexual Offences and Related Matters Act of 2007*
South Sudan	**18**	*The Penal Code: Consent of a person under 18 to sexual intercourse or carnal knowledge is not valid*	**18**	*The Penal Code: Consent of a person under 18 to sexual intercourse or carnal knowledge is not valid*
Swaziland	**16**	*Girls and Women Protection Act of 1920 and the Sexual Offences and Domestic Violence Bill*	**16**	*The Sexual Offences and Domestic Violence Bill*
Tanzania	**18**	*Tanzania Penal Code: With or without consent, unless the person is your wife and has reached puberty.*	**15**	*Indecent assault of boys under 15 is criminalised and this gives the impression that the age of consent for boys is 15*
Uganda	**18**	*The Penal Code*	**18**	*Penal Code*
Zambia	**16**	*The Penal Code Act: Defilement of girls under the age of 16 is criminalized*		*Not defined*
Zimbabwe	**16**	*Sexual acts with a young person, defined as a person under 16, is criminalized*	**16**	*Sexual acts with a young person, defined as a person under 16, is criminalized*

Proposed legal reform

- The law must clearly set out the minimum age of consent to sexual activity. The age of consent to sexual activity will have to align to the age of consent to sexual and reproductive health services, including contraceptives.
- The law must harmonize the age of consent for both adolescent boys and girls. Both boys and girls should have the same minimum age.
- Special legal provisions for adolescent boys and girls whose legal capacity is diminished, such as those who are mentally challenged, must be enacted.
- Special defences need to be reconsidered. For example, a possible defence could be that the older partner believed the other to be above the minimum age of consent.

2. AGE OF CONSENT TO MARRIAGE

Overview of findings

The combination of customary and statutory laws in many countries in East and Southern Africa also complicates the age of consent to marriage. In most instances, there is conflict between the different legal systems.

The age of consent to marriage is not clear or codified for the majority of cases in customary law and is, in most instances, much lower than 18 years of age.

ONLY 6 OUR OF 23 COUNTRIES

set the age of consent to marriage at 18 years without exceptions.

Proposed legal reform

The legislation must:

- Set the minimum age of consent to marriage at 18, without exceptions.
- Must not differentiate between boys and girls.
- Incorporate free and personal consent to marriage by the persons entering into the marriage.
- Set up a regulatory system to register all marriages.
- Take precedence over any cultural, traditional or religious customs and practices and should include a provision that child, early and forced marriage is a harmful practice.
- Include a provision that places a duty on all persons to report any marriage where one or both parties to the marriage is below the minimum age of marriage.

In addition, other possible legal reforms include:

- Giving out a child in marriage or facilitating a child marriage should be punishable by law.
- Child marriages concluded before any law criminalizing child marriage came into operation should be considered voidable.
- A rigorous birth registration system is essential in order to ensure effective compliance with the minimum age of consent to marriage.

3. AGE OF CONSENT TO HEALTH SERVICES AND MEDICAL TREATMENT

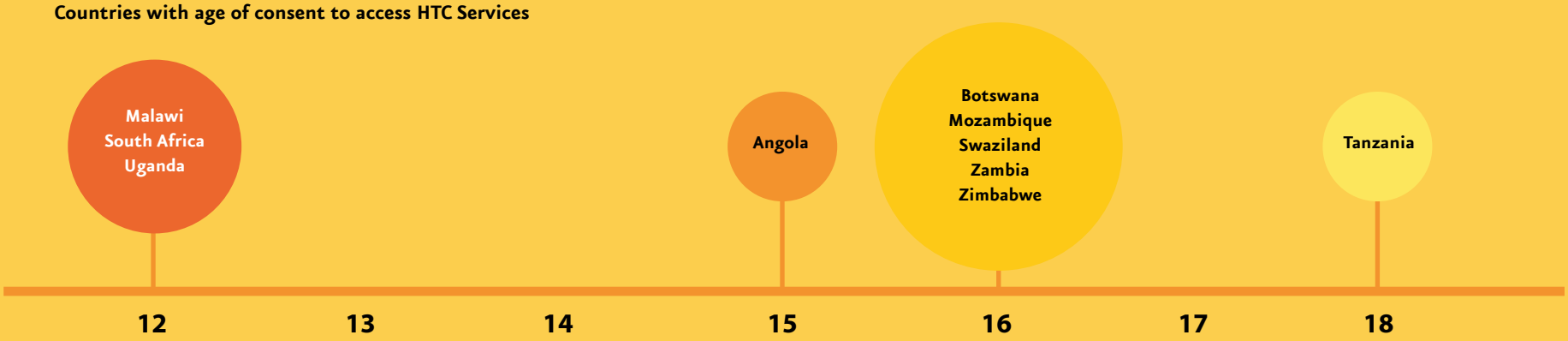
Overview of findings

The majority of countries in the region do not have laws and policies that determine the age of consent to medical treatment, including access to contraceptives, HIV counselling and testing and termination of pregnancy. This can lead to major confusion as to when young people can consent to medical treatment themselves and when they need consent from a parent or guardian. This uncertainty also creates a barrier to access to sexual and reproductive health services as many health-care providers are not clear on the age of consent. Health-care providers use their own personal descretion on 'an appropriate age' when providing services instead of practicing with a legal framework in mind.

Some countries have policies that aim to enable access to sexual and reproductive health services for young people without discriminating based on age. However, these policies are not sufficient. Clear legislative provisions need to be in place that take into account young people's autonomy and evolving capacities.

A few countries have made legislative provision for the ages of consent to sexual and reproductive health services by setting the minimum age at 12 years. This best practice can be emulated by the rest of the region.

Countries with age of consent to access HTC Services



Proposed legal reform

- The age of consent to medical treatment without parental consent should be set at the age of 12.
- The age of consent to contraceptives is recommended to be set at 12, without parental consent.
- Additional provision in legislation stating that health service providers must respect the views and opinions of the adolescent accessing a service.
- The legislation must make a clear distinction between medical treatment and surgical operations or major medical procedures. There must be a differentiation between medical treatment a 12-year-old can access without parental consent and major medical procedures for which the child needs the assistance of a parent or guardian.
- The age of consent to HIV testing and treatment should be separate from consent to other forms of medical treatment in order to broaden access.
- The law must qualify the age of consent to medical treatment by setting a requirement that the adolescent must have sufficient maturity to understand the risk, benefits and consequences of the medical treatment. The law should be careful not to give health-care providers a loophole to refuse medical treatment easily based on this requirement. To that end, the law must provide guidance to health service providers on how to assess the adolescent's maturity.
- There must be emergency measures in the legislation indicating who may consent to the adolescent's medical treatment in the event that the adolescent cannot consent and parental consent cannot be obtained.
- The adolescent's right to confidentiality regarding any medical treatment, including adolescent sexual and reproductive health rights, must be explicitly protected in legislation.

4. CRIMINALIZATION OF CONSENSUAL SEXUAL ACTS AMONGST ADOLESCENTS

Overview of findings

Some countries criminalize consensual sexual acts amongst adolescents. In most of these particular cases, boys are convicted and end up in prison. Criminalizing consensual sexual acts amongst adolescents is an impediment to their right to access sexual and reproductive health services and leads to stigmatization of the normal sexual development of young people.

Countries need to decriminalize consensual sexual acts amongst adolescents and focus on educative approaches that will instead enable and empower young people to make informed choices about their sexual and reproductive health rights and needs.

Proposed legal reform

- The law must clearly set out the minimum age of consent to sexual activity. The age of consent to sexual activity will have to align to the age of consent to sexual and reproductive health services, including contraceptives.
- The law must harmonize the age of consent for adolescent boys and girls.
- Special legal provisions for adolescents whose legal capacity is diminished should be enacted, for example, those who are mentally challenged. These legal provisions should also include a clear definition of mental disability.
- Special defences, such as an adult accused being able to raise a legal defence that the complainant appeared older than the minimum age of consent, need to be re-considered.

5. ACCESS TO SEXUAL AND REPRODUCTIVE HEALTH SERVICES

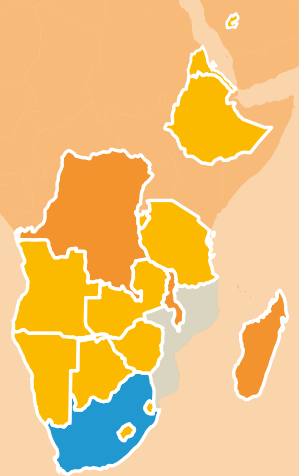
Overview of findings

The majority of countries in East and Southern Africa do not have provisions that clearly set out the right of adolescents to access sexual and reproductive health services.

The majority of countries criminalize abortion, although they provide for exceptions.The narrow and unclear legal exceptions for termination of pregnancy are at the discretion of health service providers. This creates additional challenges to those who even fall under the categories for which exceptions are made.

The lack of provision for termination of pregnancy as a choice drives young women to unsafe abortions, putting their health and life at risk. This applies not only to young people, but also to women in general.

There is a need to reconsider the criminalization provisions and to broaden the categories of circumstances under which termination of pregnancy will be provided.



Countries that have decriminalized abortion

Countries that have crimalized abortion with some exceptions

Countries that have crimalized abortion without exception

Proposed legal reform

- Adolescent sexual and reproductive health and rights comprises a full range of services including preventative and curative services, of which termination of pregnancy is only one. The legislation should follow a rights-based approach, making it clear that adolescents have a right to access all sexual and reproductive health and rights.
- Legislation must provide for the establishment of youth-friendly clinics, including the proper resourcing of clinics at state expense and set out the norms and standards for youth-friendly clinics. This includes which services will be accessible at the clinic, training of staff and confidentiality requirements.
- The sexual and reproductive health policy of a country should facilitate access to family planning methods as preventive action.
- Elective termination of pregnancy should be available subject to conditions depending on the period of gestation. The conditions become more restrictive as the pregnancy developments.
- Termination of pregnancy services should not be subject to minimum age of consent requirements or parental consent.
- The law must prescribe who is qualified and authorized to perform terminations and must include criminal sanctions against persons who perform illegal abortions.

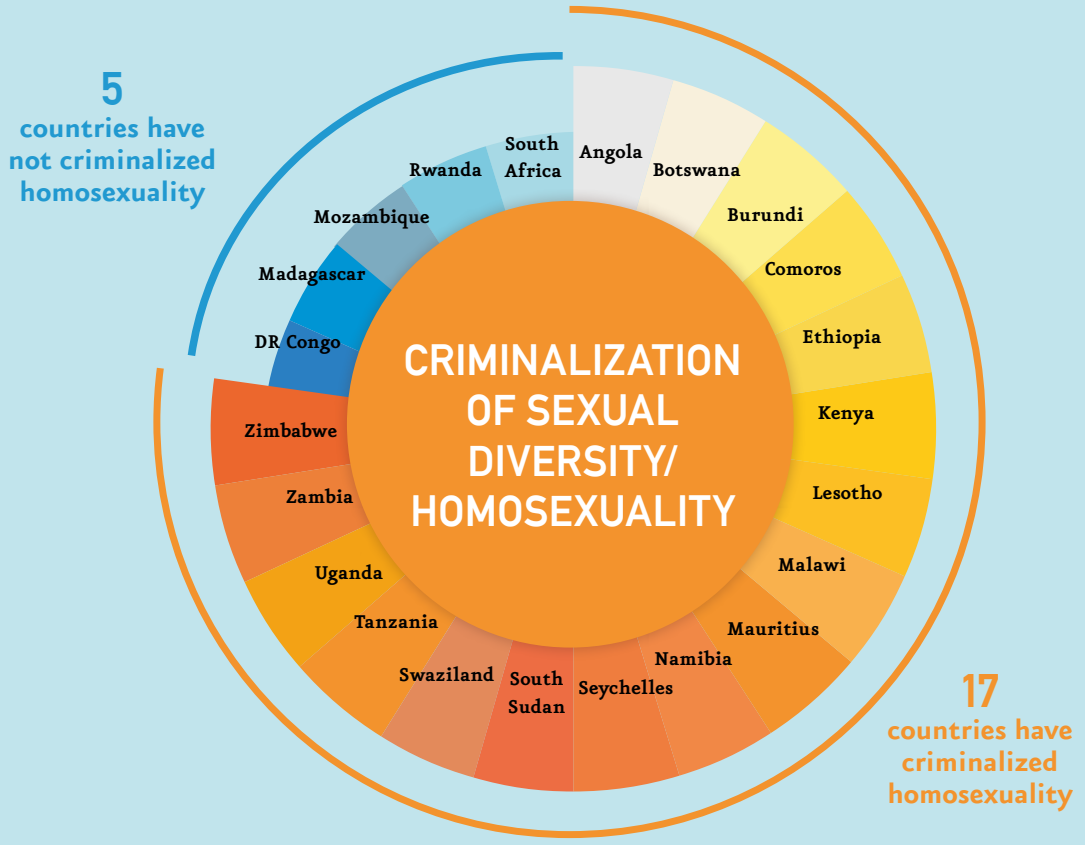
6. SEXUAL AND REPRODUCTIVE HEALTH RIGHTS OF VULNERABLE ADOLESCENTS AND YOUNG PEOPLE

Overview of findings

There are noticeable gaps in the specific provision for the protection of the sexual and reproductive health and rights for vulnerable adolescents and youth, including individuals with disabilities, in the majority of the 23 countries in the region.

Although mainstreaming of the issues is considered to enable inclusivity, there is a need for focused attention to adolescents and young people with disabilities particularly in relation to balancing their special needs. Provision should be made for the institutions where adolescents and young people report or obtain assistance if their sexual and reproductive health and rights are violated.

In relation to lesbian, gay, bisexual, transexual and intersex (LGBTI) persons, the most notable concern is the criminalization of same-sex relationships. In some countries in the region, homosexual acts committed in respect of minors are subject to increased penalties, irrespective of consent. Some countries specifically criminalize "sodomy", meaning that male homosexual acts are prohibited, with the inference that sexual acts committed between females are excluded.



Proposed legal reform

Legislation must:

- Include the principle of non-discrimination in the provision of sexual and reproductive health services based on disability, sexual orientation or HIV status.
- Be aimed at addressing gender inequality and promoting women's right to property, inheritance and custody so that there are fewer risks for women in disclosing their HIV status or leaving a relationship that place them at risk or expose them to HIV.
- Should set out adolescents' right to privacy and confidentiality in youth-friendly clinics.
- Set out when and under what circumstances an adolescent's HIV status may be disclosed with, and without, the adolescent's consent.

Other considerations for legal reform include:

- Primary, secondary and tertiary educational institutions and employers must be obliged, by law, to prevent and eliminate discrimination against adolescents living with HIV.
- Law that criminalize same-sex relationships should be amended to bring it in line with SADC Model Law on HIV and AIDS in Southern Africa.
- Existing criminal provisions should be utilized to prosecute intentional transmission of HIV and countries should avoid legislation that explicitly criminalize transmission. If there is legislation that criminalize HIV transmission, it must be nuanced and sensitive to not criminalize persons who may be unaware of their status.
- Legislation must be sensitive to the disproportionate impact HIV transmission has on women and their ability to negotiate safe sex and disclose their status.

7. CRIMINALIZATION OF HIV TRANSMISSION AND ACCESS TO HIV AND AIDS SERVICES

Overview of findings

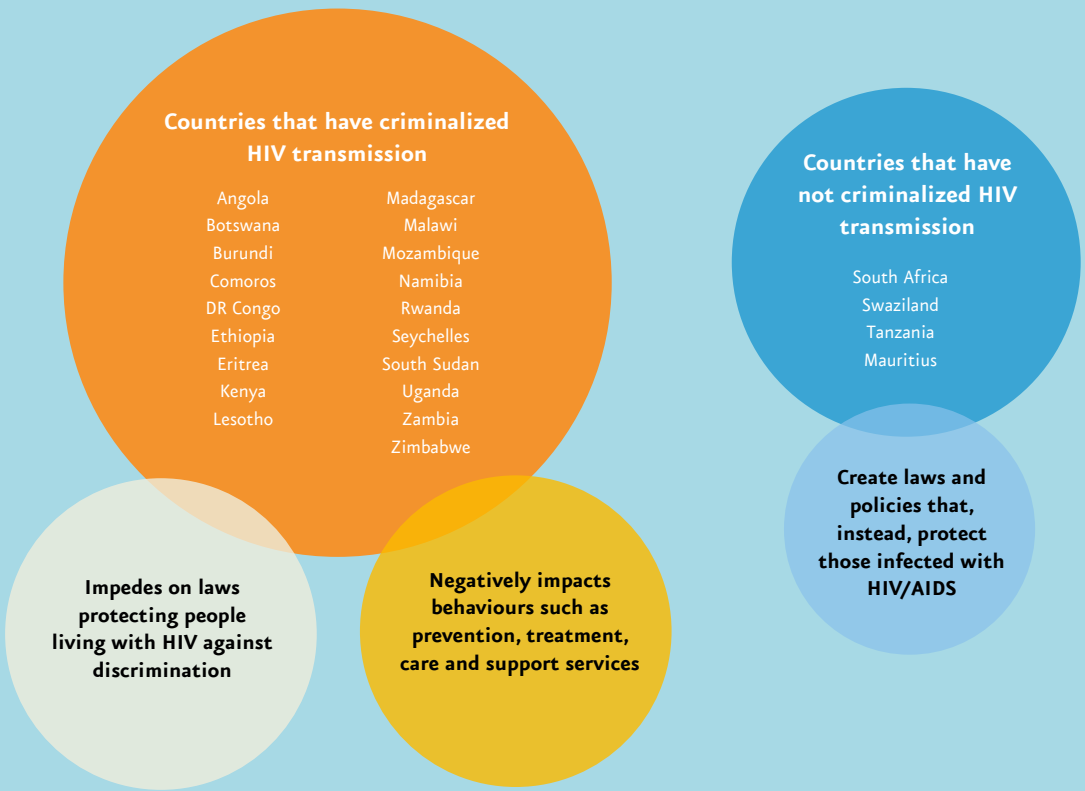
Most countries in East and Southern Africa have legislative provisions criminalizing the transmission of HIV or a disease that may cause death explicitly. The majority of the countries that criminalize infecting others with HIV do not require such acts to be intentional but also negligent in infecting others.

Notwithstanding the fact that most of the countries under review have legislative provisions criminalizing the transmission of HIV, some of these countries also have laws protecting people living with HIV against discrimination.

The overly-broad application of criminal law to HIV transmission creates a real risk of increasing stigma and discrimination against people living with HIV and can drive them further away from HIV prevention, treatment, care and support services.

Countries, such as South Africa, have also seen that criminalizing HIV transmission can infringe on the right to privacy to an extent that is not justified as it requires inquiry of intimate medical histories and sexual affairs.

Criminalizing HIV transmission infringes on human rights and negatively impacts behaviours such as testing, treatment, and care.



Proposed legal reform

- Ensure the monitoring and application of general criminal law only to the the intentional transmission of HIV is not used inappropriately in the context of HIV.
- Redirect legislative reform and law enforcement towards addressing sexual and other forms of violence against women, discrimination and human rights violations against people living with HIV.
- Ensure that civil society, including women's and human rights groups, representatives of people living with HIV and other key populations, is fully engaged in developing and reviewing HIV laws and their enforcement.
- Promote gender equality in education and employment, providing age-appropriate sexuality and life-skills education (including negotiation skills) to children, adolescents and young people, and enacting and enforcing laws to promote women's rights to property, inheritance, custody and divorce so women can avoid and leave relationships that place them at risk of exposure to HIV.
- The need to significantly expand access to proven HIV prevention (including positive prevention) programmes and support voluntary counselling and testing for couples, voluntary disclosure, and ethical partner notification.

8. HARMFUL CULTURAL, RELIGIOUS OR TRADITIONAL PRACTICES

Overview of findings

The efforts to do away with harmful cultural practices have been strengthened by the adoption of laws that criminalize practices such as female genital mutilation, particularly in East Africa. Some countries have opted to include protection of children against harmful cultural practices in their constitution and child specific legislations.

The recognition of customary law and existence of a dual legal system in some of the countries creates an impediment to dealing with harmful cultural practices effectively and leaves young people vulnerable.

Criminalization of harmful cultural practices is a good start, however, there is a need to ensure that the legislative provisions translate into practice and are enforced against those who commit these offences.

Countries that have banned female genital mutilation

Numerous international and regional instruments, either directly or indirectly, prohibit harmful cultural practices:

- The Universal Declaration of Human Rights
- International Covenant on Civil and Political Rights (ICCPR)
- The International Covenant on Economic, Social and Cultural Rights
- The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- UN General Assembly Declaration on the Elimination of Violence Against Women
- GA Resolution 61/143 (2007) reminded states that they must not use customs, traditions, or religious beliefs as excuses for avoiding their obligation to eliminate violence against women and girls.
- The African Charter on Human and People's Rights (the Banjul Charter)
- The African Charter on the Rights and Welfare of the Child (African Charter)
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (The Maputo Protocol)
- The Cairo Declaration for the Elimination of FGM, 2003
- The 1999 Ouagadougou Declaration of the Regional Workshop on the Fight against Female Genital Mutilation
- Addis Ababa Declaration on Development in Africa beyond 2014, State Parties committed themselves, amongst other things, to protect the dignity and rights of women and girls by eradicating all harmful practices.

Proposed legal reform

- Legislation should explicitly prohibit cultural, religious or traditional practices that are harmful to the health of women, children, adolescents and young people, including but not limited to female genital mutilation, virginity testing and early, child or forced marriage.
- Legislation that prohibit harmful practices must include effective enforcement mechanisms that empower the state to act against perpetrators.
- Any conflict between the legislation that prohibits harmful practices and religious or traditional laws should be resolved in favour of protecting women, children, adolescents and young people against harmful practices.
- Harmful effects of a practice can be improved by having clear regulations set out in law the safe and hygienic exercise of the practice. For example, non-medical male circumcision must be done under safe and hygienic conditions by a person who has been trained to perform male circumcision.
- Legislation must have a requirement where the adolescent is of sufficient age, maturity and stage of development to consent to a cultural, religious or traditional practice.
- The giving out of a child or adolescent in marriage, or any other union similar to marriage, below the minimum age of marriage must be prohibited and criminalized by law.

9. PREGNANT LEARNER RETENTION AND RE-ENTRY LAW AND POLICY

Overview of findings

Only about half (11) of the countries in the regional study have legislation and policies on the management of learner pregnancy and re-entry after delivery. However, the majority of those countries that have policies tend to approach learner pregnancy from a punitive perspective. This is clear from some of the policies that ban learners from returning to the specific school; exclude them for a specific pre-determined time frame or expel them on the grounds of pregnancy.

These approaches are not in line with international obligations. A more accommodative approach, which has general principles guided by a rights-based framework and takes into account an individual learner's needs and circumstances, is more appropriate.

For example, Zambia's Re-entry Policy has established a process by which maternity leave should be granted at an education institution. To initiate maternity leave, the girl requesting the leave. The girl's parents, and the child's father fill out a form stating the date on which the girl agrees to return to school. The Re-entry Policy also obliges schools to ensure a paternity leave of the same length as the maternity leave for the child's father, if he is a schoolboy, to facilitate joint caretaking of the infant. The girl's parents and the child's father are asked to sign the maternity leave form in order to mutually accept responsibility for caring for the baby and for supporting the girl's return to school.

11

countries have legislation and policies on the prevention and management of learner pregnancy and re-entry after delivery

Proposed legal reform

Any legislation or policy should not only apply to schools, but also other training, vocational or educational institutions. The legislation or policy should:

- Adopt a non-punitive approach to adolescent pregnancy.
- Not exclude or expel the leaner who is responsible for the pregnancy where he was in a consensual relationship with the pregnant girl;
- Make provisions that respect the privacy of the pregnant learner.
- Clearly state that adolescent girls should not be withdrawn or excluded from a school or institution due to pregnancy or marriage.
- Provide time frames when the learner can notify the school or institution of the pregnancy.
- Include measures for the retention of pregnant learners and allow them to continue with their education until they are close to delivery.
- Make provision for referral of the learner to health and other related services she may require.
- Obligate the school or institution to report to educator's bodies and ministry of education where the pregnancy is, as a result of a relationship with a teacher or rape by a teacher or other staff member.
- Provide for re-entry after delivery based on the learner's readiness and not exclude the learner's return to school or the institution based on rigid rules.
- Ensure that the consent of parents, husbands or families is not a requirement for the re-entry of the learner into school or an institution.
- Provide for support to the learner during pregnancy, birth and re-entry by a trained staff member at school or the institution, which may include State-provided financial and psychosocial support.
- Include measures aimed at de-stigmatizing pregnancy among adolescents, and using the opportunity to inform and educate other learners on the importance of obtaining sexual and reproductive health information and services to prevent pregnancy.

10. PROVISION OF COMPREHENSIVE SEXUALITY EDUCATION

Overview of findings

The majority of countries in East and Southern Africa have diverse policies indicating integration of comprehensive sexuality education (CSE) for in and out of school youth. Additionally, ministers of health and education from 20 countries in the region have endorsed the Eastern and Southern African Commitment, which has time-bound targets to scale up CSE and sexual and reproductive health services to young people. However, only some countries have fully integrated CSE curricula for both primary and secondary schools, ensuring it is both compulsory and examinable. It is worth noting that some country policies have a negative approach aimed at instilling fear in adolescents of and toward sexual and reproductive health.

COUNTRIES	PROVISION FOR CSE
Angola	No provision. CSE is mentioned in the National Strategy for HIV, TB and Malaria for the Education Sector (2013-17)
Botswana	Yes - a life skills education curriculum for primary and secondary schools
Burundi	The National Strategic Plan on the Fight Against HIV/AIDS 2012-2016 suggests that the ministries in charge of education should adopt curricula in order to improve the fight against HIV/AIDS in schools
Comoros	No Data
DRC	Sexuality Education is integrated in the 2010-2014 and 2014-2017 AIDS Multi-Sectorial National Strategic Plans through behaviour change communication
Ethiopia	No, but offer basic topics on HIV in primary and contraception in secondary
Eritrea	No
Kenya	The Adolescent Reproductive Health Development Policy (2003) identifies ASRHR as an area of concern
Lesotho	No, HIV/AIDS Life Skills Curriculum covered but does not include SRH matters
Madagascar	Unclear, but in 2013 Sexuality Education became compulsory following the adoption of the Orientation Framework for the Malagasy Curriculum on Sexuality Education (OFMCSE) by the Ministry of Education
Malawi	Yes, stand alone
Mauritius	Catered mainly by NGOs and other Ministries other than the Ministry of Education
Mozambique	The National System Education Curriculum introduces some topics on sexuality as from Grade 5.
Namibia	The Education Sector Policy for Prevention and Management of Learner Pregnancy
Rwanda	The National School Health Policy emphasises an age-appropriate and culturally relevant approach to teaching about sex and recognises that sexuality education tends to lead to later sexual debut and healthy sexual behaviour.
Seychelles	No Data
South Africa	Yes - Integrated School Health Policy
South Sudan	Unclear - The National Reproductive Health and Strategic Plan 2011-2015
Swaziland	The Swaziland Education and Training Sector Policy (2011)
Tanzania	Guidelines for Implementing HIV & AIDS and life skills education programmes in schools
Uganda	In 2001 the Ugandan President launched an official programme for sexual education for youth, known as the Presidential Initiative on AIDS Strategy for Communication to Youth
Zambia	Yes, the Comprehensive Sexuality Education Framework (2014), integrated into course subjects
Zimbabwe	Life Skills, Sexuality, HIV and AIDS Education Strategy (2012–2015)

Proposed legal reform

- In the curriculum, the CSE content should include the cognitive, emotional, social, psychological and interpersonal relationship components of sexuality.
- The curriculum must be rights based, following a human rights approach and include scientifically accurate information.
- Adolescents and young people should be informed about science-based sexuality, as part of their right to health.
- Sexuality education should be age-appropriate with regard to the adolescent's or young person's level of development and understanding, and culturally and socially sensitive with a gender perspective.
- Provision of CSE should be in line with the International Technical Guidelines and regional commitments such as the Eastern and Southern African Commitment.

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