HARMONIZATION OF THE LEGAL ENVIRONMENT ON ADOLESCENT SEXUAL AND REPRODUCTIVE HEALTH IN EAST AND SOUTHERN AFRICA

A REVIEW OF 23 COUNTRIES
While more needs to be done, the regional trend of adapting and applying useful legal strategies for the realization of the rights of adolescents and young people to Sexual and Reproductive Health Services and information, in line with their evolving capacities, is truly encouraging.

- Dr. Julitta Onabanjo
  (UNFPA East and Southern Africa Regional Director)
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ACKNOWLEDGEMENTS

Many individuals and organizations contributed to the development and implementation of this study. In particular, we would like to acknowledge the financial support of the United Nations Population Fund East and Southern Africa Regional Office (UNFPA ESARO) and the Swiss Agency for Development and Cooperation (SDC), which made this study possible.

We wish to extend special thanks to the following people and organisations for their tireless contribution: Renata Tallarico for providing necessary guidance concerning the design and implementation of the study; Jyoti Tewari, Maria Bakaroudis, Lucetta Takawira and Lindiwe Siyaya for their support in ensuring a smooth validation of the findings and recommendations; UNFPA country staff and government focal points in Angola, Botswana, Burundi, Comoros, Democratic Republic of the Congo, Ethiopia, Eritrea, Eswatini, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Seychelles, South Africa, South Sudan, Tanzania, Uganda, Zambia and Zimbabwe, for providing country reviews of the study; and various members of the UN family, including UN Women, United Nations Educational, Scientific and Cultural Organization (UNESCO), the Office of the High Commissioner for Human Rights (OHCHR) and the United Nations Programme on HIV and AIDS (UNAIDS) for their technical support.

We are also grateful to Karabo Ozah, Carina Du Toit and Dr. Nkatha Murungi at the University of Pretoria Law Faculty’s Centre for Child Law for providing the technical expertise and research skills needed to complete this project. Finally, the report and its legal framework would not have been possible without the leadership and guidance of the African Union Commission (AUC) Human Resources, Science and Technology Department, the Southern African Development Community (SADC), SADC Parliamentary Forum, and the East African Community (EAC).

ACRONYMS

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AIDS</td>
<td>Acquired Immunodeficiency Syndrome</td>
</tr>
<tr>
<td>ASRHR</td>
<td>Adolescent Sexual and Reproductive Health and Rights</td>
</tr>
<tr>
<td>AUC</td>
<td>African Union Commission</td>
</tr>
<tr>
<td>CSE</td>
<td>Comprehensive Sexuality Education</td>
</tr>
<tr>
<td>EAC</td>
<td>East African Community</td>
</tr>
<tr>
<td>ESA</td>
<td>East and Southern Africa</td>
</tr>
<tr>
<td>FGM</td>
<td>Female Genital Mutilation</td>
</tr>
<tr>
<td>HIV</td>
<td>Human Immunodeficiency Virus</td>
</tr>
<tr>
<td>LGBTI</td>
<td>Lesbian, Gay, Bisexual, Transgender and Intersex</td>
</tr>
<tr>
<td>SADC</td>
<td>Southern African Development Community</td>
</tr>
<tr>
<td>SADC-PF</td>
<td>Southern African Development Community Parliamentary Forum</td>
</tr>
<tr>
<td>SRHR</td>
<td>Sexual and Reproductive Health and Rights</td>
</tr>
<tr>
<td>STI</td>
<td>Sexually Transmitted Infection</td>
</tr>
<tr>
<td>SYP</td>
<td>Safeguard Young People Programme</td>
</tr>
<tr>
<td>TB</td>
<td>Tuberculosis</td>
</tr>
<tr>
<td>UNAIDS</td>
<td>Joint United Nations Programme on HIV/AIDS</td>
</tr>
<tr>
<td>UNESCO</td>
<td>United Nations Educational, Scientific and Cultural Organization</td>
</tr>
<tr>
<td>UNFPA</td>
<td>United Nations Population Fund</td>
</tr>
<tr>
<td>WHO</td>
<td>World Health Organization</td>
</tr>
<tr>
<td>YFHS</td>
<td>Youth-Friendly Health Services</td>
</tr>
</tbody>
</table>
Changing young people’s lives through progressive legislation

The winds of change are blowing strong in East and Southern Africa! Governments are assuming their obligations and duties under international, continental and regional commitments to respect, protect and fulfil the sexual and reproductive rights of adolescents and young people. A review of legal reforms, specifically around harmonizing laws and policies that affect the sexual and reproductive health and rights (SRHR) of adolescents and young people, shows tremendous progress across the region and this is truly commendable.

The UNFPA youth flagship programme - Safeguard Young People (SYP), in collaboration with SADC, the SADC Parliamentary Forum and other partners, has been a powerful driver of this advancement. Together, with the leadership of governments, parliaments and policymakers, and in collaboration with young leaders, we have undertaken six years of sustained advocacy.

A quick round-up of positive change shows that Malawi, Namibia, South Africa and Zimbabwe have used the SADC Model Law on child marriage to take critical steps towards eradicating this harmful practice and protecting adolescent girls. All four countries have domesticated the SADC Model Law on child marriage, while Mozambique used the Model Law in its new bill banning child marriage and setting the minimum age for marriage at 18.

In Botswana, smart advocacy by young activists succeeded in advocating for the inclusion of the close-in-age provision (commonly known as the Romeo and Juliet law) when the age of sexual consent went from 16 to 18 years, thus reducing the risk of criminalization of young people engaging in consensual sexual activity - a factor that limits their right to access services and information on Sexual and Reproductive Health and Rights.

Malawi, South Africa and Uganda have set the minimum age of consent to HIV testing and counselling at 12 years without parental consent. This provision ensures that all adolescents are aware of their HIV status, enabling them to access treatment and care services.

The caveat, of course, is that changing the law is only the initial step. Robust oversight mechanisms are required to ensure accountability and implementation of the newly endorsed reform. Communicating the new legislation to get broad buy-in, monitoring enforcement, and expanding the youth-friendly Sexual and Reproductive Health and Rights services that adolescents and young people need, is imperative.

While more needs to be done, the regional trend of adapting and applying useful legal strategies for the realization of the rights of adolescents and young people to Sexual and Reproductive Health Services and information, in line with their evolving capacities, is truly encouraging.

As we embark on the Decade of Action for Sustainable Development in line with the aspirations of Africa Agenda 2063, UNFPA continues to support regional economic communities, governments and partners, including young leaders, in the quest to realize our shared vision of a healthy, informed and empowered youth, capable of reaching their full potential.

Dr. Julitta Onabanjo
Regional Director
UNFPA East and Southern Africa
Regional Office
INTRODUCTION

About the study

In 2015, UNFPA ESARO commissioned a study on the Harmonization of the Legal Environment on Adolescents’ Sexual and Reproductive Health Rights (ASRHR). The study assessed the laws and policies that affect ASRHR in 23 East and Southern African (ESA) countries, and was updated in 2019.

An outcome of the study was the development of a regional legal framework that provides legal guidance to countries towards the harmonization of laws and policies relating to ASRHR and their alignment with international, continental and regional instruments. This document summarizes the study’s findings and the key recommendations for legal reform presented in the regional framework, which taken together, constitute useful tools to continue advancing the SRHR of adolescents and young people across the region and to build on the many positive developments that have taken place between 2015 and 2019 in ESA.

Methodology

The legal review was conducted in 2015 and updated in 2019 through a detailed perusal of various laws and policies, as well as a study of other frameworks that set out the legal environment for adolescent SRHR in ESA countries. Because the legislative and policy provisions that impact adolescent SRHR are multifaceted, the review identified themes of relevant laws and policies to guide the assessment of the different countries.

<table>
<thead>
<tr>
<th>Laws and policies were assessed against the following themes:</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>age of consent to sexual activity</strong></td>
</tr>
<tr>
<td><strong>age of consent to marriage</strong></td>
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<tr>
<td><strong>age of consent to health services</strong></td>
</tr>
<tr>
<td><strong>criminalization of consensual sexual acts among adolescents</strong></td>
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<td><strong>criminalization of HIV transmission</strong></td>
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<tr>
<td><strong>SRHR services for young people further left behind</strong></td>
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<tr>
<td><strong>cultural, religious and traditional practices that are harmful</strong></td>
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<tr>
<td><strong>learner pregnancy retention and re-entry laws and policies</strong></td>
</tr>
<tr>
<td><strong>provision of comprehensive sexuality education</strong></td>
</tr>
</tbody>
</table>

This study provides vital information that will help harmonize the law and policy environment affecting adolescent SRH across the region.
LEGAL FRAMEWORKS RELEVANT TO ADOLESCENT SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS

Regional

• African Charter on Human and People’s Rights (1981)
• Plan of Action on Sexual and Reproductive Health and Rights (2006)
• African Youth Charter (2006)
• Model Law on HIV in Southern Africa (2008)
• General Comments on Article 14 (1) (d) and (e) of the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (2012)
• The ESA commitment made by ministers of health and education in 21 ESA countries to scale up comprehensive sexuality education (CSE) and SRH services for adolescents and young people (2013)
• General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14.2 (a) and (c) of the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (2014)
• The Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage (2016)
• The SADC Strategy on Sexual and Reproductive Health and Rights (2019-2030)

International

• Universal Declaration of Human Rights (1948)
• International Covenant on Civil and Political Rights (1966)
• Convention on the Elimination of All Forms of Discrimination against Women (1979)
• Convention of the Rights of the Child (1989)
• International Conference on Population and Development (1994)
• General Comment No. 4 on Adolescent Health and Development in the context of the Convention on the Rights of the Child (2003)
• General Comment No. 20 on the Implementation of the Rights of the Child during Adolescence (2016)
• Framework of actions for the follow-up to the Programme of Action of the International Conference on Population and Development Beyond 2014
• Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/ General Comment No. 18 of the Committee on the Rights of the Child on harmful practices (2014)
### Overview of findings

The average age for sexual debut ranges across East and Southern Africa from 15 years in Angola and 16 in Mozambique to 19 years in Namibia and 20 in Burundi. Yet the laws on age of consent to sexual activity in the region do not necessarily reflect the reality. The majority of countries do not have a minimum age of consent to sexual activity clearly set out in their legislation. Consequently, the age of consent needs to be gleaned from a reading of sections that relate to criminal sexual activities. This makes it difficult for young people and communities to determine, with certainty, what the minimum legal age is.

In some countries where the age of consent is stated, the age of consent is lower for girls than for boys, which creates further barriers to accessing services and perpetuates discrimination and early girl child marriage.

### Age of consent to sexual activity for males and females

<table>
<thead>
<tr>
<th>Country/Region</th>
<th>Ages of Consent</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Comoros</strong></td>
<td>13</td>
</tr>
<tr>
<td>Eswatini, Lesotho, Malawi, Mauritius,</td>
<td></td>
</tr>
<tr>
<td>South Africa, Zambia</td>
<td>16</td>
</tr>
<tr>
<td>Namibia, Seychelles</td>
<td>14 +</td>
</tr>
<tr>
<td>Girls in DRC</td>
<td></td>
</tr>
<tr>
<td>Botswana, Burundi, Eritrea, Ethiopia,</td>
<td>18 +</td>
</tr>
<tr>
<td>Kenya, Mozambique, Rwanda, South Sudan,</td>
<td></td>
</tr>
<tr>
<td>Tanzania, Uganda</td>
<td></td>
</tr>
<tr>
<td>Boys in DRC &amp; Angola</td>
<td></td>
</tr>
</tbody>
</table>

### Proposed reform

**Recommendations in law:**
- 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 SRH services, including access to contraceptives.
- Consider narrowing the legal defences available to adults who engage in sexual activity with a child below the age of consent.
- Claiming that the child appeared older should not be considered sufficient grounds to justify unlawful behaviour.
- Harmonize the age of consent for both adolescent boys and girls: both should have the same minimum age.
• The legislation must include provisions that deal with the legal capacity of mentally disabled adolescents to consent to sex.

Recommendations in policy:
• Provide guidance on the recognition of the evolving capacities of adolescents and normative sexual development.

2. AGE OF CONSENT TO MARRIAGE

Overview of findings
Globally, more than one in four girls are married as children, before the age of 18. In East and Southern Africa, the share is 36 per cent married by age 18, while 10 per cent of girls are married by age 15. The combination of customary and statutory laws in many countries 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 seven countries have set the age of consent to marriage at 18 years, with no exceptions permitted. These countries are Democratic Republic of Congo, Eritrea, Kenya, Mozambique, Rwanda, South Sudan and Uganda. Recently Zimbabwe and Tanzania have been ordered by the courts to revise their ages of consent to 18 years, without exceptions.

Minimum age of consent to marriage

<table>
<thead>
<tr>
<th>Country</th>
<th>Minimum Age of Consent to Marriage</th>
</tr>
</thead>
<tbody>
<tr>
<td>ANGOLA</td>
<td>16 for boys, 15 for girls</td>
</tr>
<tr>
<td>BOTSWANA</td>
<td>18 for both sexes</td>
</tr>
<tr>
<td>BURUNDI</td>
<td>21 for boys, 18 for girls</td>
</tr>
<tr>
<td>COMOROS</td>
<td>18</td>
</tr>
</tbody>
</table>

- **ANGOLA**: In terms of the Angola Family Code:
  - With the permission of a person having authority over the minor, or, after review of circumstances and taking into account the minor’s best interests, the marriage appears to be in the best interests of the child in question.

- **BOTSWANA**: In terms of the Marriage Act of 2001:
  - With parental consent.

- **BURUNDI**: In terms of the Code of Persons and Family of 1993:
  - The provincial governor may grant an exemption for serious reasons.

- **COMOROS**: In terms of the Code de la Famille of 2005:
  - A competent judge who may perform a marriage may grant exemptions to age for serious reasons and if there is legitimate mutual consent of the intending spouses.

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2. In Mudzuru and Another v Minister of Justice, Legal and Parliamentary Affairs CCZ 12/2015 the Constitutional Court of Zimbabwe declared section 22(1) of the Marriage Act inconsistent with the Constitution insofar as it provides for an age of marriage that is below 18 years. A new law that will make the minimum age of consent to marriage 18 years without exception is in process.
3. In October 2019 the Court of Appeal confirmed the findings of the High Court that the provisions that allowed for marriage of children violated the rights of the said children: Attorney General v Rebeca Z Gyumi Civil Appeal 204 of 2017.
<table>
<thead>
<tr>
<th>Country</th>
<th>Law Reference</th>
<th>Age Requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Democratic Republic of</td>
<td>In terms of the revised Family Code and the Child Protections Code:</td>
<td>18 years for both partners</td>
</tr>
<tr>
<td>the Congo</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Eritrea</td>
<td>In terms of the Revised Family Code of 2000:</td>
<td>18 years for both partners</td>
</tr>
<tr>
<td>Eswatini</td>
<td></td>
<td>18 years for both partners</td>
</tr>
<tr>
<td>Ethiopia</td>
<td>In terms of the Revised Family Code of 2000:</td>
<td>18 years for both partners</td>
</tr>
<tr>
<td>Kenya</td>
<td>In terms of the Constitution of 2010:</td>
<td>18 years for both partners</td>
</tr>
<tr>
<td>Lesotho</td>
<td>In terms of the Constitution of 2010:</td>
<td>18 years for both partners</td>
</tr>
<tr>
<td>Madagascar</td>
<td>In terms of the Family Code Law of 2007:</td>
<td>18 years for both partners</td>
</tr>
<tr>
<td>Malawi</td>
<td>In terms of the Constitution of 1994:</td>
<td>18 years for both partners</td>
</tr>
</tbody>
</table>

**Kenya**

In terms of the Constitution of 2010:
Every adult has a right to marry a person of the opposite sex and an adult is defined as a person above 18 years.

In terms of the Child Act of 2001:
18 years is the age of consent.
Early marriage, that being a marriage or cohabitation with a child, is prohibited and subject to criminal sanctions.

**Lesotho**

In terms of the Marriage Act:
18 years for both partners

Where children are below the ages stated above, the Minister must give written permission for such a marriage.

**Malawi**

In terms of the Constitution of 1994:
18 years for both partners

With parental/guardian consent and Minister or Court may authorize where there is no parent or guardian.
The 2017 amendment of the Constitution has raised the age of minority from 16 years to 18 years to better protect Malawian children.

**Malawi**

In terms of the Revised Family Code of 2000:
18 years for both partners

The Minister of Justice may, on application of the future spouses or their parents or guardians, for serious cause, grant dispensation of not more than two years.
<table>
<thead>
<tr>
<th>Country</th>
<th>Law Reference</th>
<th>Age Requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mauritius</td>
<td>In terms of the Civil Code:</td>
<td>16–18 with parental consent or a person of authority. In the absence of parents or person of authority, the court can authorize.</td>
</tr>
<tr>
<td>Mozambique</td>
<td>In terms of the Family Law Act of 2004:</td>
<td>18</td>
</tr>
<tr>
<td>Namibia</td>
<td>The Marriage Act of 1961 was amended by the Married Persons Equality Act:</td>
<td>No exceptions.</td>
</tr>
<tr>
<td>Rwanda</td>
<td>In terms of the Civil Code of Rwanda:</td>
<td>A waiver of age for persons under 21 may, on serious grounds, be granted by the Minister of Justice, provided that such persons are over 18 years of age.</td>
</tr>
<tr>
<td>Seychelles</td>
<td>In terms of the Civil Status Act:</td>
<td>18, 15</td>
</tr>
<tr>
<td>South Africa</td>
<td>In terms of the Marriage Act of 1961:</td>
<td>14, 12</td>
</tr>
<tr>
<td>South Sudan</td>
<td>In terms of the Transitional Constitution of 2011:</td>
<td>18</td>
</tr>
<tr>
<td>Tanzania</td>
<td>In terms of the Law of Marriage of Tanzania:</td>
<td>18, 15</td>
</tr>
<tr>
<td>South Sudan</td>
<td>In terms of the Customary Marriages Act 120 of 1998:</td>
<td>The minimum age without parental consent is 18.</td>
</tr>
<tr>
<td></td>
<td>Minister can consent to the marriage of a boy above 14 or a girl above 12 years. Parental consent also required.</td>
<td></td>
</tr>
<tr>
<td>Tanzania</td>
<td>In terms of the Education Act of Zanzibar:</td>
<td>No enrolled learner may marry before completion of basic education.</td>
</tr>
</tbody>
</table>

*Note: In South Sudan, the minimum age without parental consent is 18.*

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*Ibid*
In Mudzuru and Another v Minister of Justice, Legal and Parliamentary Affairs CCZ 12/2015 the Constitutional Court of Zimbabwe declared section 22(1) of the Marriage Act inconsistent with the Constitution insofar as it provides for an age of marriage that is below 18 years. A new law that will make the minimum age of consent to marriage 18 years without exception is in progress.

**Proposed reform**

**Recommendations in law:**
- Set the minimum age of consent to marriage to 18 years, without exception and without differentiating between boys and girls.
- SADC countries to adopt the Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage.
- Prohibit and criminalize under the law the giving out of a child in marriage or the facilitation of a child marriage.
- Ensure that the minimum age of consent to marriage takes precedence over any cultural, traditional or religious customs and practices, and include a provision that acknowledges that child and forced marriages are harmful practices.
- Enact a rigorous birth registration system in order to ensure effective compliance with the minimum age of consent to marriage.
- Consider voidable any child marriage concluded before any law criminalizing child marriage came into operation.

**Recommendations in policy:**
- Develop comprehensive policies, such as poverty alleviation programmes, in order to address root causes of child and forced marriages.

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**UGANDA**

In terms of the Constitution of 1995:

- **18**

**ZIMBABWE**

In terms of the Marriage Act:

- **18**
- **16**

Parents or court may allow marriages below prescribed ages.

The Constitution of 2013:

- **18**

Provides for the right to marry a person of the opposite sex who is 18 and the right to found a family.

Furthermore, the Constitution provides that the marriage must be with free and full consent.

**ZAMBIA**

In terms of the Marriage Act:

- **16**

With parental consent and for marriages of persons below the age of 16 – only where a Judge of the High Court considers the marriage not to be against public interest and there was consent to the marriage.
3. AGE OF CONSENT TO HEALTH SERVICES

Overview of findings

Studies show that young people - and adolescent girls in particular - are most adversely affected by the HIV, AIDS and TB epidemics, as well as being exposed to a high prevalence of violence, trauma and injuries. For instance, in sub-Saharan Africa, young women aged 15 to 24 years are twice as likely as young men of the same age to be living with HIV. This underscores the immense need to eliminate barriers for this age group to access quality health services and medical treatment.

While some countries have policies that aim to enable access to SRH services for adolescents and young people regardless of age, these policies are not enough. Clear legislative provisions need to be in place that consider young people’s autonomy and evolving capacities.

The majority of countries in the region do not have clear laws and policies that determine the age of consent to medical treatment, including access to contraceptives, HIV counselling and testing, and abortions (where legal).

This can lead to confusion as to when young people may access medical treatment without a parent or guardian’s consent. This uncertainty also creates a barrier to accessing services. Health-care providers end up using personal discretion on ‘an appropriate age’ instead of practising within the legal framework.

Three countries (Malawi, South Africa and Uganda) have made legislative provision for the age of consent to HIV testing and counselling by setting the minimum age at twelve years. This best practice can be emulated by the rest of the region in order to reduce new HIV infections.

Proposed reform

Recommendations in law:

- Set the age of consent to 12 years for HIV testing and pre- and post-counselling without parental consent.
- Emergency measures should be included if parental consent cannot be obtained.
- Clearly state in additional provisions in legislation that health-care providers need to respect the views and opinions of the adolescent or young person accessing a service and respect their right to confidentiality.
- Base the age of consent on whether the adolescent is sufficiently mature to understand the risks, benefits and consequences of the medical treatment.
- The law should guide health-care providers on how they can assess these maturity levels.

Recommendations in policy:

- Create guidelines for the provision and institutionalization of SRH services.
- Develop a policy that sets out the benefits of access to adolescent SRH.

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4. CRIMINALIZATION OF CONSENSUAL SEXUAL ACTS AMONG ADOLESCENTS

Overview of findings

Some countries criminalize consensual sexual acts among adolescents without any exception or defences.\(^7\) In most cases, boys are convicted and sent to prison.\(^8\) The criminalization of consensual sexual activities among adolescents and young people is directly at odds with the approach set out in international treaties that recognize adolescents’ evolving capacities.

The criminalization of consensual sexual acts among adolescents is an impediment to their right to access SRHR services and leads to stigmatization of the normal sexual development of young people. In addition, it can delay or prevent young women from seeking contraception and lead to unintended pregnancies, HIV or other STIs.

Countries need to decriminalize consensual sexual acts among adolescents and focus instead on educative approaches that enable and empower young people to make informed choices about their SRHR and their needs.

Recent good practices

<table>
<thead>
<tr>
<th>Rwanda</th>
<th>South Africa</th>
<th>Botswana</th>
<th>Namibia</th>
</tr>
</thead>
<tbody>
<tr>
<td>Non-criminalization: According to Law No 68/2018, 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 law says that children between the ages of 14 and 18 who engage in consensual sex with each other, are not punished.</td>
<td>Close-in-age defence: In terms of the Sexual Offences Act: “A person (‘A’) who commits an act of sexual violation with a child (‘B’) who is 12 years of age or older but under the age of 16 years is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration or violation with a child, unless A, at the time of the alleged commission of such an act, was • 12 years of age or older but under the age of 16 years; or • either 16 or 17 years of age and the age difference between A and B was not more than two years.</td>
<td>Close-in-age defence: The amended Penal Code raises the age of consent to sex from 16 to 18 years. Thus, sex with a person below the age of 18 years, with that person’s consent or not, is an offence. The Penal Code makes provision for two exceptions. Consensual sexual activity is not an offence if: • It takes place between persons who are both under the age of 18 years; or • It takes places between a person who is not more than two years older that the other, i.e. a 17-year-old and a 19-year-old who have consensual sex.</td>
<td>Close-in-age defence: In terms of the Combating Rape Act: Consensual sexual acts with persons under the age of 14 are criminalized. However, there is a close-in-age defence of three years, meaning that only persons who are three years older than the victim will be convicted.</td>
</tr>
</tbody>
</table>

\(^7\) Kenya, Uganda and Zambia.

**Proposed reform**

**Recommendations in law:**

- Clearly set out the minimum age of consent to sexual activity and ensure that it aligns to the age of consent to SRH services, including contraception.
- Make provision for a close-in-age defence, whereby consensual sexual activity between adolescents who are close in age - when one adolescent is below the age of consent for sexual activity and the other is over the age of consent - is not criminalized. This is called the 'close-in-age defence'.
- Harmonize the age of consent for both boys and girls.
- Enact special provisions for adolescents whose legal capacities are diminished, such as those who are mentally challenged. These legal provisions should also include a clear definition of mental disability.

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### 5. CRIMINALIZATION OF HIV TRANSMISSION

**Overview of findings**

Most countries in the region have legislative provisions criminalizing the transmission of HIV or a disease that may explicitly cause death. Some, however, have laws protecting people living with HIV against discrimination.

There is no data indicating that the broad application of criminal law to HIV transmission will achieve either criminal justice or prevent HIV transmission. Rather, such application risks undermining public health and human rights. Because of these concerns, UNAIDS' urges governments to limit criminalization to cases of intentional transmission, e.g. where a person knows his or her HIV-positive status and acts with the intention to transmit HIV, and does in fact transmit it.

The majority of countries in the region criminalize infecting others with HIV, whether intentionally or through negligence. However, this 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 prevention, treatment, care and support services.

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

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Proposed reform

Recommendations in law:

• Decriminalize transmission with no exceptions or use existing criminal provisions to prosecute intentional transmission of HIV.

• Monitor application of the general criminal law focused on intentional transmission of HIV to ensure it is not used inappropriately.

• Redirect legislative reform and law enforcement towards addressing sexual and other forms of violence against women and 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.

Recommendations in policy:

• 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.

• Include educational and counselling programmes in policy to encourage early disclosure of the HIV status of a child born with the virus.

• Promote gender equality in education and employment and provide developmentally appropriate sexuality education that addresses relevant topics outlined in the UN International Technical Guidance, accommodates developmental diversity, and facilitates the internalization of sexual health messages.

6. SEXUAL AND REPRODUCTIVE HEALTH SERVICES FOR YOUNG PEOPLE FURTHER LEFT BEHIND

Overview of findings

In East and Southern Africa, there are an estimated 2.4 million sexually active adolescent girls (aged 15-19 years) who have an unmet need for family planning – this is expected to rise to 3.4 million by 2030 if access to family planning methods does not improve. The majority of countries in the region do not have provisions that clearly set out the rights of adolescents to access SRH services, despite regional and international commitments and treaties supporting SRHR.

In the majority of cases, there are noticeable gaps in the specific provisions for the protection of the SRHR of vulnerable adolescents and youth, including individuals with disabilities. There is a need for focused attention on adolescents and young people with disabilities, particularly in relation to their special needs. This also requires an understanding of the varied nature of disabilities – be they physical or mental disabilities.

In relation to lesbian, gay, bisexual, transgender and intersex (LGBTI) people, the most notable concern is the criminalization of same-sex relationships.

In some countries, homosexual acts committed in respect of minors are subject to increased penalties, irrespective of consent. Some countries specifically criminalize male homosexual acts, the inference being that sexual acts between females are excluded. This creates further barriers in accessing health information and services.

Young women and girls face significant discrimination, which results in a higher number of deaths and complications related to pregnancy, childbirth and unsafe abortion. The risk of dying during childbirth is twice as high for women aged 15 to 19 years as it is for women in their twenties. The lack of access to contraceptives and safe abortion, even where legal, drives many young women to have unsafe abortions in order to terminate unintended pregnancies, including

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pregnancies as a result of rape. This can be avoided through provisions that respond to their unique needs, including contraception, counselling, post-abortion care and safe abortions, where legal. Although the majority of countries criminalize abortion, some provide room for exceptions. The narrow and unclear legal exceptions for abortion are often at the discretion of health-care providers. This creates additional challenges for those who fall under the categories for which exceptions are made.

**Proposed reform**

**Recommendations in law:**

- Follow a rights-based approach in legislation, making it clear that any adolescent – no matter their status, orientation or background – has a right to access SRHR services and information.
- Address gender inequality and promote women’s rights to property, inheritance and custody so that there are fewer risks if they decide to disclose their status or leave a relationship.
- Ensure broader access to prevention services, such as contraceptives, to reduce recourse to abortion.
- Ensure abortion services, where legal, are not subject to minimum age of consent requirements or parental consent.
- Ensure availability of quality post-abortion care to all girls and young women.
- Integrate and scale-up youth-friendly health services, including confidential and voluntary HIV testing and counselling, HIV and STI treatment and care, voluntary family planning, safe abortion (where legal), post-abortion care, safe delivery, prevention of HIV and STI mother-to-child transmission and other related services for young people, in and out of school.
- Provide for the establishment of youth-friendly clinics, including proper resourcing from the State and setting norms and standards, including which services will be accessible, training of staff and confidentiality requirements.
- Amend laws that criminalize same-sex relationships to align with the SADC Model Law on HIV and AIDS.

**Recommendations in policy:**

- Promote SRH policies that improve access to family planning services as preventive action.
- Make provisions for adolescents and young people to report or obtain assistance if their SRHR are violated at an institution.
- Include strategies that educate and raise awareness among parents and communities to prevent stigmatization, prejudice and denial of health services to adolescents with disabilities as well as those who are HIV-positive, who engage in sex work, who are out of school, who inject drugs, who belong to the LGBTI community or who are associated with other sexual minority groups.
7. CULTURAL, RELIGIOUS AND TRADITIONAL PRACTICES THAT ARE HARMFUL

Overview of findings

Female genital mutilation (FGM) has been documented in many countries. The percentage of girls and women aged 15-49 years who have undergone FGM was highest in Eritrea (89%), Ethiopia (74%) and Kenya (27%), and lowest in Tanzania (15%) and Uganda (1%).

Efforts to do away with harmful cultural practices have been strengthened by the adoption of laws that criminalize practices such as FGM, particularly in East Africa. In 2019, the majority of countries in the East Africa region signed a declaration to eliminate FGM, as well as FGM that has cross-border dimensions.

Some countries have opted to include protection of children against harmful cultural practices in their constitutions and child-specific legislation, including raising the age of consent to marriage to eradicate forced and early marriages.

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.

Only 8 out of 23 countries have banned female genital mutilation

- Eritrea (2007)
- Ethiopia (2004)
- Tanzania (1998)
- Botswana (2009)
- South Africa (2000)
- Uganda (2010)

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Proposed reform

Recommendations in law:
- Explicitly prohibit cultural, religious and traditional practices that are harmful to the health of women, children, adolescents and young people, including, but not limited to FGM, virginity testing and child or forced marriage.
- Prohibit harmful practices and include effective enforcement mechanisms that empower the State to act against perpetrators.
- Resolve any conflict between legislation that prohibits harmful practices and religious or traditional laws, in favour of protecting women, children, adolescents and young people.
- Clearly ensure that male circumcision is conducted in safe and hygienic conditions by a trained professional.

Recommendations in policy:
- Include strategies that get greater buy-in from cultural, religious and traditional leaders to prevent harmful practices.
- Develop programmes to monitor compliance with legal prohibitions on harmful practices through existing human rights structures and institutions.

8. LEARNER PREGNANCY RETENTION AND RE-ENTRY LAWS AND POLICIES

Overview of findings

For many girls and young women, becoming pregnant means an end to an education. In fact, a five-country study in the region shows that less than 5 per cent of girls who drop out of school as a result of pregnancy, return.13 Keeping girls in school, despite pregnancy, is crucial to ensuring opportunities for a better life and future.

Only about half of the countries in the regional study have legislation and national policies on the management of learner pregnancy and re-entry after delivery. These countries are Botswana, Eswatini, Kenya, Malawi, Mozambique, Namibia, Rwanda, South Sudan, Tanzania, Uganda, Zambia and Zimbabwe.

However, the majority of those countries tend to approach learner pregnancy from a punitive perspective.14 This is clear from the policies that ban learners from returning to their former 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. An accommodating approach, which has general principles guided by a rights-based framework and considers an individual learner’s needs and circumstances, is more appropriate.

About half of countries (12 out of 23)

have prevention, management and re-entry legislation and policies on learner pregnancy but the majority of these countries tend to approach learner pregnancy from a punitive perspective.

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Proposed reform
Recommendations in law:
• Make it clear that pregnancy is not a disciplinary issue and that a non-punitive approach to pregnancy needs to be adopted.
• Provide for supportive re-entry of the pregnant learner to school after delivery, when the adolescent is ready.
• Make provisions that respect the privacy of the pregnant learner.
• Include measures for the retention of pregnant learners to continue their education until they are close to delivery.
• Obligate the school or institution to report to educator bodies and the ministry of education where pregnancy is caused by a teacher or other staff member.
• Make provision for disciplinary steps against teachers or principals who obstruct access to education for pregnant learners or refuse their re-entry after giving birth.

Recommendations in policy:
• Emphasize the importance of adolescents receiving adequate knowledge and life skills related to their sexuality.
• Include measures aimed at de-stigmatizing pregnancy among adolescents and use the opportunity to inform and educate other learners on the importance of obtaining services to prevent unplanned pregnancy.
• Pregnant learners need to be supported to continue their studies until as close as possible to delivery. They must also be referred to health and other related services.

9. PROVISION OF COMPREHENSIVE SEXUALITY EDUCATION
Overview of findings

The majority of countries in the region have diverse policies that indicate integration of comprehensive sexuality education (CSE) for in- and out-of- school youth. In particular, Angola, Botswana, Burundi, DRC, Eswatini, Kenya, Lesotho, Madagascar, Malawi, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Uganda, Zambia and Zimbabwe have CSE strategies for out-of- school youth. Additionally, ministers of health and education from 20 countries in the region have endorsed the East and Southern African Commitment, which has time-bound targets to scale up CSE and SRH services for 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 towards SRH. However, evidence shows that CSE increases knowledge of prevention of HIV and teenage pregnancy, improves condom use and empowers females to refuse sex. It has also been proven to delay initiation of first sex and significantly decrease the number of partners a young person has.

Proposed reform

Recommendations in law:
• Ensure the curriculum is rights-based and includes scientifically accurate information, as part of adolescent and young people’s right to health.
• Ensure that CSE is underpinned by principles of gender, self-determination and non-discrimination.
• Ensure the curriculum provides developmentally appropriate sexuality education that addresses relevant topics outlined in the *UN International Technical Guidance*, accommodates developmental diversity, and facilitates the internalization of sexual health messages.

Recommendations in policy:
• Set out the need for and benefits of CSE and the contribution it makes to reducing STIs, HIV and unintended pregnancy, based on scientific evidence.
• Align with the *UN International Technical Guidance* and regional commitments such as the *ESA Commitment*.
• Recognize the importance of delivering CSE not only in school settings but also through parents and communities that play a crucial role in educating adolescents about sexuality.
CONCLUSION

This study demonstrates the steady progress that has been made between 2016 and 2019 towards making young people’s well-being a priority through law and policy reforms. However, there is still a long way to go before full domestication of regional, continental and international commitments to ASRHR is adopted across all countries. Efforts need to go beyond amendments of Marriage Acts and Penal Codes, to taking brave steps that ensure that States’ legislation aligns and harmonizes with previously agreed standards to uphold adolescents’ and young people’s fundamental human right to sexual and reproductive health.

Age of consent to sexual activity

*Many countries in East and Southern Africa do not have the minimum age of consent to sexual activity clearly set out in legislation.*

There is a need for the enactment of unambiguous legislative provisions that provide for the recognized age of consent to sexual activity. This may assist to clarify that the age of consent is to protect young adolescents from sexual exploitation while ensuring harmonization with other ages of consent, such as age of consent to health services in line with the evolving capacity of adolescents. The criminalization of consensual sexual acts among adolescent needs to be revisited as it can be an impediment to accessing SRHR services and information.

Age of consent to marriage

*All 23 countries have set the age of consent to marriage. However, in some instances, there is disharmony between the legislative provisions and international standards, as well as between statutory and customary laws.*

The disharmony between legislative provisions and the failure of States to harmonize their legislative provisions with the *African Charter on the Rights and Welfare of the Child* leads in some instances, to the continued practice of child marriage, which has negative consequences on young girls, communities and society at large.

Age of consent to medical treatment

*In many countries, the age of consent to receive medical treatment, including access to contraceptives and HIV counselling and testing services, is not provided in legislation.*

The lack of a clear legal and policy framework can lead to confusion as to when young people may directly access health services without parental or other third-party consent. This uncertainty creates a barrier to accessing SRH services and leaves room for health-care providers to enforce their own belief systems regarding the appropriate age of consent. It is recommended that the ages be set out in legislation, and consequentially included in policies and other relevant national regulations.

**Criminalization of consensual sexual activity between adolescents**

*The criminalization of consensual sexual acts between adolescents remains a concern across the region.*

Criminalization of consensual sexual activity is at odds with the approach set out in international treaties, which recognize adolescents’ evolving capacities and promotes an educative approach. Countries should consider provisions that do not criminalize consensual adolescent sexual acts between peers, for example, through the inclusion of the so called “close-in-age defence” into national provisions.

**Criminalization of HIV transmission**

*The criminalization of infecting others with HIV is a further area needing revision across the region.*

While 11 out of 23 countries in the region have laws protecting people living with HIV against discrimination, criminalization of HIV transmission remains a concern. Currently, 17 out of 23 countries in the region criminalize the act of infecting others with HIV. Such provisions may or may not make any distinction between intentional or negligent acts of transmission and non-intentional ones. Countries need to be encouraged to revise these laws and do away with criminalization as it perpetuates stigma and could be an impediment to accessing SRHR services.

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18 UNFPA and other partners have developed a technical brief explaining the “Close in Age” provision and sharing some good practices from countries who have included it in their legislations.

19 Angola, Ethiopia, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, South Africa, Tanzania, Uganda and Zambia.
Harmful cultural practices

While some promising progress has been made with respect to the criminalization of harmful cultural practices, there is a need to ensure that legislative provisions translate into practice, to ensure that those who commit such offenses are brought to book. Legislation should explicitly prohibit cultural, religious or traditional practices that are harmful to the health of women, adolescents and young people. Implementation of such legislation should be prioritized, and enforcement measures should accompany law reforms in this area.

Sexual and reproductive health and rights of young people further left behind

Very few countries in the region have enacted laws and policies that protect young people further left behind.

The lack of provisions for young people further left behind creates a barrier to accessing sexual and reproductive health services, which in turn creates obstacles for the achievement of universal access to SRHR. Laws and policies should address the different categories of vulnerable adolescents and implement strategies to eliminate discrimination and ensure access to services and information by all. This includes identifying adolescents with disabilities, youth living with HIV, young sex workers, youth out-of-school, young LGBTIs and those who associate with sexual minorities. Nuanced and comprehensive provisions of services and information are needed to address the needs of each of the identified categories of adolescents.

Learner pregnancy retention and re-entry law and policy

Only about half of the countries in the region have legislation and policies governing the management of learner pregnancy and re-entry to school after delivery. Where these exist, the policies tend to approach learner pregnancy from a punitive perspective.

There is a need to emphasize the importance of the right to education as an empowering human right. Excluding learners simply on the grounds that they are pregnant limits the potential of young people and perpetuates gender inequality, which affects the individuals as well as their communities. States need to realize the right to education for pregnant learners and hold school officials accountable for exclusion and refusal of re-entry.

Provision of comprehensive sexuality education (CSE)

Although the majority of the countries have provisions in their diverse policies indicating that CSE is a fundamental component of the life skills curriculum, only some appear to have aligned the curricula to international standards.

Every country is diverse and has religious, moral and traditional nuances that may influence how CSE is taught in its schools. However, these should not prevent the revision of existing curricula to incorporate core topics that enable young people to make informed choices in line with the ESA Ministerial Commitment to SRHR. This is also relevant for young out-of-school people who need to access CSE information and related services even though they are no longer in the formal education system.
Delivering a world where every pregnancy is wanted, every childbirth is safe and every young person’s potential is fulfilled