

HARMONIZATION OF MINIMUM AGES AND ADOLESCENT SEXUAL AND REPRODUCTIVE HEALTH RIGHTS

Consent to sex, marriage, and access to sexual and reproductive health services in East and Southern Africa

This technical brief provides an overview of age of consent when it comes to sex, marriage, and access to sexual and reproductive health services in East and Southern Africa (ESA). In particular, this technical brief will explain why harmonization of ages of consent to sex, to health services and to marriage means setting different ages of consent.

Minimum ages of consent do not need to be made the same for marriage, for sex and for access to sexual and reproductive health and rights. This is because these minimum ages of consent serve different purposes and need to be understood from that starting point. In the case of marriage, the minimum age of consent advocated for is 18 years without exceptions, as per international standards. This aims to guard against minors being given out in marriage without their consent and to prevent the disruption of their schooling. In terms of sexual activity, the age of consent is set to protect adolescents against adults who may prey on them but also recognizes that with their evolving capacity, adolescents should be able to consent to sexual activity, especially as they approach their 18th birthday.¹



Access to sexual and reproductive health services is crucial for adolescents and therefore the age at which adolescents may access services should not be set unreasonably high, as it impedes access to preventative services such as HIV testing, information and/or contraceptives when needed.

It also prevents access to sexual and reproductive health information and opportunities to instill health and wellbeing through a life course approach starting from puberty.

This document aims at supporting national legal reforms pertaining to adolescent sexual reproductive health rights and therefore, it can be utilized by decision makers, law drafters and human rights defenders.

This is a useful tool that operationalizes international and continental standards with the intent to advance 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.

¹ UNICEF, Age Matters! Exploring age-related legislation affecting children, adolescents and youth, Youth Policy working paper, 2016. Available at <http://www.childrenandaid.org/sites/default/files/2018-11/Age%20Matters%20-%20Exploring%20age-related%20legislation%20affecting%20children%20adolescents%20and%20youth.pdf>

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MINIMUM AGE OF CONSENT TO MARRIAGE

International and Continental Legal Framework

- **The Universal Declaration on Human Rights (UDHR)** provides in Article 16 that **men and women of full age** have the right to marry and found a family, and are entitled to equal rights as to marriage, during marriage and at its dissolution. Furthermore, that marriage shall be entered into only with **free and full consent** of the intending parties.
- **The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)** provides, in Article 16(1), that **men and women have equal rights** to enter into a marriage; that they have the same right to **freely choose a spouse**, and to enter into marriage only with their **free and full consent**. More importantly, Article 16(2) of CEDAW states that the **betrothal and marriage of a child shall have no legal effect**, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage.
- **The African Women's Protocol to the African Charter on Human and Peoples' Rights** calls on States Parties to ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. Article 6 specifically provides that **appropriate national legislative measures** should be taken to guarantee that:



the minimum age of marriage for women shall be 18 years;



no marriage shall take place without the free and full consent of both parties;



monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships, are promoted and protected; and



every marriage shall be recorded in writing and registered in accordance with national laws, in order to be legally recognized.

- The **African Charter on the Rights and Welfare of the Child** provides for the protection of children against harmful social and cultural practices in Article 21. Article 21(2) provides that child marriage and the betrothal of girls and boys should be **prohibited** and that effective action, including legislation, should be taken to specify the minimum age of marriage to be 18 years and make **registration of all marriages in an official registry compulsory**.

In East and Southern Africa, only nine countries - Botswana, Eritrea, Kenya, Malawi, Mozambique, Rwanda, South Sudan, Uganda and Zimbabwe - have set the minimum age of consent to marriage at 18 years or over, with no exceptions permitted. Rwanda's minimum age of consent to marriage is 21, without exceptions. Elsewhere, the majority of ESA countries allow exceptions to the minimum age of consent to marriage (generally set at 18), or have different ages of consent for boys and girls, with the age for girls being lower than that for boys.

The **Southern African Development Community (SADC) Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage**, provides a common framework to end child marriage and protect children already in marriage, for law-makers, policy-makers, service providers and civil society across the SADC region. It has the potential to trigger law and/or policy reform on child marriage in SADC Member States by providing an easy-to-apply regional standard and to promote cohesion among SADC Member States' in relation to their legal response to child marriage. The relevant sections are referenced below:

"Child" means every human being below the age of 18 years, and the word "children" shall be construed accordingly;

"minimum age of marriage" means the age of 18 years or such older age as the Constitution or law of a Member State may specify, without exception or gender discrimination.

Section 16. Minimum age of marriage and contractual capacity

From the commencement of the law, a person under the minimum age of marriage has no capacity to consent to a marriage or contract a marriage, and any marriage purportedly entered into or solemnized is a prohibited marriage and void.

Section 17. Prohibition of child betrothal and marriage

- (1) From the commencement of the law -
 - (a) the betrothal of a child is prohibited;
 - (b) a marriage between a child and an adult or between two children is prohibited; and
 - (c) a person shall not contract, solemnize, abet or aid, promote, permit, coerce or force the betrothal or marriage of a child.
- (2) A person, other than a child, who contravenes subsection (1), commits an offence and shall be liable, on conviction, to a fine not exceeding [insert amount] or to a term of imprisonment not exceeding [stipulate the length of prison term], or to both. *(insert offence and penalty clause according to the style used in, and sentencing policy of, Member State)*

- (3) Where it is proved to a court that a child was, at the time the betrothal or marriage was contracted, living or dependant on a person, the court shall consider the parental relationship as an aggravating circumstance. *(This provision may need to be amplified to make clear in some jurisdictions that the penalty imposed shall be higher/stiffer)*

Section 19. Voidable child marriage

- (1) Every child marriage contracted before the commencement of the law shall be voidable at the option of-
- (a) one party or both parties to the marriage, where one party was a child or both parties were children at the time the marriage was contracted;
 - (b) a child to the marriage, where the child is married to an adult person;
 - (c) an adult person to the marriage, where the adult person is married to a child;
 - (d) one party or both parties to the marriage, where both parties to the marriage are children; or
 - (e) a third party, in consultation with an appropriate authority, in any of the circumstances specified in paragraphs (a) to (d).
- (2) A court shall, on petition of a child, adult person or third party referred to in subsection (1), dissolve/annul the marriage that was contracted before the commencement of the law.
- (3) The Chief Justice *(or relevant state authority)* shall prescribe rules for the procedures and processes relating to the dissolution/annulment of a voidable child marriage. *(These rules and procedures may be prescribed in the law itself).*

In early 2016, in the case of *Mudzuru and Another v Minister of Justice, Legal and Parliamentary Affairs CCZ 12/2015*¹ 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. The Zimbabwe Marriages Bill, 2019, provides a further example of best practice:

Minimum age of marriage²

- (1) No person under the age of eighteen years may contract a marriage or enter into an unregistered customary law marriage or a civil partnership.
- (2) For the avoidance of any doubt, it is declared that child marriages are prohibited and under no circumstances shall any person contract, solemnise, promote, permit, allow or coerce or aid or abet the contracting, solemnising, promotion, permitting, allowing or coercion of the marriage, unregistered customary law marriage, civil partnership, pledging, promise in marriage or betrothal of a child.

Recommendations

- Legislation should set the minimum age of consent to marriage at 18 years, without exceptions including customary law marriages.
- The legislation relating to consent to marriage must not differentiate between boys and girls in respect of the minimum age to consent to marriage.
- The legislation must provide that free and personal consent to marriage must be given by the persons entering into the marriage.
- The legislation should set up a regulatory system to register all marriages.
- Legislation must include a provision that the law setting the minimum age of consent to marriage at 18, without exceptions, takes precedence over any cultural, traditional or religious customs and practices and should include a provision that child, early and forced marriage is a harmful cultural, social or religious practice.
- Legislation must include a provision that places a duty on all persons with knowledge to report any purported marriage where one or both parties to such marriage is below the minimum age of consenting to marriage.
- The giving out of a child in marriage or facilitating a child marriage should be punishable under the law.
- Child marriages that were concluded before any law criminalizing child marriage came into operation should be considered voidable at the instance of an aggrieved party to any such marriage.
- A rigorous birth registration system is essential to ensure effective compliance with the minimum age of consent to marriage. It is essential to prove an adolescent's age in order to protect him or her against early marriage.



- (3) Any person, other than the child concerned, who contravenes subsection (2), shall be guilty of an offence and liable to a fine not exceeding level 10 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

- (4) It shall be an aggravating factor in an offence referred to in subsection (3) that the contravention was by a parent or a person in loco parentis to the child concerned."

¹ Available at <http://old.zimlil.org/zw/judgment/child-marriage/2016/12>.

² This technical brief recognizes as good practice all the provisions as defined in the SADC Model Law on Child Marriage

MINIMUM AGE OF CONSENT TO SEX

International and Continental Legal Framework

The United Nations Committee on the Rights of the Child (CRC) - Adolescent Health General Comment No.4 sets out guiding principles on adolescent sexual health and provides, among other things, that:

- Appropriate guidance must be given in the exercise of rights, which entails to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the Convention; and
- Legal and judicial measures and process, which in the context of the rights of adolescents to health and development, are required to be put in place by States Parties to ensure that specific legal provisions are guaranteed under domestic law, including with regard to setting a minimum age of consent to sex.

The Eastern and Southern Africa Ministerial Commitment on Comprehensive Sexuality Education and Sexual and Reproductive Health Services for Adolescents and Young People urges the relevant ministers to review – and where necessary amend – existing laws and policies on the age of consent to sex, child protection and teachers’ codes of conduct to improve independent access to sexual and reproductive health services for adolescents and young people, as well as for protecting children.

Table 1: Variations of minimum age of consent to sex set by countries in East and Southern Africa.

Note: Where sexual acts with adolescents below a certain age are criminalized, we have assumed that this is the age of consent, even if it is not specifically stated.

COUNTRY	MINIMUM AGE OF CONSENT TO SEX	
ANGOLA	In terms of the Angolan Penal Code, the age of consent is 18 (boys) and 16 (girls).	
BOTSWANA	The Penal Code was amended in 2018, and the age of consent has been raised from 16 to 18 years for boys and girls.	
BURUNDI	The law considers as rape any sexual activity involving an adolescent under 18 and an adult, even with the consent of the adolescent.	
DRC	The age of consent is 18 for boys and 14 for girls.	
ESWATINI	Sexual Offences and Domestic Violence Act 15 of 2018 sets the age of consent at 18.	
ETHIOPIA	In terms of the Criminal Code, the age of consent is 18.	
KENYA	In terms of the Sexual Offences Act, the age of consent is 18.	
LESOTHO	In terms of the Sexual Offences Act, sexual acts with a minor under the age of 16 are criminalized.	
MADAGASCAR	In terms of the Penal Code, indecent assault of a girl under the age of 14 is criminalized.	
MALAWI	In terms of the Penal Code, sexual activity with a person under the age of 16 is criminalized.	
MAURITIUS	According to the Criminal Code, sexual intercourse with a person under 16 is criminalized.	
MOZAMBIQUE	In terms of the Penal Code, female rape and engaging in sexual intercourse with a girl below the age of 18 is criminalized.	
NAMIBIA	According to the Combating Rape Act, the age of consent is 14.	
RWANDA	In terms of Law 27/2001, sexual relations with a person under the age of 18 is criminalized.	
SEYCHELLES	The age of consent is 18.	
SOUTH AFRICA	In terms of the Sexual Offences and Related Matters Act of 2007, the age of consent is 16.	
SOUTH SUDAN	Consent of a person under 18 to sexual intercourse or carnal knowledge is not valid.	
TANZANIA	In terms of the Tanzania Penal Code, as amended by the Sexual Offences Special Provisions Act, the age of consent is 18 for girls.	Indecent assault of boys under 15 is criminalized and this gives the impression that the age of consent for boys is 15.
	It is a defence that the person was your wife, provided she is at least 15 years of age.	In terms of the Penal Code of Zanzibar, the age of consent is 18 for girls regardless of consent, unless the person is your wife and has reached puberty.
UGANDA	In terms of the Penal Code, the age of consent is 18.	
ZAMBIA	In terms of the Penal Code, defilement of girls under the age of 16 is criminalized, thus the age of consent is 16 for girls.	
ZIMBABWE	In terms of the Sexual Offences Act, sexual acts with a young person, defined as a person under 16, is criminalized.	

Recommendations

- The law should state clearly the minimum age of consent to sexual activity and should be gender neutral.
- Research indicates that the median age of sexual debut in the East and Southern Africa region is between 15 and 19 years with a significant proportion indicating sexual debut below the age of 15.³ It is recommended that the age of consent to sexual activity is set at 16. If the age of consent is set too high, there is a risk that normative and age-appropriate sexual activity between consenting adolescents will be criminalized.
- The law should include provisions that deal with the legal capacity of mentally disabled adolescents to consent.
- States should consider narrowing the legal defences available to adults who engage in sexual activity with a minor below the age of consent, e.g. that it is not sufficient to claim the minor appeared older or that the minor was a sex worker. There should be additional requirements to establish a defence.
- Legislation dealing with the minimum age of consent to sexual activity should define the actions included in sexual activity and should be clear that sexual activity is not limited to penetration. The definitions should include coverage of the customary law implications of practices that adolescents engage in.
- The law should not criminalize consensual sexual conduct between adolescents of similar age but must set an absolute minimum age under which a child does not have any capacity to consent. Alternatively, the law should include a defence for consensual sexual conduct between adolescents who are **close in age**.



Best practice example:

Section 61(1) read with section 70 of the **Zimbabwean Criminal Law (Codification and Reform) Act** states as follows:

“61. Interpretation in Part III of Chapter V(1) In this Part- “young person” means a boy or girl under the age of sixteen years.

70. Sexual intercourse or performing indecent acts with young persons

(1) Subject to subsection (2), any person who—

- (a) has extra-marital sexual intercourse with a young person; or
 - (b) commits upon a young person any act involving physical contact that would be regarded by a reasonable person to be an indecent act; or
 - (c) solicits or entices a young person to have extra-marital sexual intercourse with him or her or to commit any act with him or her involving physical contact that would be regarded by a reasonable person to be an indecent act;
- shall be guilty of sexual intercourse or performing an indecent act with a young person, as the case may be, and liable to a fine not exceeding level twelve or imprisonment for a period not exceeding ten years or both.

(2) It shall be no defence to a charge of sexual intercourse or performing an indecent act with a young person to prove that he or she consented to such sexual intercourse or indecent act.

(3) It shall be a defence to a charge under subsection (1) for the accused person to satisfy the court that he or she had reasonable cause to believe that the young person concerned was of or over the age of sixteen years at the time of the alleged crime: Provided that the apparent physical maturity of the young person concerned shall not,

on its own, constitute reasonable cause for the purposes of this subsection.

(4) For the avoidance of doubt—

- (a) the competent charge against a person who—
 - (i) has sexual intercourse with a female person *below the age of twelve years*, shall be rape; or
 - (ii) commits upon a female or male person *below the age of twelve years any act referred to in subsection (1) of section sixty-six*, shall be aggravated indecent assault;
 - (iii) commits upon a female or male person *below the age of twelve years any act involving physical contact* (other than an act referred to in subsection (1) of section sixty-six) that would be regarded by a reasonable person to be an indecent act, shall be indecent assault;
 - (iv) without the consent of a female person of or *above the age of twelve years but below the age of sixteen years*, has sexual intercourse with that female person, shall be rape; or
 - (v) without the consent of a female or male person of or *above the age of twelve years but below the age of sixteen years*, commits upon that female or male person any act referred to in subsection (1) of section sixty-six, shall be aggravated indecent assault;
 - (vi) without the consent of a female or male person of or *above the age of twelve years but below the age of sixteen years*, commits upon that female or male person any act involving physical contact (other than an act referred to in subsection (1) of section sixty-six) that would be regarded by a reasonable person to be an indecent act, shall be indecent assault; and not sexual intercourse or performing an indecent act with a young person;”

³ Ferry, B et al “Comparison of key parameters of sexual behaviour in four African urban populations with different levels of HIV infection.” AIDS August 2001, Vol 15, p S41 - S50; Zaba B et al “Age at first sex: Understanding recent trends in African demographic surveys.” Sexually Transmitted Infections 2004, Vol 80, p ii28 - ii35.

ACCESS TO SEXUAL AND REPRODUCTIVE HEALTH SERVICES

International and Continental Legal Framework

- The United Nations General Comment on Adolescent Health and Development, in the context of the Convention on the Rights of the Child is, inter alia, grounded on the principle that States Parties are required to ensure that specific legal provisions are guaranteed under domestic law, including with regard to setting a minimum age for sexual consent, marriage and the possibility of medical treatment without parental consent.
- Insofar as States Parties' responsibilities are concerned, Paragraph 41 of the Adolescent Health General Comment states that, in accordance with Articles 24, 39 and other related provisions of the Convention, States Parties should provide health services that are sensitive to the particular needs and human rights of all adolescents, paying attention to the following characteristics:
 - **Availability.** Primary health care should include services sensitive to the needs of adolescents, with special attention given to sexual and reproductive health and mental health;
 - **Accessibility.** Health facilities, goods and services should be known and easily accessible (economically, physically and socially) to all adolescents, without discrimination;
 - **Acceptability.** While fully respecting the provisions and principles of the CRC, all health facilities, goods and services should respect cultural values, be gender-sensitive, be respectful of medical ethics, and be acceptable to both adolescents and the communities in which they live;
 - **Quality.** Health services and goods should be scientifically and medically appropriate, which requires the provision of personnel trained to care for adolescents, adequate facilities, and scientifically accepted methods.
- In terms of the Framework of Action for the follow-up to the Programme of Action of the International Conference on Population and Development beyond 2014:
 - States should fund and develop, in partnership with young people and health-care providers, policies, laws and programmes that recognize, promote and protect young people's sexual and reproductive health and rights and lifelong health. All programmes serving adolescents and youth, whether in- or out- of- school, should provide for referral to reliable, quality sexual and reproductive health counselling and services.
 - States to remove legal, regulatory and policy barriers to sexual and reproductive health services for adolescents and youth, and ensure information and access to contraceptive technologies; prevention, diagnosis and treatment for sexually transmitted infections and HIV, including the HPV vaccine; and referrals to services dealing with other health concerns such as mental health problems.
- Under the ESA Ministerial Commitment on Comprehensive Sexuality Education and Sexual and Reproductive Health Services for Adolescents and Young Persons in Eastern and Southern Africa, the Ministers of Education and Health of 20 ESA countries in 2013 committed, inter alia, to integrate and scale up youth-friendly HIV and SRH services that take into account social and cultural contexts to improve age-appropriate access to and uptake of high-quality SRH services and commodities, including condoms, contraception, HPV vaccine, HIV counselling and testing (HCT), HIV/STI treatment and care, family planning, safe abortion (where legal), post-abortion care, safe delivery, prevention of mother-to-child transmission (PMTCT) and other related services for young people in - and out of - school.
- The Southern African Development Community (SADC) has approved a Regional Strategy for Sexual and Reproductive Health and Rights (SRHR) 2019–2030. This strategy is intended to meet the SRHR needs of all people in the SADC region including adolescent girls and young women, boys, key populations.⁴ One of the key principles of this regional strategy is that countries must follow a youth-facing and youth-friendly approach so that the region will capitalize on the demographic dividend and involve those most affected in matters that affect their own health and well-being and accelerate its economic and social development. Countries in the SADC region are called on to create an enabling environment for adolescents and young people to make healthy sexual and reproductive choices that enhance their lives and well-being.

⁴ The Regional Strategy for Sexual and Reproductive Health and Rights (SRHR) 2019–2030 states that key populations include sex workers, people who inject and use drugs, prisoners, MSM and LGBTQI, Migrants, Refugees, Mobile Populations, People living with Disabilities and victims of sexual exploitation. [Page 26]

Recommendations

- The age of consent to seek and receive medical treatment without parental consent should be set at 12 years of age.
- Access to information on SRHR and services should be available to adolescents from 10 years of age.⁵
- Health service providers must be legislatively obliged to respect the views and opinions of an adolescent lawfully accessing a service.
- The legislation must make a clear distinction between medical treatment and surgical operations or other major medical procedures. There must be a differentiation between medical treatment that a minor can access at the age of 12 without parental consent and major medical procedures for which the minor needs the consent of a parent or guardian.
- Progressive policies that aim to secure access to SRHR services for adolescents should be reflected in national legislation. Countries should seek to align progressive policies and legislation to ensure the implementation of and access to SRHR services.
- The age of consent to seek and receive HIV testing and treatment should possibly be separate from consent to other forms of medical treatment in order to broaden access to HIV testing and treatment.
- The law can qualify the age of consent to medical treatment by setting a requirement that the adolescent must have sufficient maturity to understand the risks, benefits and consequences of the medical treatment. The law should be careful not to give health service providers a loophole to refuse medical treatment based on this requirement.
- There should 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 age of consent to seek and obtain contraceptives without parental consent should be set below 18 years.
- The adolescent's right to confidentiality regarding any medical treatment or medical condition, including SRHR services, must be explicitly protected in legislation.

Best practice:

The Lesotho Children's Protection and Welfare Act 2011 provides at:

Section 232(2):

A child may consent to medical treatment provided the child is -

- (a) at least 12 years of age; and
- (b) of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment or operation.

Section 233(2):

Consent for HIV test on a child may be given by -

- (a) the child, if the child is 12 years or older.

The South African Children's Act 38 of 2005 includes provisions on consent to medical treatment and surgical procedures, HIV testing and counselling, and access to contraceptives:

Section 129

(2) states that a child may consent to his or her own medical treatment or to the medical treatment of his or her child if -

- (a) the child is over the age of 12 years; and
- (b) the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment.

(3) A child may consent to the performance of a surgical operation on him or her or his or her child if -

- (a) the child is over the age of 12 years; and
- (b) the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the surgical operation; and
- (c) the child is duly assisted by his or her parent or guardian.

Section 134 states that:

(1) No person may refuse -

- (a) to sell condoms to a child over the age of 12 years; or
- (b) to provide a child over the age of 12 years with condoms on request where such condoms are provided or distributed free of charge.

(2) Contraceptives other than condoms may be provided to a child on request by the child and without the consent of the parent or caregiver of the child if -

- (a) the child is at least 12 years of age;
- (b) proper medical advice is given to the child; and
- (c) a medical examination is carried out on the child to determine whether there are any medical reasons why a specific contraceptive should not be provided to the child.

(3) A child who obtains condoms, contraceptives or contraceptive advice in terms of this Act is entitled to confidentiality in this respect, subject to section 105.

⁵ WHO recommendations on adolescent sexual and reproductive health and rights (<https://apps.who.int/iris/bitstream/handle/10665/275374/9789241514606-eng.pdf?ua=1>) that refers to adolescents aged 10-19.

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