



WORKING WITH CHILDREN AND YOUNG PEOPLE WHO ARE SEXUALLY ACTIVE

MULTI AGENCY PRACTICE GUIDANCE

DOCUMENT CONTROL

Author	Aberdeen City CPC Operational Subcommittee (from a preceding document prepared by NESCPC)
Governance	Aberdeen City Child Protection Committee
Effective date	1 August 2017
Review Date	1 August 2019

CONTENTS PAGE

1	Purpose	3
2	Background	3
3	Context	4
	3.1 Definition of a Child.....	4
4	Principles of Practice	5
	4.1 All practitioners and agencies have a duty of care to:.....	5
	4.2 The UN Convention of the Rights of the Child	5
5	Making Assessments	7
	5.9 Issues to Consider	8
6	Possible Courses of Action	11
7	Professional Responsibilities	12
	7.2 Health Staff	12
	7.3 Other Staff including Education	13
	7.4 Police and Social Work Staff.....	13
8	Summary of Key Points	13
 Appendices		
	Appendix 1 - Section 4 of the Sexual Offences Act (Amendment) Act 2000 .	15
	Appendix 2 -The Law: The Criminal Law (Consolidation) Act 1995.....	17
	Appendix 3 - Legal Age of Capacity	20

1. Purpose

- 1.1 This guidance has been drawn up in recognition that there is a significant number of children and young people, who through their own behaviour, or as a consequence of others behaviour towards them, are at considerable risk. The intention is to give guidance on the assessment, decision making and co-ordination of a multi-agency response to the complex needs of this group of children and young people.
- 1.2 This guidance is also relevant for all practitioners who work with young people with disabilities. Young people with disabilities have the same rights as everyone else in this age group to information, services, confidentiality etc. These young people are also at greater risk of abuse because of their disability. They may be particularly vulnerable to coercion due to physical dependency or because a learning or sensory disability impairs their ability to communicate.
- 1.3 This guidance is intended to mirror and complement existing [child protection guidance](#).

2. Background

- 2.1 This guidance recognises the different roles and responsibilities that agencies have in relation to sexually active young people. Advice should not be given or services provided unless staff are appropriately qualified and trained. Young people should be signposted to the most appropriate service. All concerns should be referred to line managers as appropriate.
- 2.2 The Sexual Offences (Scotland) Act 2009 (the Act) maintains the age of consent at 16 years and redefines sexual offences against and between children. It defines a significant difference between a 'young child' and an 'older child'. The Act makes it clear that any sexual activity between an adult and any child constitutes a criminal offence and sexual intercourse and oral sex between children under the age of 16 years also remains unlawful. However, research indicates that many 'older children' are becoming sexually active before the legal age of 16 years and they are engaging in a range of sexual behaviour with almost 30% of young men and 26% of young women reporting having had intercourse before their 16th birthday.
- 2.3 It is now well established that increasing numbers of young people are engaging in a range of sexual activity before the age of 16 years. For some this will be a mutually agreed activity: for others it may be the response to peer pressure or the result of abuse or sexual exploitation. Some young people may not recognise that they are in an exploitative relationship. Children may be lured into sexual activity because of a range of issues, which may include abuse, family breakdown and conflict, low self-esteem, substance misuse and truancy. All will therefore have differing needs which requires sensitive and appropriate responses from practitioners and services tasked with the care of children and young people.

- 2.4 The inconsistency of approach to issues relating to sexuality causes confusion and conflict, not just for children and young people and those caring for them, but also for the wider societal response of those around them.
- 2.5 Children may be exposed to sexual imagery from an early age through the media and this may result in young people being given confusing and often distorted messages about relationships and gender roles. Research indicates that young people struggle with sexual health and relationship issues and are wary of seeking advice or help because they fear the consequences of sharing such issues with an adult.

3. Context

3.1 Definition of a Child.

The UN Convention on the Rights of a Child defines children as “all persons less than 18 years of age, unless the legal age of majority in a country is lower.”

Under Common Law in Scotland a child is someone under the age of 16.

The Lord Advocate’s Guidelines to Chief Constables – Reporting to Procurators Fiscal of Offences Alleged to Have Been Committed by Children¹ (COPFS 2010) provides guidance on the categories of offences that require to be jointly reported to Crown Office and Procurator Fiscal Service (COPFS) and to the Scottish Children’s Reporter Administration (SCRA). The guidelines outline the expected responses of police in relation to the reporting of various crimes and offences **committed by children**, including offences contrary to the Sexual Offences (Scotland) Act 2009.

For the purposes outlined above, a child is defined as:

- A child who has not attained the age of 16 years,
- A child over the age of 16 years who has not attained the age of 18 years and in respect of whom a supervision order is in force, or
- A child whose case has been referred to a Children’s Hearing by virtue of Section 66 of the Children’s (Hearing) Scotland

Section 30² of the *Sexual Offences (Scotland) Act 2009*, creates an offence for a person who has attained the age of 16 to engage in sexual activity with or towards an ‘older child’.

Section 37 of the *Sexual Offences (Scotland) Act 2009*, specifically deals with ‘older children’ engaged in sexual contact with each other and creates an

² Section 30, Sexual Offences (Scotland) Act 2009, along with all other offences against ‘older children’, are outlined in full in Appendix A

offence for either 'older child' where there is consensual penetrative or oral sexual intercourse.

Section 39 of the [Sexual Offences \(Scotland\) Act 2009](#), provides a possible defence where there is a maximum of 2 years proximity in age. This allows for some leniency and helps ensure that young people aged 16 and 17 years are not disproportionately criminalised for engaging in consensual sexual activity.

- 3.2 It is acknowledged that consensual sexual activity in itself is not unlawful when both parties are over the age of 16. However, this guidance may be of assistance to practitioners making assessments of vulnerable young people between the ages of 16 - 17 years who may be placing themselves at risk or who are at risk. It should also be noted that sexual activity with a young person under the age of 18 by a person in a position of trust is unlawful. (see Appendix 1).

4. Principles of Practice

4.1 All practitioners and agencies have a duty of care to:

- Ensure that children and young people are given information and access to services to enable them to safeguard their health;
- Appropriately assess information about the nature and circumstances of any sexual activity that comes to their attention;
- Know their limitations – practitioners should not give advice, provide services or make assessments that they are not competent to provide. It may be appropriate to signpost the young person to another service or agency.

- 4.2 **The UN Convention on the Rights of the Child.** This guidance recognises that young people are rights holders and, according to their evolving capacities, they can progressively exercise their rights to promote their health and development. As a consequence practitioners should adhere to the following principles:

- 4.2.1 **Welfare of the child** – all legislation relating to children and young people states that the child's welfare or "best interests" is the paramount consideration in all matters.

- 4.2.2 **To voice their opinions** – practitioners have a duty to ensure that all children and young people are listened to and enabled to freely express their views on all matters that affect them.

- 4.2.3 **To be protected from harm** – practitioners have a duty to ensure that all children and young people are protected from all forms of violence, abuse, neglect and exploitation.

4.2.4 **To access information and services** – practitioners have a duty to ensure that all children and young people are provided with accurate and age appropriate information on how to protect their health and well-being and practice healthy lifestyles and behaviours.

4.2.5 **To expect confidentiality** – it is recognised that clear assurances around confidentiality are vital to enable the young person to have trust and confidence to give the practitioner the information required to effect provision of appropriate care.

Children and young people have the same right to confidentiality as adults; that personal and private information should not be shared without consent, except in certain exceptional circumstances where there is the potential of significant harm to themselves or others.

Practitioners must ensure that children and young people are informed from the outset that confidentiality is not absolute but that in such circumstances every reasonable attempt will be made to explain and clarify the reasons behind such a breach in advance. Attempts should always be made to gain the child or young person's consent and understanding before passing on information.

It is also crucial that children and young people should be advised of how their personal information may be shared within the team or agency they have contact with.

4.2.6 **To have their information rights respected** – alongside the law and professional codes of confidentiality, there are strict rules under the Data Protection Act 1998 as to what practitioners are allowed to do with any personal information. It must be further noted that relating to data protection, “a child or young person aged 12 or above is presumed to have sufficient mental capacity to be able to exercise their rights and make decisions regarding their own information” (Section 66, Data Protection Act, 1998). This includes matters such as the results of pregnancy or Sexually Transmitted Infection tests, as well as information supplied by the young person to the practitioner (or to which the practitioner has access).

Further detailed guidance relating to this is available within [A Practitioner's Guide to Information Sharing](#).

4.2.7 **To consent to health interventions** – The law on consent is complex and needs to be considered in each individual case with the examining Doctor prior to examination. Medical treatment is only lawful with consent. Very exceptionally it may be in the child's best interest to undergo a medical examination without consent. Reasons for this should be clearly recorded in the medical notes.

A child under the age of 16 has the legal capacity to make decisions relating to health interventions provided they are capable of understanding the nature and possible consequences of the interventions. (Age of Legal Capacity

(Scotland) Act 1991, Section 2(4), see further information Appendix 4). This is a matter of clinical judgement and will depend on the age and maturity of the young person, the complexity of the proposed intervention, its likely outcome and the risks associated with it. This applies to all health interventions, including assessment, treatment and counselling.

Every effort should be made to encourage the young person to involve their parents or relevant carers. However, intervention can take place if the young person is opposed to involving parents and is deemed competent.

If there is a difference of opinion between a young person and their parent, where the young person has the capacity to make an informed choice, the young person's decision must be respected and given effect to even where it differs from the parent's or the practitioner's view.

- 4.2.8 **Involving Parents** – practitioners should encourage children and young people to share information with their parents where it is safe to do so, in recognition of the rights, responsibilities and duties of parents. However, information relating to child protection matters should not be shared with parents of young people aged 16 – 18 against their wishes as parental responsibility to this age range is that of only guidance. If the young person chooses not to follow this guidance then confidentiality should be maintained.

5. Making Assessments

- 5.1 When a practitioner becomes aware that a young person is sexually active or is likely to become sexually active, the practitioner has a duty of care to ensure that the young person's health and emotional needs are addressed **and** to assess whether the sexual activity is of an abusive or exploitative nature. It is recognised that this process may not always be straightforward and so it will require sensitive handling and the use of professional judgment.
- 5.2 All young people who are, or who are planning to be, sexually active have a right to access information and services to meet their immediate health needs, in terms of education, emotional support, contraception/protection, etc. For those practitioners in settings where such provision can be offered, reference should be made to the aforementioned Age of Legal Capacity (Scotland) Act (1991). Other practitioners, as a minimum, have a responsibility to either signpost or refer a young person, with their permission, to appropriate local services.
- 5.3 Where a practitioner is not in a position to meet the young person's immediate health needs, having given due regard to consent (4.2.7) , it is within the law, without parental consent or even knowledge, to provide information, to make an appointment or to accompany a young person to an agency which is able to meet their immediate health needs.
- 5.4 When a practitioner becomes aware that a young person is, or is likely to become sexually active, the practitioner has a responsibility to make an initial

assessment as to whether the sexual behaviour and/or relationship may be abusive or not. It is essential to look at the facts of the actual relationship between those involved and to take into account the wider needs of the young person. Crucial elements of this assessment relate to issues of consent, the ages of those involved, the circumstances of the sexual activity and the vulnerability of the young person involved.

- 5.5 It is recognised that information about sexual behaviour involving a young person can come from a variety of sources e.g. rumour, directly from the young person, from a third party or from direct observation. The source and the nature of the information will determine the timing and who is best placed to seek clarification from the young person. In addition, the skills, confidence and the level of responsibility of the practitioner involved and their knowledge of the young person will determine who is best placed to speak with the young person.
- 5.6 Depending on the source, the clarity and the immediate seriousness of the information, it may or may not be appropriate to speak directly with the young person at this initial stage. These are matters for professional judgment. If the initial information is indicating that child protection measures may be required, contact should be made immediately with social work services, or the police and this may need to happen without prior consultation with the young person. If required, advice can be sought by contacting social work services.
- 5.7 For all other situations (i.e. where the need for child protection measures is not immediately apparent), practitioners are required to make an initial assessment of the information before them. There is an expectation that the practitioner will explore with the young person the circumstances of the sexual activity. The young person's views should always be sought and listened to.
- 5.8 It is acknowledged that personal relations are sometimes ambiguous and open to interpretation. **However there are two particular circumstances which offer no ambiguity and would require an automatic sharing of information with social work services or the police.** These are:
- Where the child is 12 years of age or under and/or
 - Where the other person is in a position of trust in relation to the young person. It should be noted that this legislation is applicable to young people up to the age of 18 years. (For the legal definitions of 'position of trust' please refer to Appendix 1).

5.9 **Issues to consider**

In making an initial assessment of the situation i.e. a determination of "need" and "risk" and deciding whether and what information to share and what action to take, all staff should consider the following:

- The age of each partner and any difference in age between them. The greater the age difference the more likely it is that the behaviour is

abusive. While chronological age is significant, young people mature at different rates. The respective level of cognitive, emotional and social development should also be considered.

- The nature of the relationship between those involved and whether a power imbalance exists e.g. differences in size, age, material wealth and/or psychological, social and physical development. In addition, gender, race and levels of sexual knowledge can be used to exert power. It should not automatically be assumed that power imbalances do not exist for two young people similar in age or of the same sex.
- Whether both young people truly understand the activity they are involved in and can give informed consent. Compliance is not the same as consent.
- Whether manipulation, bribery, threats, aggression and/or coercion, were involved e.g. the young person is being isolated from their peer group, the young person was given alcohol or other substances as a disinhibitor etc.
- Whether the young person's own behaviour e.g. use of alcohol or other substances, placed them in a position where their ability to make an informed choice about the sexual activity was compromised.
- Whether the other person is known by the agency to be or have been involved in concerning behaviour towards children and young people or there is a familial background including child sex offences.
- If one of the partners has a learning disability, extra care should be taken to ensure they are not being exploited.
- If one of the partners has a communication difficulty, care should be taken to ensure they understand the activity and that their wishes and feelings about it can be understood.
- Whether the other person has attempted to secure secrecy beyond what would be considered usual in teenage sexual activity.
- Whether the other person has used 'grooming' methods to gain the trust and friendship of the young person e.g. by indulging or coercing the young person with gifts, treats, money etc; by befriending the young person's family; by developing a relationship with the young person via the internet.
- Whether a young person, male or female, is frequenting places that are used for prostitution.

- Whether a young man is frequenting places where men have sex with men and circumstances of additional dangers e.g. physical assault, might arise.
- Whether there are other concerning factors in the young person's life which may increase their vulnerability or place them 'at risk' e.g. homelessness.
- Whether the young person denies, minimises or accepts the concerns held by practitioners.

All partner agencies must be sensitive to the possibility of sexual abuse as a result of exploitation, commonly referred to as Child Sexual Exploitation (CSE).³ See the CPC documents [CSE - Short Guide for Practitioners](#) and [CSE Strategy and Extended Guide for Practitioners](#)

- 5.10 The presence of one or more factor will raise different levels of concern depending on the young person's individual circumstances. For some young people it will be a combination of factors which may suggest that further intervention is required.
- 5.11 Practitioners need to be aware that should information come to their attention about past sexual behaviour and /or relationships involving children or young people the same consideration should be given as to whether this was abusive or exploitative and appropriate action should be taken. It may be the case that the child or young person in question is no longer at risk of harm; however, this information may have implications for other children, e.g., cases such as historical disclosure where there may still be implications for vulnerable children.
- 5.12 In line with their own agency procedures, practitioners can seek the advice of a colleague or line manager to assist them in this assessment process. Where appropriate, practitioners should advise the young person of their intentions to speak with a colleague.
- 5.13 While the wishes and feelings of children and young people should always be taken into account, it is important to recognise that some, particularly younger children may not fully understand the relationship and activity. Peer pressure and perceived norms can be powerful. For example, a young girl may be pleased to have an older boyfriend and may comply with his wishes; but may not perceive the relationship as abusive until much later. She may regard any attempts to stop the relationship as intrusive and wrong. Practitioners need to be aware that some young people may not identify abusive behaviour as such.

³ Child Sexual Exploitation involves exploitative situations, context and relationships where a child (or a third person or persons) receives 'something' e.g. food, accommodation, drugs, alcohol, cigarettes, affections, gifts, money as a result of them performing, and/or others, performing on them sexual activities.

6. Possible Courses of Action

6.1 Depending on the outcome of the initial assessment, there are several courses of action that can be taken:

- i. If the initial assessment suggests that the practitioner is dealing with mutually-agreed teenage sexual behaviour and/or relationship in which there are no concerns of abuse or exploitation, the practitioner should, if qualified, provide practical assistance and advice as required. Other practitioners, such as youth workers, must signpost young people to appropriate services, such as school nurses.
- ii. If the practitioner does not assess the sexual behaviour and/or relationship to be abusive or exploitative but has some concerns about the young person's behaviour e.g. their ability to assess risk, their use of alcohol, the environment in which they seek sexual contacts etc, then either the practitioner should address these matters directly with the young person or, with their permission, share the information with an appropriate person or agency. It may be agreed that due to a number of concerns about the person's vulnerability, the young person may benefit from an integrated assessment of their needs so that agencies, in conjunction with the young person, can best identify what supports and services would benefit them. In such circumstances, a lead agency is identified to lead the process and all agencies would be involved in contributing to this. (ref "Getting it Right for Every Child").
- iii. If the practitioner, using the indicators set out in 5.9 has relevant concerns about the young person's behaviour or about the nature of the sexual behaviour and/or relationship, they should seek guidance from a line manager in accordance with their own agency guidelines. Further action will then be considered. Advice can be sought from Social Work Services to assist in this decision making.
- iv. If the practitioner has definite concerns that the young person has experienced, or may experience, significant harm, but it is believed that the young person is not at immediate risk, they should share this information with the named person, detailing those who are involved, the nature of concerns etc. In those circumstances where it is appropriate to speak with the young person prior to the information being shared, every reasonable effort should be made to seek their agreement in sharing the information. If agreement is not reached, the practitioner should still share the information and inform the young person that this will be the course of action and explain why.
- v. As stated at 5.8, if the child is, or is believed to be, sexually active and is 12 years or under, the matter should automatically be passed to Social Work Services and/or the police. If the young person is currently 13 or over but sexual activity took place when they were 12 years or under, this

information must be shared with Social Work Services and/or the Police (ref legislation Appendix 1).

- vi. Similarly, as stated at 5.8, if the 'other person' is in a position of trust in relation to the young person (refer to appendix 1) the matter should automatically be discussed with Social Work Services and/or the Police.
 - vii. If the young person is perceived to be at immediate risk, then concerns must be shared with Police and/or Social Work Services.
- 6.2 In all of the above situations the practitioner, in line with their own agency procedures, should make a written record of events, ensuring as much detail as possible and including the reasons behind their action.
 - 6.3 On each occasion that a practitioner has contact with a child or young person or receives information about them, consideration should be given as to whether their circumstances have changed.
 - 6.4 In addition, each agency should set in place monitoring procedures to ensure that practice is consistent and appropriate.
 - 6.5 Pregnancy in young women under the age of 16 should be dealt with using the same criteria set out in 5.8 and 5.9. If it is assessed that the pregnancy is the result of mutually-agreed teenage sexual behaviour and/or relationship in which there are no concerns of abuse or exploitation, the matter should not be considered to be a child protection matter: the emphasis should be on ensuring that the young woman's health, educational, social and emotional needs are appropriately assessed and support is offered.

7. Professional Responsibilities

7.1 Professionals working with young people have different responsibilities both with regard to advice given to young people and the actions they take when aware of under-age sexual activity. These differences are detailed below:

7.2 Health Staff

It is considered good practice for Doctors and other Health Professionals to consider the following issues when providing advice or treatment to young people under 16 on contraception, sexual and reproductive health.

If a request for contraception is made, Doctors and other Health Professionals should establish rapport and give a young person support and time to make an informed choice by discussing:

- The emotional and physical implications of sexual activity, including the risks of pregnancy and sexually transmitted infections

- Whether the relationship is mutually agreed and whether there may be coercion or abuse
- The benefits of informing their GP and the case for discussion with a parent or carer. Any refusal should be respected. In the case of abortion, where the young woman is competent to consent but cannot be persuaded to involve a parent, every effort should be made to help them find another adult to provide support, for example another family member or Specialist Youth Worker
- Any additional counselling or support needs

7.3 Other Staff including Education

Young people need to be able to talk to a trusted adult about sex and relationship issues. Although it is desirable that this person is their parent or carer, this is not always possible. The law allows staff to respect young people's rights to confidentiality when discussing sex and relationship issues and a disclosure of underage sex is not of itself a reason to break confidentiality.

Young people should be made aware that confidentiality might be breached if they or another young person is believed to be at risk. In these circumstances staff should consult the young person and endeavour to gain their co-operation to sharing information with the relevant agencies. If that is not possible they should be advised that their confidentiality will be breached.

7.4 Police and Social Work Staff

Whilst Police and Social Services staff may provide advice and guidance to a young person involved in under-age activity both agencies have specific responsibilities with regards to criminal activities.

One of the considerations for the Police is the identification and investigation of underage sexual activity where the relationship is abusive, either by being intra-familial in nature, or where there is a significant age/power gap between the parties involved.

Police must be sensitive to the possibility of sexual abuse as a result of exploitation, commonly referred to as Child Sexual Exploitation (CSE).

8. Summary of Key Points

- Children aged 12 years and under cannot by law give consent and therefore sexual acts with this group of children will always constitute an offence and information must be shared with Social Work and/or Police.
- Sexual activity between teenagers will often be consensual but even where a child or young person may appear to be a willing party such activity may constitute a criminal offence and be indicative of sexual exploitation or child sexual abuse.

- The abuse of a Position of Trust can occur with any child or young person up to 18 years of age and concerns must be shared with Social Work and /or Police.
- In cases where the child or young person is 13 years of age and over, professional advice should be sought and initial checks made by key agencies as appropriate.
- An Initial Referral Discussion will inform the decision making process.
- A clear record must be made of the decision, the reasons for the decision, agreed actions and those responsible for the actions.
- At no stage should any Child Protection action prevent the young person accessing (or continuing to access) relevant advice and services concerning contraception, condoms, pregnancy and abortion.

Sexual Offences (Scotland) Act 2009

42 - Sexual abuse of trust

If a person (“A”) who has attained the age of 18 years —

- (a) intentionally engages in a sexual activity with or directed towards another person (“B”) who is under 18, and
 - (b) is in a position of trust in relation to B,
- then A commits an offence, to be known as the offence of sexual abuse of trust.

43 - Positions of trust

- (1) For the purposes of section 42, a person (“A”) is in a position of trust in relation to another person (“B”) if any of the five conditions set out below is fulfilled.
- (2) The first condition is that B is detained by virtue of an order of court or under an enactment in an institution and A looks after persons under 18 in that institution.
- (3) The second condition is that B is resident in a home or other place in which accommodation is provided by a local authority under section 26(1) of the Children (Scotland) Act 1995 (c. 36) and A looks after persons under 18 in that place.
- (4) The third condition is that B is accommodated and cared for in –
 - (a) a hospital,
 - (b) accommodation provided by an independent health care service,
 - (c) accommodation provided by a care home service,
 - (d) a residential establishment, or
 - (e) accommodation provided by a school care accommodation service or a secure accommodation service,and A looks after persons under 18 in that place.
- (5) The fourth condition is that B is receiving education at
 - (a) a school and A looks after persons under 18 in that school, or
 - (b) a further or higher education institution and A looks after B in that institution.
- (6) The fifth condition is that A—
 - (a) has any parental responsibilities or parental rights in respect of B,
 - (b) fulfils any such responsibilities or exercises any such rights under arrangement with a person who has such responsibilities or rights,
 - (c) had any such responsibilities or rights but no longer has such responsibilities or rights, or
 - (d) treats B as a child of A's family,and B is a member of the same household as A.
- (7) A looks after a person for the purposes of this section if A regularly cares for, teaches, trains, supervises, or is in sole charge of the person.
- (8) The Scottish Ministers may by order modify this section (other than this subsection) and section 44 so as to add, delete or amend a condition.

44 - Interpretation of section 43

In section 43 –

“care home service” has the meaning given by section 2(3) of the Regulation of Care (Scotland) Act 2001 (asp 8) (“the 2001 Act”)

“further or higher education institution” means a body listed in schedule 2 to the Further and Higher Education (Scotland) Act 2005 (asp 6)

“hospital” means a health service hospital (as defined in section 108(1) of the National Health Service (Scotland) Act 1978 (c. 29))

“independent health care service” has the meaning given by section 2(5) of the 2001 Act

“local authority” means a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 (c. 39)

“parental responsibilities” and “parental rights” have the same meanings as in the Children (Scotland) Act 1995 (c. 36)

“residential establishment” has the meaning given by section 93(1)(a) of that Act of 1995

“school” has the same meaning as in the Education (Scotland) Act 1980 (c. 44)

“school care accommodation service” has the meaning given by section 2(4) of the 2001 Act, and

“secure accommodation service” has the meaning given by section 2(9) of the 2001 Act.

45 - Sexual abuse of trust: defences

- (1) It is a defence to a charge in proceedings under section 42 that A reasonably believed –
 - (a) that B had attained the age of 18, or
 - (b) that B was not a person in relation to whom A was in a position of trust.
- (2) It is a defence to a charge in proceedings under section 42 –
 - (a) that B was A's spouse or civil partner, or
 - (b) that immediately before the position of trust came into being, a sexual relationship existed between A and B.
- (3) Subsection (2) does not apply if A was in a position of trust in relation to B by virtue of section 43(6).

It is essential that professionals work with knowledge of the law and use legal provision to inform and determine their decisions and intervention. However, the paramount consideration at all times should be the welfare of the child.

The Law: Sexual Offences (Scotland) Act 2009

30 - Engaging in sexual activity with or towards an older child

- (1) If a person (“A”), who has attained the age of 16 years, does any of the things mentioned in subsection (2), “B” being in each case a child who -
 - (a) has attained the age of 13 years, but
 - (b) has not attained the age of 16 years,then A commits an offence, to be known as the offence of engaging in sexual activity with or towards an older child.
- (2) Those things are, that A –
 - (a) penetrates sexually, by any means and to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B
 - (b) intentionally or recklessly touches B sexually
 - (c) engages in any other form of sexual activity in which A, intentionally or recklessly, has physical contact (whether bodily contact or contact by means of an implement and whether or not through clothing) with B
 - (d) intentionally or recklessly ejaculates semen onto B
 - (e) intentionally or recklessly emits urine or saliva onto B sexually.
- (3) Without prejudice to the generality of paragraph (a) of subsection (2), the reference in the paragraph to penetration by any means is to be construed as including a reference to penetration with A's penis.

37 - Older children engaging in sexual conduct with each other

- (1) If a child (“A”), being a child mentioned in subsection (2), does any of the things mentioned in subsection (3), “B” being in each case a child mentioned in subsection (2), then A commits an offence, to be known as the offence of engaging while an older child in sexual conduct with or towards another older child.
- (2) The child is a child who –
 - (a) has attained the age of 13 years, but
 - (b) has not attained the age of 16 years.
- (3) The things are that A –
 - (a) penetrates sexually, with A's penis and to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B,
 - (b) intentionally or recklessly touches the vagina, anus or penis of B sexually with A's mouth.

- (4) In the circumstances specified in subsection (1), if B engages by consent in the conduct in question, then B commits an offence, to be known as the offence of engaging while an older child in consensual sexual conduct with another older child.
- (5) In paragraph (b) of subsection (3), the reference to A's mouth is to be construed as including a reference to A's tongue or teeth.

39 - Defences in relation to offences against older children

- (1) It is a defence to a charge in proceedings –
 - (a) against A under any of sections 28 to 37(1) that A reasonably believed that B had attained the age of 16 years,
 - (b) against B under section 37(4) that B reasonably believed that A had attained the age of 16 years.
- (2) But –
 - (a) the defence under subsection (1)(a) is not available to A –
 - a. if A has previously been charged by the police with a relevant sexual offence,
 - b. if A has a previous conviction for a relevant foreign offence committed against a person under the age of 16, or
 - c. if there is in force in respect of A a risk of sexual harm order,
 - (b) the defence under subsection (1)(b) is not available to B –
 - a. if B has previously been charged by the police with a relevant sexual offence,
 - b. if B has a previous conviction for a relevant foreign offence committed against a person under the age of 16, or
 - c. if there is in force in respect of B a risk of sexual harm order.
- (3) It is a defence to a charge in proceedings under any of the sections mentioned in subsection (4) that at the time when the conduct to which the charge relates took place, the difference between A's age and B's age did not exceed 2 years.
- (4) Those sections are –
 - (a) section 30(2)(a), but not in so far as the charge is founded on –
 - a. penetration of B's vagina, anus or mouth with A's penis,
 - b. penetration of B's vagina or anus with A's mouth, tongue or teeth,
 - (b) section 30(2)(b) or (c), but not in so far as the charge is founded on sexual touching or other physical activity involving—
 - a. B's vagina, anus or penis being touched sexually by A's mouth,
 - b. A's vagina, anus or mouth being penetrated by B's penis,
 - c. A's vagina, anus or penis being touched sexually by B's mouth,
 - (c) section 30(2)(d) or (e),
 - (d) any of sections 31 to 36.
- (5) In paragraphs (a) and (b) of subsection (2) -
 - (a) “a relevant sexual offence” means an offence listed in schedule 1,
 - (b) “a previous conviction for a relevant foreign offence” means a previous conviction by a court in a member State of the European Union other than the United Kingdom for an offence that is equivalent to one listed in paragraph 1, 4, 7, 10, 13 (so far as applying to an offence listed in paragraph 1, 4, 7 or 10) or 14 of schedule 1,

- (c) “a risk of sexual harm order” means an order under section 2 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) or section 123 of the Sexual Offences Act 2003 (c. 42).
- (5A) Any issue of equivalence arising in pursuance of subsection (5)(aa) is for the court to determine.
- (5B) For that purpose, an offence may be equivalent to one listed in paragraph 1, 4, 7, 10, 13 (so far as applying to an offence listed in paragraph 1, 4, 7 or 10) or 14 of schedule 1 even though, under the law of the member State (or part of the member State) in question, it is an offence –
- (a) regardless of the age of the victim, or
- (b) only if committed against a person under an age other than 16 years.
- (6) The Scottish Ministers may by order modify schedule 1 so as to add an offence against a child which involves sexual conduct or delete an offence listed there.
- (7) It is not a defence to a charge in –
- (a) proceedings under any of sections 28 to 37(1) against A that A believed that B had not attained the age of 13 years,
- (b) proceedings under section 37(4) against B that B believed that A had not attained the age of 13 years. (**Section 39** as amended by the Criminal Justice and Licensing (Scotland) Act 2010).

Age of Legal Capacity.

The Age of Legal Capacity (Scotland) Act 1991 is the primary legislation relating to "competency".

Legal Capacity means having the ability to understand the meaning and consequence of decisions and being able to make a true choice.

The Act states that for a child under 16 the consent of parents is not required where in the opinion of the medical practitioner the child is capable of understanding the nature and consequences of the procedure. Where the child does not have such understanding the consent of a person with parental responsibilities and rights is required, or an alternative route to obtaining consent must be taken.

If a young person is capable of giving consent, then their decision to refuse treatment cannot be overridden by the person with parental responsibilities and rights.

How to ascertain if the young person is capable of giving informed consent or refusal?

This is determined by a medical practitioner considering:

- Whether the young person is able to take in the information and retain it long enough to weigh up the options;
- Whether the young person believes and understands the information;
- Whether the young person is able to make a free and informed choice.

A person of 16 or over must either make decisions for him/herself or must have a person legally appointed to them. Parents may not continue to make decisions for a child who is 16 or over, unless legally appointed to do so. This means that parents or "next of kin" of a person aged 16 or over have no sustainable right to access information about that person and may not sign legal forms on behalf of the person. The term "next of kin" has no legal meaning and is simply used as a means of identifying a person who can be contacted in an emergency.

If there is a dispute about medical treatment, any person claiming interest may apply to the Sheriff for a specific issue order under Section 11 of the Children (Scotland) Act, 1995.

The position for accommodated / Looked After Children is the same as for all other children under the age of legal capacity.