

27 July 2010

Summary Response

SCRA welcomes the opportunity to respond to the draft National Guidance on under-age sexual activity. The imminent implementation of the Sexual Offences (Scotland) Act 2009 means that the production of this guidance is timely and we are pleased to see the links being made with the broader and more comprehensive review of the national child protection guidance. Consistency between these two documents will be important going forward.

We have responded to the specific questions asked in the consultation document, as well as providing more detailed comment on a number of issues and sections of the draft guidance.

Specific questions

1. Do you agree with how this document describes the relationship between under-age sexual activity and child protection?

Yes, but see detailed comment on the potential impact of the Sexual Offences (Scotland) Act 2009.

2. Is the guidance clear in relation to the scale of response required depending on whether a child or young person is at risk of significant harm, or has other support needs that do not constitute a child protection risk?

Yes, but see detailed comment on the impact of the Sexual Offences (Scotland) Act 2009. Additionally, in the factors that give rise to automatic referral in paragraph 66, we suggest that there should be something to reflect that when one party is an adult and there is an age/maturity gap, there should be an automatic child protection referral. At the moment, it only envisages an automatic referral if there's a relationship of trust.

Related to this, we suggest that the age of the other party should be referred to as a specific factor in paragraph 52, alongside the age of the child. although the ages of those involved are mentioned at para 53, the age of the other party is significant enough that it should be highlighted in para 52.

3. How would this guidance add value to your local policies and procedures? How could it be improved to add more value?

More detailed guidance for practitioners working with children who may fall within the scope of Part 4 of the Sexual Offences (Scotland) Act 2009 (see comments below).

4. The document deliberately offers limited information about issues discussed in further detail in the National Child Protection guidance. Do you agree with this approach, or would you prefer to see less/more detail about other issues (and if so, which)?

We agree in general terms, but please see detailed comment in response to Q8 about the role of the police and the Reporter.

5. Is the terminology and descriptions used throughout the document relevant to your specific agency or service?

Yes, for the most part. However, it would be useful for the guidance to define what precisely is meant by “under-age sexual activity”. Sometimes the phrase is used to refer to two under-age children engaging in sexual activity, but the guidance applies in relation to a range of situations including those where a very young child has been abused by an adult.

6. Are the processes described in this document relevant for your particular agency or service? What elements of the guidance are not compatible with your current practices?

The guidance contains little detail on the Children’s Hearings System processes and we consider that more content in this area would be helpful.

7. Is this guidance targeted at the right people?

We have no comment to make here.

8. Do you have any additional comments?

Please see below.

Detailed response

Disclosing information to the police

SCRA suggests that this section could be made clearer in terms of the police’s role, not just to investigate criminal offences, but also to take action in response to child protection concerns. The guidance attempts to cover a very complex area in a limited space.

SCRA believes that clear explanations of how child victims and child offenders would and should be treated should be included within the guidance. At present, we do not believe that it is sufficiently clear. Paragraph 18 says very clearly that “...the police must be informed if there is suspicion that a crime or offence has been committed”. There is some inconsistency with other sections of the guidance (for example paragraph 62) which suggests that where sexual activity is consensual and non-harmful, there is no need for reporting the matter to the police.

Matters become more complex as a result of recent legislation, whose provisions mean that a child can be both the victim of an offence and the perpetrator of it, at the same time. The Sexual Offences (Scotland) Act 2009 makes it illegal for under-16s to engage in penetrative or oral sex with each other. In these cases, a child could be both the perpetrator of an offence and, simultaneously, the victim, even where the behaviour has been consensual. It is important to make clear that there is a separate assessment necessary to decide whether a child victim of such an offence is at risk of significant harm and that the relevant child protection actions should be triggered. One does not automatically follow the other.

There are also real issues for under-13s. For example, two 12 year olds engaging in any of the sexual activity described in sections 14-19 of the Act, will both be committing an offence, even though they are deemed legally incapable of consenting to the behaviour in question. Both children again, will be simultaneously victim and perpetrator. This is an extremely complex area and we consider that those working with children in such situations are likely to require far more detailed guidance about how to respond. It is assumed that the police will be producing guidance in this area and it may be beneficial for linkages to be made so that non-police professionals working with children have a better understanding of the likely police response to concerns that they may raise.

The forthcoming changes to the minimum age of prosecution contained within the Criminal Justice and Licensing (Scotland) Act, will result in additional complexities in relation to the likely response from



police. A child aged 11 committing such an offence will be referred to the Reporter, while a 12 year old may be liable for prosecution.

Also worth noting is that where the guidance notes that children may be referred to the Procurator Fiscal for committing an offence, that would actually be a joint-referral to the PF and to the Reporter.

Discussions would then take place between the two in order to allow the PF to make a decision on whether the child should be prosecuted, or whether it would be more appropriate for them to be dealt with via the Children's Hearings System. The Guidance could usefully reference SCRA's joint agreement with COPFS on jointly-reported cases:

<http://www.copfs.gov.uk/Publications/2010/03/AgreePFChildrensReporter>

It has been suggested that one of the reasons people working with children who are engaging in inappropriate sexual activity might be reluctant to involve the police and other agencies is a fear of children being treated as criminals. Providing more information as regards the welfare-basis on which the Children's Hearings System operates might alleviate some of that concern and help to prompt earlier action and involvement of agencies. The majority of non-offence referrals to the Reporter also come from the police (83.3%). Where a child has been the victim of an offence, or simply where the police have identified concerns about the child's welfare, care and protection (whether or not an offence has been committed in respect of that child) they may make a referral to the Reporter if they consider that one of the grounds for referral in s.52(2) of the Children (Scotland) Act 1995 applies and that compulsory measures of supervision may be required.