SEXUAL OFFENCES (SCOTLAND) BILL: CHILDREN
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The Scottish Government introduced the Sexual Offences (Scotland) Bill in the Parliament in June 2008. The Parliament's Justice Committee has been designated as lead committee for parliamentary consideration of the Bill.

The Bill seeks to provide a statutory framework for sexual offences, so that most offending of a sexual nature would in future be prosecuted under one of the offences in the Bill.

Most of the provisions contained in the Bill are the same as, or very similar to, proposals published by the Scottish Law Commission in 2007. Perhaps the most important exception to this concerns how the law should deal with children who engage in consensual sexual activities with other children. This briefing looks at the various proposals and arguments in relation to this controversial issue.

A separate SPICe briefing looks at the Bill in more general terms – 'Sexual Offences (Scotland) Bill' (McCallum 2008).
KEY POINTS OF THIS BRIEFING

- At present, sexual offending is prosecuted under a wide range of common law and statutory offences. The Bill seeks to provide a statutory framework for sexual offences, so that most offending of a sexual nature would in future be prosecuted under one of the offences in the Bill.

- Most of the provisions set out in the Bill are very similar to proposals put forward by the Scottish Law Commission (SLC) in 2007. One of the main differences between the proposals put forward by the SLC and those contained in the Bill concerns how the law should deal with children who engage in apparently consensual sexual activities with other children.

- The SLC’s proposals relating to sexual activities between children differ depending upon whether those involved include one or more ‘young children’ aged less than 13, or only involve ‘older children’ aged 13, 14 or 15.

- In relation to young children, the SLC stated that there is a clear principle that such children do not have the legal capacity to consent to sexual activities. For this reason, the SLC proposals would criminalise any sexual activities involving young children (even if all of those involved were children and claimed to have consented).

- Although not seeking to criminalise consensual sexual activities between older children, the SLC did conclude that such activities could still give rise to serious concerns about the welfare of the children involved. Thus, the SLC recommended that there should be a new non-offence ground for referring children involved in sexual activities to the Children’s Hearings System.

- The Bill takes a different approach in relation to older children. It does not introduce a new ground of referral to the Children’s Hearings System. Instead, it seeks to criminalise some (but not all) consensual sexual activities between older children.

- The question of how the law should deal with older children involved in consensual sexual activities with other older children has proven to be a particularly controversial issue. There are conflicting opinions on what approach would best achieve aims such as protecting children and encouraging children to avoid early sexual activity. (Some of the main arguments in this area are outlined at pages 9 to 11 of this briefing.)
INTRODUCTION

Background

The Sexual Offences (Scotland) Bill (the Bill) was, together with Explanatory Notes and a Policy Memorandum, introduced in the Parliament on 17 June 2008.

Most of the Bill’s provisions are the same as, or very similar to, proposals put forward in 2007 by the Scottish Law Commission (SLC). In 2004 the then Scottish Executive asked the SLC to examine the law relating to rape and other sexual offences. The SLC’s final report was published in December 2007 – Report on Rape and Other Sexual Offences (the SLC Report).

A major difference between the proposals set out in the SLC Report and those contained in the Bill concerns how the law should deal with children who engage in consensual sexual activities with other children. This is an issue which has produced a significant degree of interest, not least during the various consultation exercises carried out during the development of the proposals. Consultations were carried out by both the SLC (2006) prior to producing its report, and by the Scottish Government (2007) prior to introduction of the Bill. In addition, the Justice Committee has received written submissions in response to a call for evidence on the Bill. The Justice Committee is due to take oral evidence on the general principles of the Bill during October and November 2008.

This briefing focuses on the various proposals and arguments in relation to the most appropriate legal response to what might be characterised as consensual sexual activities between children. However, the rest of this introductory section seeks to provide some context by briefly outlining how other provisions in the Bill also deal with sexual activities involving children. Further information in this area is set out in the SPICe briefing Sexual Offences (Scotland) Bill (McCallum 2008).

Sexual Offences Involving Children

Children may be the victims of sexual offences. They may also be the perpetrators of such offences. The Bill includes:

- offences where there is no restriction on the age of the victim (ie the offence may be committed against both children and adults)
- offences which can be committed only against children (or against children within a particular age range)
- offences where there is no restriction on the age of the offender and thus anyone over the ‘age of criminal responsibility’ can be found guilty of the offence. Current provisions on the age of criminal responsibility allow (in exceptional circumstances) for the possibility of a child as young as eight being prosecuted in the criminal courts
- offences which can be committed only by adults against children (or against children within a particular age range)

1 For more information on the age of criminal responsibility see the SPICe subject map ‘Children and the Scottish Criminal Justice System’ (McCallum, Ross and Oag 2004).
• offences which are committed only when ‘older children’ (defined in the Bill as those aged 13, 14 or 15) engage in sexual activities together

Part 1 of the Bill sets out a range of offences in which the lack of consent of the victim is generally a central element in the definition of the offence (eg rape and sexual assault). There are no restrictions on the age of the victim (ie they may be committed against both children and adults). Nor are there any special restrictions on the age of the offender (ie both children over the age of criminal responsibility and adults can be guilty of these offences).

Part 4 of the Bill sets out a range of offences which seek to provide extra protection for children. They can be committed only against children under the age of 16. To a large extent, the offences set out in Part 4 cover similar activities to those set out in Part 1, with the important difference that a conviction for any of the Part 4 offences does not require proof that the child victim did not consent to the activity involved. The existence of specific offences relating to sexual activities involving children does not, even though the victim was a child, prevent a person being prosecuted for one of the offences in Part 1 of the Bill. The most appropriate charge will depend on all the circumstances of the case. Some of the Part 4 offences can be committed by anyone (over the age of criminal responsibility), whilst others can be committed only by adults or by older children:

• sections 14 to 20 deal with offences against ‘young children’ (defined in the Bill as those aged less than 13). There is no restriction on the age of the offender and thus anyone over the age of criminal responsibility (ie as young as eight) could be found guilty of an offence

• sections 21 to 29 deal with offences against ‘older children’ (aged 13, 14 or 15). They fall into two groups:
  – the first group is similar to those covering young children but can be committed only by adults aged 16 or over
  – the second group covers certain forms of penetrative sexual activity between older children and can be committed only by older children

Part 5 of the Bill sets out a number of offences dealing with situations where the offender may be said to hold a position of trust in relation to the victim. A conviction for any of these offences does not require proof that the victim did not consent. The offences include one dealing specifically with positions of trust which may exist between an adult offender aged 18 or over and a child victim aged less than 18 (eg within family or school settings).

Children Accused of Sexual Offences

As indicated above, the Bill allows for the prosecution of children under 16 for a number of sexual offences:

• any child who has reached the age of criminal responsibility (ie aged at least 8) could be prosecuted for any of the offences set out in Part 1 of the Bill

• any child who has reached the age of criminal responsibility could also be prosecuted for those offences set out in Part 4 of the Bill which are aimed at protecting young children (see sections 14 to 20)

• an older child (ie aged 13, 14, or 15) could be prosecuted for one of the offences set out in Part 4 of the Bill dealing with certain forms of penetrative sexual activity between older children (see sections 27 and 28)
A successful prosecution for any of the offences covered by the second and third of the above bullet points does not require proof that a victim did not consent.

Although children as young as eight can be prosecuted for many offences (not just sexual offences) in the Scottish criminal courts, this is not the norm. Section 42(1) of the Criminal Procedure (Scotland) Act 1995 provides that:

“No child under the age of 16 years shall be prosecuted for any offence except on the instructions of the Lord Advocate, or at his instance; and no court other than the High Court and the sheriff court shall have jurisdiction over a child under the age of 16 for an offence.”

The Crown Office has published a ‘Prosecution Code’ (2001) setting out general criteria for prosecution decision making. It notes that the United Nations Convention on the Rights of the Child (1989) recognises certain fundamental rights of the child which are relevant to cases involving children accused of crime. It states that the youth of an accused may, depending on other circumstances, be a factor which influences a prosecutor in favour of action other than prosecution. The code also notes that the Lord Advocate has issued confidential guidelines to the police in relation to reporting offences to prosecutors which are alleged to have been committed by children. The code goes on to emphasise that prosecutors retain the discretion to refer cases involving children to the Children’s Reporter where such action is considered to be in the public interest. This may lead to a child being dealt with through the Children’s Hearings System rather than the court system.

In practice the vast majority of alleged child offenders under the age of 16 are dealt with through the Children’s Hearings System. For example, in 2006/07 a total of 16,490 children were referred to the Children’s Reporter on offence grounds. By way of comparison, 99 children under the age of 16 were prosecuted in the Scottish criminal courts (in a total of 147 occasions) during 2006/07.

CONSENSUAL SEXUAL ACTIVITY BETWEEN CHILDREN

General Approaches of the Scottish Law Commission and Scottish Government

The question of how the law should deal with children who engage in sexual activities with other children, in circumstances where it appears that the activities were consensual, is a controversial issue. It raises a number of difficult issues, including:

- to what extent are children under the age of 16 capable of giving informed consent to sexual activities?
- to what extent should the law recognise any such capability?

The SLC Report sought to draw a distinction between ‘young children’ aged less than 13 and ‘older children’ aged 13, 14 or 15. Various existing sexual offences already recognise such a
In relation to sexual activities involving young children, the SLC Report stated that there is a clear legal principle that such children do not have the capacity to consent to such activities. Thus, engaging in a sexual activity with a young child is always wrong and should be prohibited by the criminal law.

In relation to sexual activities involving older children, the SLC Report stated that some children of that age do have the capacity to consent to sexual activity but that they are still likely to be more vulnerable to sexual exploitation. On this basis, the SLC proposals sought to criminalise sexual activities between adults and older children but did not seek to criminalise consensual sexual activities between older children. However, the SLC report did recognise that consensual sexual activities between older children could still give rise to serious concerns about the welfare of those children. For this reason, the SLC recommended that there should be a new non-offence ground for referring a child to the Children’s Hearings System – that the child has engaged in a sexual activity with, or been subjected to sexual activity by, another person. This would allow for compulsory intervention in appropriate cases.

The Bill, whilst adopting a distinction between young children and older children, provides for a wider role for the criminal law – by seeking to criminalise some (but not all) consensual sexual activities between older children. The Scottish Government’s stated aim, in extending the scope of the criminal law beyond that proposed by the SLC, is to discourage children under 16 from engaging in sexual intercourse and/or to help such children resist any pressure to engage in sexual intercourse. In relation to consensual sexual activities between older children, the main concerns highlighted by the Government in the Policy Memorandum relate to the risks posed to their welfare and health by early sexual activity (e.g., unwanted teenage pregnancies and sexually transmitted infections). The Government has sought to reflect these concerns in setting out in the Bill the types of sexual activities between older children which would (or would not) be criminal.

### Sexual Activity Involving Young Children

Both the SLC proposals and the provisions in the Bill make it clear that sexual activities involving young children (aged less than 13) should always be prohibited by the criminal law. The fact that a young child may claim to have consented to such activities does not prevent a conviction. As stated in the SLC Report, this approach is based on the recognition of a principle that young children never have the legal capacity to consent to sexual activities.

In general, the proposals in this area have given rise to less debate than those relating to older children. However, the fact that two young children could (at least in theory) be subject to police investigation and criminal prosecution for engaging in some form of sexual activity with each other, where there is no indication that one has exploited the other, has given rise to some concern. It should be noted that the types of behaviour covered by the relevant offences are potentially quite wide. For example, it would be an offence under section 15(2) of the Bill for one young child to touch another young child in a way which a reasonable person would, in all the circumstances of the case, consider to be sexual.

Organisations raising concerns in the above area, in response to a call for written evidence by the Scottish Parliament’s Justice Committee, included Barnardo’s Scotland, Brook, Children

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5 See the Government’s Policy Memorandum at paragraphs 110 to 122.
6 See ‘Sexual Offences (Scotland) Bill: Call for Evidence’ (Scottish Parliament Justice Committee 2008a).
A response from Scotland’s Commissioner for Children & Young People (2008) said:

“I am concerned at the potential for criminalisation of children under 13 for what might be defined as ‘sexual activity’ with each other. The definition of ‘sexual activity’ is very broad and could include normal, childish exploration and activities such as kissing. Given the very low age of criminal responsibility in Scotland, this allows for the possibility of children aged 8 to 12 being prosecuted for sexual offences or referred to the children’s hearing on the grounds that they have committed such an offence. It seems strange that children might be charged with offences relating to activities that they are otherwise presumed to be incapable of consenting to.” (p 1)

Sexual Activity Involving Older Children

As noted earlier, the Bill would allow older children (aged 13, 14 or 15) to be prosecuted for engaging in certain penetrative sexual activities with other older children. Separate offences are set out in relation to the child penetrating (section 27(1)) and the child being penetrated (section 27(4)). As for other offences in Part 4 of the Bill, a person may be found guilty even if all of those involved claim to have consented.

The relevant offences in the Bill cover sexual activities involving penetration of the vagina or anus by anything other than the mouth (eg penetration by a penis, finger or sex toy would be covered whilst penetration by a tongue would not be covered). Oral sex would not be covered by the offences, either because the mouth is used to penetrate or because it is the mouth that is penetrated.

The scope of the proposed offences is broader than existing criminal law provisions in that they allow for the prosecution of girls engaging in relevant sexual activities with boys. At present girls/women engaging in sexual activities with boys aged 14 or 15 are not generally covered by the law on sexual offences.

The SLC Report had recommended that consensual sexual activities between older children should not give rise to the possibility of the children involved being prosecuted. As noted above, instead of potential criminal liability the SLC Report proposed that the fact that a child has engaged in a sexual activity with another person should be a new non-offence ground for referring that child to a Children’s Hearing. This makes it clear that intervention (including compulsory measures of supervision) would be possible where consensual sexual activities between children give rise to concerns.

The SLC proposals on this topic were rejected by the Scottish Government, in favour of the criminal law approach in the Bill. The Policy Memorandum stated that:

“Touching, kissing and sexual conversations are considered by most people to be a normal part of growing up for a teenager. The Scottish Government does not propose that the law should interfere with this kind of activity between two young people aged 13 to 15 so long as both parties consent to the activity. We take a different view in relation to sexual intercourse since this poses much greater risks to
Arguments which have been advanced in favour of the approach in the Bill and/or against the approach proposed in the SLC Report include:

1. The threat of criminal prosecution may help to send out a clear message that underage sex is wrong and that society does not condone the idea that children can agree to have sex.

2. Use of the criminal law in this area may help dissuade older children from engaging in sexual activities which can be harmful if started at an early age. It may also help older children resist pressures from others to engage in such activities. For example, a response from the Christian Institute Scotland (2008), to the Scottish Government’s consultation, emphasised that peer pressure in this area must not be underestimated and argued that such pressure would increase if the SLC proposals were adopted. In relation to the types of harm which might be caused, the Scottish Government highlighted the spread of sexually transmitted infections and unwanted pregnancies.

3. Where appropriate it would still be possible to deal with older children, who have engaged in consensual penetrative sexual activities with other older children, by way of the Children’s Hearings System rather than by prosecution in the criminal courts. (It is anticipated that prosecution in the criminal courts would not be the norm.)

4. Decriminalising consensual sexual activities between older children, as proposed by the SLC, might encourage such activities and might be interpreted (albeit mistakenly) as lowering the age of consent for sexual intercourse.

5. The existence of offences which do not rely on proving that the offender knew, or should have known, that the victim did not consent may be helpful in prosecuting cases where there is some evidence that one older child was sexually exploited by another older child, but probably not enough evidence to obtain a conviction for one of the offences set out in Part 1 of the Bill. For example, a response from Rape Crisis Scotland (2008), to the Scottish Government’s consultation, raised a concern that the SLC proposals might limit the options for prosecutors.

Arguments which have been advanced in favour of the approach proposed in the SLC Report and/or against the approach in the Bill include:

1. The SLC approach, which clearly focuses on the welfare of the individual child rather than threatening criminal prosecution, may be a more appropriate response where it is clear that the activities involved are consensual. The Scottish Children’s Reporter Administration (2008) has noted that other concerns about the welfare of children arising out of their behaviour (including misusing alcohol or drugs) are currently addressed by way of non-offence grounds of referral to the Children’s Hearings System.

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9 Responses to the Scottish Government’s consultation have not been published at the time of writing this briefing. They are, however, available for viewing at the Government’s library in Edinburgh.

10 See paragraph 114 of the Policy Memorandum.
2. The existence of criminal offences relating to older children who engage in consensual sexual activities could, even where a child is not prosecuted in the criminal courts, result in children being subject to criminal investigations by the police. This may have an adverse impact on the emotional development of children.

3. The criminal offences in section 27 of the Bill could result in children, who have engaged in wholly consensual activities, having a record for committing a sexual offence. Even if dealt with by way of the Children’s Hearings System, rather than the criminal courts, such information could limit the prospects of a child in later life (e.g. in relation to employment). The Scottish Child Law Centre (2008) has noted that, whilst offences dealt with by the Children’s Hearings System do not result in a criminal record, they can appear in Disclosure Certificates.

4. The fact that current criminal law provisions allow for the prosecution of boys who engage in consensual sexual intercourse with girls under the age of 16 has not prevented a significant proportion of Scotland’s children engaging in sexual intercourse before the age of 16.\footnote{A response from the organisation Brook (2008), to the Justice Committee’s call for written evidence, stated that research had shown that 30% of boys and 23% of girls in Scotland have had sexual intercourse by the age of 16.}

5. Research evidence does not necessarily support the view that removing the threat of criminal prosecution for consensual sexual activities between older children will lead to more pressure on such children to engage in sex at an early age. For example, the sexual health organisation Brook (2008) has stated that research has identified socio-economic status, educational achievement, age at first menarche (first menstrual period) and source of information about sex as the most important factors influencing the age at which young people begin sexual activity.

6. The creation of criminal offences, such as those set out in section 27 of the Bill, may fail to send a clear message about the undesirability of underage sex if coupled with minimal enforcement by way of prosecution.

7. A criminal law approach to dealing with consensual sexual activities between older children may present difficulties for organisations providing sexual advice to children (e.g. they may be accused of encouraging criminal activity). Such an approach may also discourage children from accessing advice services which seek to protect their wellbeing (e.g. because of concerns that the service will not be in a position to keep information confidential if it points to the possibility that a criminal offence has occurred). The Community Planning Partners in Highland (2008) (including the Highland Child Protection Committee and Sexual Health Strategy Group) have noted that girls currently vastly outnumber boys in attendance at sexual health services for sexually transmitted infection testing and contraception advice. One reason for this may be the fact that, under current legal provisions, a girl who has consensual sexual intercourse with a boy aged 14 or older is not thereby guilty of a sexual offence.

8. Making consensual sexual intercourse between older children criminal might encourage some children, who actually consented to having sex, to make false allegations that they did not consent. It may also lead to an argument, in cases where an older child is being prosecuted for forcing another older child to have sex, that the victim has lied about the issue of consent in order to avoid prosecution.

9. Various respondents to the Justice Committee’s call for written evidence questioned the proposed limits on the range of sexual activities covered by the offences in section 27 of the
Bill, in particular the justification for excluding oral sex from their scope. It was noted that oral sex can lead to the spread of sexually transmitted infections. This issue was raised by respondents who are in favour of the use of the criminal law and by those who favour the approach proposed by the SLC. It may be noted that the SLC proposals would allow intervention (by way of the Children’s Hearings System) in relation to a much wider range of sexual activities than the provisions in the Bill (ie they are not restricted to a limited range of penetrative sexual conduct).

A response from Scotland’s Commissioner for Children & Young People (2008), to the Justice Committee’s call for written evidence, argued for more research to investigate the validity of some of the arguments advanced for or against the different proposals, and to identify the best way of:

- helping young people to make the right choices
- encouraging young people to avoid early sexual activity
- protecting young people from sexually transmitted infections and unwanted pregnancies
- protecting young people from exploitation or peer pressure

The Commissioner emphasised the importance of such research involving consultation with children and young people.

**SOURCES**


