

PSHE Association

A summary of the law on sexual consent – February 2015

This document provides a summary of the law on sexual consent according to Crown Prosecution Service (CPS) guidance on The Sexual Offences Act 2003; the CPS guidance on the Statutory Definition of Consent; the CPS 'What is Consent?' factsheet; and the CPS Sexual Offences Factsheet. It sets out the legal position and the key principle that it is the seeker of consent who is legally responsible for ensuring that consent is given.

It also outlines the law on sharing sexual images of people without their consent, drawing upon guidance from the Association of Chief Police Officers. The document supplements the PSHE Association's guidance on teaching about consent.

How does the law define 'consent'?

The Sexual Offences Act 2003 states that a person has consented '*if she or he agrees by choice, and has the freedom and capacity to make that choice*'. There are three important parts to this. Firstly, there is the emphasis on *choice* – a deliberate, active decision; secondly, there is the question of capacity to consent: is the person old enough, are they capable of understanding what is happening, are they intoxicated by alcohol or affected by drugs, do they have a mental health problem or learning difficulties, and are they conscious? Finally the law asks whether a person makes their choice *freely*, that is to say without manipulation, exploitation or duress. This may include the use or threat of force, or may be more subtle, to do with whether the person seeking consent is in a position of power or authority, or is significantly older than the other person.

The CPS states that the law does not allow a person's consent to sexual activity to have effect in the following situations:

- where the person giving consent did not understand what was happening and so could not give informed consent, for example in the case of a child or someone suffering from a severe mental disability;¹
- where the person giving consent was under the relevant age of consent

In all cases, the law is clear that it is the responsibility of the person *seeking* consent who has the responsibility to ensure that the other person agrees by choice and has the freedom and capacity to make that choice. The CPS is clear that the seeker of consent must seek continuing consent, rather than treating it as a one off.

What is the legal age of sexual consent?

Despite what young people may feel in a given situation, there are legal boundaries to their ability to give consent, so any voluntary agreement to sexual activity by someone under 16 cannot be defined as consent in law, according to the Sexual Offences Act 2003 (i.e. any sexual activity involving one or more

¹ This reference to severe mental disability obviously has significant implications. These cannot be fully covered in this document; however our colleagues at FPA provide comprehensive advice and support in relation to sexual health services for people with learning disabilities and can provide more information if needed, [see their website](#) for further details.

person who is under the age of sixteen is illegal). However, in its sexual offences factsheet, the CPS states that “*children of the same or similar age are highly unlikely to be prosecuted for engaging in sexual activity, where the activity is mutually agreed and there is no abuse or exploitation*”. This applies unless it involves one or more person who is under 13 and then it is an absolute offence and the issue of mutual agreement is irrelevant.

It is important for pupils to understand that in cases where a person over the age of 16 has sex with someone under 16, it is the person over 16 who commits the offence, not the younger person, assuming there is no other offence being committed by the younger person (i.e. in the case of a violent sexual attack on a 16-year-old by a 15-year-old, the 16-year-old would clearly be the victim).

According to the law, when has an offence been committed?

The Sexual Offences Act states that certain things must have happened to *prove* that an offence has taken place. Person A is seen to have committed an offence against Person B when:

- 1) Person A does the relevant act
- 2) Person A acts intentionally
- 3) Person B does not consent
- 4) Person A does not reasonably believe that Person B consented.

Deciding on ‘reasonable’ belief means taking into consideration factors such as whether Person A has the capacity to determine consent and what steps they have taken to assure themselves that Person B consents and continues to consent.

In relation to many other offences there is no requirement to prove an absence of consent. Only the act itself and the age of the victim or other criteria need to be proved. They include:

- rape, assault by penetration or sexual assault of a child under 13
- inciting or causing a person to engage in sexual activity with a child under 13
- child sexual offences involving children under 16
- children under 18 having sexual relations with persons in a position of trust
- children under 18 involved with family members over 18
- persons with a mental disorder impeding choice, who are induced threatened or deceived or who have sexual relations with care workers

Sharing sexually explicit images without consent

It is both a gross violation and a very serious offence to take or share sexual images of another, without their consent. Depending on the circumstances, sharing such images can be an offence under various different pieces of legislation including the Sexual Offences Act (2003), Malicious Communications Act (1988), Obscene Publications Act (1959) and the Protection of Children Act (1978). If the victim is under 18, it could also lead to the perpetrator being subject to the notification requirements under Part 2 of the Sexual Offences Act 2003, commonly referred to as the Sex Offender Register.

Pupils should also learn that it is illegal to produce, possess or distribute an indecent image of a person under the age of 18 – even if it’s a picture of themselves. These laws have been created to protect children and young people. It is therefore unlikely that the police would prosecute a young person for taking or sharing pictures of themselves, unless they were concerned that images were being used to harass or coerce, or shared with intent to harm. For further information see advice from the Association of Chief Police Officers.