

“Underage sex” and sexting: There is no such thing as “the age of consent”

There is no part of a statute which states “The Age of Consent is X”. There is no common law principle giving “The Age of Consent”. So what do people *mean* when they talk about the age of consent?

Most people would say that it means the age when it is legal to have sex, which most people would identify as 16. However, if a child aged 15 has sex *s/he* is not thereby breaking the law, but their *partner* may well be. So, is it the age when sex stops being unlawful *for the partner*? Well, from the age of 16, a person can (usually) consent to sex. But, this aspect of the age of consent covers more than just sexual intercourse. The Sexual Offences Act 2003 (SOA 2003) is very widely drafted; before a person’s 16th birthday *s/he* cannot consent to *any* sexual activity. That includes sex, but it also includes a simple kiss.^[1] So, sexually kissing a 15 year old is an offence. Of greater concern is that two 15 year olds having a kiss are *both* breaking the law. We rely on the hard-pressed Crown Prosecution Service using its discretion not to prosecute in this situation.

So, have we at least established that consensual sexual activity with a young person aged 16 is lawful? After all, a 16 year old can get married. Well, it all depends on the partner, because not all partners are treated the same way. If the partner is in a “position of trust” in relation to the young person (e.g. a teacher), the partner is likely to be committing an offence if they engage in any sexual activity while the young person is under 18.^[2] The media regularly shows us examples of this, the most recent and high profile being [Jeremy Forrest](#). See our earlier post [here](#).

If the partner is not in a “position of trust”, then is all consensual sexual activity lawful? The answer is “yes”, although if indecent images are taken or received further complications arise, because it is unlawful to make or possess an indecent image of a person aged under 18. If the images were taken when the young person was 16 or over and the couple were at the time married, civil partners or living together in an enduring family relationship then it is lawful for the images to have been taken and/or received *by the parties*, but if indecent images are taken and/or kept outside of these categories (e.g. when the young person was under 16, or in a relationship which never involved cohabitation) or by someone other than the parties, then an offence will be committed.^[3] A 17 year old taking pictures of his/her 17 year old partner would be committing an offence. Two 17 year olds sexting each other, even in the context of a loving relationship are *both* committing a criminal offence by downloading and/or keeping the images they sending or are sent. So whether the partner took the photo, sent the photo or received it *s/he* would be committing an offence. This includes moving images, cartoons and other pseudo photographs so creating graphics is not an option.

The BBC recently devoted a day to staying safe online. Newsbeat's part of this was a programme about people using the "hook-up" apps like Grindr, Blendr, Scruff, Jack'd and Bender to meet people for sex. At least some of these apps have terms of use policies "requiring" users to be 18 or over. However, the companies must be working on the basis that policing this is nigh on impossible. The government view (as expressed to the BBC by the Department of Culture, Media and Sport) is that such terms of use are voluntary and not legally enforceable as they have no basis in law. That view may not stand up to scrutiny as an app provider who failed to put in place age restrictions, bearing in mind the point of these apps is to enable people to communicate about sex and then meet for sex, might find themselves charged with facilitating a child sex offence^[4] or assisting or encouraging the commission of a child sex offence or an indecent images offence^[5].

Another issue raised in the Newsbeat feature, and about which the NSPCC have concerns, is the use of the hook-up apps for "grooming" young people for sex. There will inevitably be predatory people using such apps for exactly that reason and the NSPCC are right to raise awareness of this risk to try and keep young people safe. However, there may also be adults using such an app and assuming that everyone else using the app is 18 or over. That is a dangerous assumption to make, just as it would not be safe to assume that every person drinking in a pub on a Friday night is 18 or over. But at least in the pub, the adult can see the other person face to face. That safeguard is lost when communication is over the internet. There is a risk of people mistakenly getting involved in sexual messaging, including sending and receiving indecent images, with those aged under 18, or even under 16.

So, "The Age of Consent" is really a sliding scale of what can be done with or in relation to a young person between the ages of 16 and 18, with the partner breaking the law rather than the young person. A child aged under 16 cannot consent to any sexual activity whatsoever. There have been attempts to argue in favour of lowering the age of consent most recently and prominently from Barabara Hewson in Spiked magazine. Our own Felicity Gerry argued strongly against this line in Criminal Law and Justice Weekly, pointing out the vital difference between legalizing adults preying on children and legalizing what many teenagers are already doing i.e. having consensual sex with each other.

The broad drafting of the child sex offences in the SOA 2003 was deliberate, to provide the widest possible protection for children. The laws preventing the possession etc of indecent images of children were amended to cover those aged 16 and 17 for the same reason (to make it harder for defendants to argue that the child in the image might be 16 or over). The result is that we have strong laws protecting children and young people from sexual exploitation, but perhaps we need to reconsider the situation where we are protecting *consenting* teenagers from one another. If 15 year olds are told that *all* sexual activity is unlawful until they are 16, does that not dilute the perhaps rather more important message that *non-consensual* sexual activity is unlawful? Perhaps, with these older teenagers, the focus needs to be as much on the age of the partner as much as on the age of the "child".

Catarina Sjölin

[1] ss.9-13, SOA 2003

[2] ss.16-19, SOA 2003

[3] s.1 Protection of Children Act 1978 and ss.160 and 160A Criminal Justice Act 1988

[4] s.14, SOA 2003

[5] See the Serious Crime Act 2007.