This is a peer-reviewed, accepted author manuscript of the following research article: Callander, I 2026, 'Section 37 of the Sexual Offences (Scotland) Act 2009: still a problem?', *Edinburgh Law Review*.

SECTION 37 OF THE SEXUAL OFFENCES (SCOTLAND) ACT 2009: STILL A PROBLEM?

Section 37 of the Sexual Offences (Scotland) Act 2009 ("the 2009 Act") contains offences criminalising consensual sexual intercourse and oro-genital sexual activity between older children. In 2019, this author revealed that this provision was used infrequently during its first seven years in effect, which contrasted starkly to the significant number of older children likely engaging in conduct criminalised by section 37.[1] This article updates that research by incorporating data, obtained through a Freedom of Information ("FOI") Request to the Crown Office and Procurator Fiscal Service (COPFS), for the ensuing eight years. Although this shows that the number of prosecutions has declined, this article argues that section 37 remains problematic despite infrequent state intervention under the provision.

A. BACKGROUND

Section 37 contains two offences criminalising "older children" aged thirteen to fifteen for their consensual sexual behaviour. Where A and B are older children, A will be guilty under section 37(1) of the offence of "engaging while an older child in sexual conduct with or towards another older child" if A engages in penetrative sexual conduct or oro-genital contact with B. If B "engages by consent" to this conduct, then B commits the offence under section 37(4) of "engaging while an older child in consensual sexual conduct with another older child".[2] Both offences carry a maximum penalty, where prosecuted on indictment, of ten years' imprisonment.[3] Section 37 thus contains "status offences"; the conduct in question is criminal only because the parties involved are both children.[4] Were they adults, the same conduct would not constitute an offence.

Section 37 has always been controversial. The Scottish Law Commission ("SLC") had recommended that factually consensual sexual behaviour between two older children should not constitute an offence, given the lack of "discernible social wrong" involved.[5] The Scottish Government, however, insisted upon blanket criminalisation of both parties because "the law should…make clear that society does not encourage underage sexual intercourse".[6] Section 37 was accordingly introduced to "send a message", but with limited political appetite for enforcement.[7] Many children were potentially affected; estimates suggest ca.45,000 adolescents were captured by the provision and thus, at least theoretically, exposed to the risk of prosecution.[8] The intentional creation of an overly inclusive offence, and consequent reliance on prosecutorial discretion *not* to prosecute it, attracted considerable criticism for undermining the rule of law.[9]

---

[1] I Callander, "Regulating consensual sexual behaviour between older children: The case against the current approach under the Sexual Offences (Scotland) Act 2009" (2019) 23(2) ELR 177-203.

[2] P Harvey and A Turnbull, *The Law of Sexual Offences in Scotland* (2025) 99, noting the consent specified in s 37(4) is "unavoidable" given s 37 seeks to criminalise consensual behaviour, as otherwise B would be criminalised even without consenting to A's conduct.

[3] 2009 Act Schedule 2.

[4] Committee on the Rights of the Child, *General comment No. 24 (2019) on children's rights in the child justice system* (2019) para 12.

[5] Scottish Law Commission, Report on *Rape and Other Sexual Offences* (Scot Law Com No 209, 2007) para 4.52.

[6] Scottish Government, *Sexual Offences (Scotland) Bill Policy Memorandum* (Scottish Parliament Corporate Body 2008) para 110.

[7] J Chalmers, "Regulating adolescent sexuality: English and Scottish approaches compared" (2011) 23(4) CFLQ 450-464 at 461.

[8] Callander (n 1)

[9] ibid; Chalmers (n 7).

Guidelines for police were first issued by the Lord Advocate in 2014 restricting the circumstances where section 37 charges should be jointly reported to COPFS and the Children's Reporter. As Harvey and Turnbull argue, these enable police to "determine whether the offence is merely sexual experimentation or something more serious and concerning".[10] The guidelines list several "indicators" that police should have regard to when deciding whether to jointly report allegations under section 37, including the presence of a "power imbalance" between the parties, or "overt aggression, manipulation, coercion or bribery".[11] The guidelines then state that joint reporting is required where a listed element, or other circumstances, indicate "that a young person may not have given free agreement to the activity".[12] "Free agreement" is the definition of consent in Scots sexual offences law.[13] Where there is sufficient evidence of an older child's lack of consent to any sexual activity, it would be expected that the other older child would be charged with, and subsequently prosecuted for, an offence based on a lack of consent, such as rape contrary to section 1 of the 2009 Act. Therefore, from the outset, the implication has been that joint reporting under section 37 is intended to capture cases at the margin, where there is some doubt over consent. Prosecution under the provision is, therefore, seemingly reserved for where there has been exploitative behaviour by one older child but there is insufficient evidence of the other older child's lack of consent to the sexual activity.[14]

B. USE OF SECTION 37

(1) CHARGES REPORTED TO COPFS: DECEMBER 2010 - OCTOBER 2017

The previous study showed, between the 2009 Act coming into force in December 2010 and October 2017, 137 charges were reported to COPFS under section 37.[15] Thus, over that approximately seven-year period, there were, on average, nineteen to twenty section 37 charges reported to COPFS annually. The most common action taken, in relation to sixty-four of the 137 charges (47%), was referral to the Children's Reporter. Court proceedings were the second most common outcome, for thirty-two charges (23%), although section 37 was not ultimately prosecuted separately for five charges. While some charges were still ongoing, by October 2017 there were five convictions for a section 37 offence.

This data therefore demonstrated the low number of charges reported to COPFS for section 37 relative to the quantity of proscribed sexual activity likely taking place between teenagers. Furthermore, a section 37 charge was only prosecuted twice as the sole sexual charge in the case, whereas twenty-five charges were prosecuted along with other sexual offences. This indicated that section 37 was rarely prosecuted in isolation.[16] The facts underlying these charges are unknown. However, the police guidelines indicate the types of circumstances that the Lord Advocate intended to be reported to COPFS.

[10] Harvey and Turnbull (n 2) 231.
[11] Crown Office and Procurator Fiscal Service, *Lord Advocate's guidelines on offences committed by children* (first published 2014, revised 2021), available at https://www.copfs.gov.uk/publications/lord-advocate-s-guidelines-offences-committed-by-children/html/.
[12] ibid.
[13] 2009 Act ss 12 and 38(3).
[14] Crown Office and Procurator Fiscal Service, *Decision making in cases of child accused*, rev edn (2023), available at https://www.copfs.gov.uk/publications/decision-making-in-cases-of-child-accused/. See para 40, which states that where there is insufficient evidence of rape, but sufficient evidence of a s 37 offence, the child can be referred to the Children's Reporter for that "lesser offence".
[15] The data in Part B(1) of this article is reported in Callander (n 1) and was obtained through an FOI request submitted to COPFS by the author in 2017. Note that the data refers to the number of charges and not the number of children or cases reported.
[16] Callander (n 1).

(2) CHARGES REPORTED TO COPFS: OCTOBER 2017 - FEBRUARY 2026

Responding to an FOI request, COPFS confirmed that, between October 2017 and February 2026, there were twenty-eight charges reported to COPFS under section 37.[17] In comparison to the earlier period therefore, the number of charges being reported has decreased significantly. In the earlier period, there was an average of nineteen to twenty charges reported annually, but in this period the annual average was three to four charges.

Despite this noticeable drop, action taken by COPFS in response has remained similar. The most common outcome is still referral to the Children's Reporter. Nineteen of the twenty-eight charges were referred (68%); a greater proportion when compared to the earlier period (47% previously, 68% now). Proceedings in court remain the second most common outcome, used for five of the twenty-eight charges (18%). While section 37 was not separately prosecuted in relation to two charges,[18] a section 37 prosecution was recorded as ongoing for a charge reported in 2023-24, and two charges resulted in conviction in 2021-22. A comparable proportion of charges therefore resulted in court proceedings across both periods (23% previously, 18% now). However, the proportion of charges resulting in a prosecution for section 37 has diminished slightly from 17% previously to 11% now (excluding section 37 charges that were not ultimately prosecuted as a separate offence and those where court proceedings were subsequently discontinued).[19]

The proportion of reported charges resulting in no action has markedly decreased, from nearly a quarter of charges (23%) in the earlier period to fewer than one in ten now (7%).[20] This could be directly related to fewer charges being reported. The Lord Advocate's guidelines to police, last revised in 2021, emphasise that "any cases of doubt should be discussed with the Procurator Fiscal in advance of any report being submitted".[21] A straightforward explanation that could account for both fewer charges being jointly reported and, in turn, fewer of those that are reported resulting in no action, would be increased communication about which charges to jointly report. A decline in joint reporting would be consistent with the wider move away from prosecuting children in Scotland. Indeed, even following a joint report, there is a rebuttable presumption that children will be referred to the Children's Reporter rather than prosecuted.[22] Other explanations may also exist, such as that instances of serious conduct are being instead reported as rape.

Whatever the explanation, it is nevertheless significant that the data indicates an increasingly restrictive use of section 37. Fewer charges are jointly reported and there are far fewer prosecutions and referrals to the Children's Reporter. Proportionally, there are more referrals and slightly fewer prosecutions than previously. Harvey and Turnbull think it "unlikely" that COPFS would prosecute a section 37 offence in isolation.[23] The data supports this, showing that in this period there were no cases where section 37 was prosecuted as the sole sexual offence. This can be differentiated from the earlier period where this occurred in two cases, albeit this was not the norm. It is also noteworthy that court proceedings have not been the outcome for any section 37 charge more recent than one reported to COPFS in 2023–24, although there have been referrals to the Children's Reporter in relation to charges reported since then, including in 2025-26. Any future uptick in prosecutions seems improbable, with COPFS restating in its 2025 guidance that "prosecutors follow a rebuttable presumption against the prosecution of children in

[17] The new data discussed in Part B(2) was obtained through an FOI request submitted by the author via email on 6 February 2026, with a response received over email on 6 March.
[18] Meaning that, while the s 37 charge was not separately prosecuted, the accused was prosecuted in relation to other charges.
[19] Thirty-two charges led to court proceedings in the earlier period, but five s 37 charges were not prosecuted separately, and five charges were latterly recorded as 'no further action' – Callander (n 1).
[20] Callander (n 1).
[21] COPFS (n 11).
[22] COPFS (n 14).
[23] Harvey and Turnbull (n 2) 99.

court for any type of offending, including solemn level sexual offending".[24] However, the possibility remains, with the guidance emphasising the presumption can be rebutted where prosecution is in the public interest, including where there is evidence of coercion.[25]

C. **STILL A PROBLEM?**

The late Sir Gerald Gordon once observed that section 37 is "so difficult to understand or apply that it is probably best ignored wherever possible".[26] Although not completely ignored, it certainly seems to have been used only sparingly in practice. Reassuringly, there is no widespread prosecutorial intervention in older children's lives for factually consensual sexual conduct. However, this does not make section 37 unproblematic. Indeed, this article argues that section 37 remains problematic for three reasons.

First, the existence of section 37 on the statute book matters irrespective of whether it is enforced. A law can have harmful social effects even where it is rarely enforced. For example, blanket criminalisation of consensual sexual behaviour can limit adolescents' perceived access to healthcare, and deter the reporting of non-consensual sexual behaviour in circumstances where there has been prior consensual behaviour between the parties.[27] Furthermore, as Ferguson and McDiarmid note, the criminal law may be "too blunt an instrument where the real issue – discouragement of early penetrative sex – may be better achieved through education and dialogue".[28] It is not simply that these alternative approaches may be more effective, but that they are likely to be undermined by blanket criminalisation. For example, criminalisation can impede dialogue by driving teenage sexual behaviour "underground, far from the guidance that might otherwise be provided by parents, guardians and other members of society".[29]

Second, although the risk of state intervention is low, section 37 is nevertheless being enforced. Over the past fifteen years, over 150 charges have been reported to COPFS, leading to both prosecutions and referrals to the Children's Reporter. While the circumstances behind each charge remain unknown, prosecutorial intent has always been to limit intervention to serious cases involving exploitative behaviour. Yet, heavy reliance upon discretion inevitably risks inconsistent and selective enforcement, however unintentional.[30] Different decision-makers (police and prosecutors) may reasonably reach different decisions on the same facts. Furthermore, while limiting enforcement to certain case types may seem appealing, the use of wide status offences creates what Strout *et al* describe as "an ideal climate for discriminatory enforcement".[31] Police and prosecutors decide which child is the "victim" and which the "perpetrator".[32] When ambiguous, the assumptions and biases of the police, prosecutors and other adults involved, about, for example, the gender or sexual experience of the children involved, determine which child is cast as the "real offender" and how to proceed.[33]

---

[24] Crown Office and Procurator Fiscal Service, *Statement of prosecution policy: diversion and referral to the Principal Reporter in rape and other solemn level sexual offences where the accused is a child* (2025), available at: https://www.copfs.gov.uk/publications/statement-of-prosecution-policy-diversion-referral-to-the-reporter-in-solemn-sexual-offences-where-the-accused-is-a-child/.

[25] ibid.

[26] *AB v HM Advocate* 2017 SCCR 244, commentary at 262D.

[27] Callander (n 1) 196-197.

[28] PR Ferguson and C McDiarmid, *Scots Criminal Law: A Critical Analysis*, 3rd edn (2025) 364.

[29] This reasoning against blanket criminalisation was accepted by the South African Constitutional Court when striking down unconstitutional equivalent provisions: *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another {2013} ZACC 35* at para 89 per Khampepe J.

[30] Callander (n 1) 192.

[31] J Strout et al, 'Protecting youth from themselves: The overcriminalization of consensual sexual behavior between adolescents' (2020) 40(1) CLRJ 1-24 at 14.

[32] ibid.

[33] ibid.

Crucially, while only certain types of cases may be targeted for enforcement, there is no requirement for proof of, for example, exploitation or coercion under section 37. Thus, as Chalmers explains, where an older child is prosecuted because their behaviour is considered exploitative, they cannot challenge the factual basis for this decision, or adduce evidence disproving the presence of exploitative circumstances in court.[34] Indeed, even if they could demonstrate that they had not acted in an exploitative way, they would still be liable to conviction.[35] While more section 37 charges are referred to the Children's Reporter than prosecuted, referrals are still on an offence ground. If the ground is denied by the child, any lack of exploitative circumstances would again be irrelevant to its establishment at a proof. The lack of any safeguard against conviction in section 37 has been described as compromising the presumption of innocence.[36] Scotland's approach stands in contrast to other jurisdictions, where legislation criminalising sexual activity involving children explicitly provides a consent defence where the parties involved are children within a specified age range of each other, and the relationship is not, for example, "intimidatory or exploitative" (Ireland) or "exploitative" (Canada).[37]

Third, the sustainability of section 37, and the spectre of criminal justice intervention it creates, is questionable given the recent incorporation of the United Nations Convention on the Rights of the Child ("UNCRC") into Scots law.[38] Although it is beyond the scope of this article to examine this further, it is worth highlighting that the Committee on the Rights of the Child ("CRC"), which monitors UNCRC implementation, has urged State parties to remove status offences criminalising consensual sexual acts between adolescents from their statute books.[39] Section 37 also sits uncomfortably with the CRC's position on where the age of criminal responsibility should be set, as "older children" are either younger than the CRC's recommended minimum age (fourteen) or younger than the age the CRC regards as commendable (sixteen).[40]

D. CONCLUSION

This article has demonstrated how section 37 has been used in the eight years since it was last investigated by the author. It has shown that although the number of charges jointly reported to COPFS under section 37 has dropped, the outcomes of those charges have nevertheless remained similar. This article has further argued that, despite the minimal risk of state intervention under section 37, the provision remains a significant cause for concern for several reasons. First, its presence on the statute book is problematic due to the adverse social consequences arising from blanket criminalisation irrespective of enforcement. Second, it is problematic when enforced (however rare), due to the lack of an appropriate safeguard against conviction. Third, its existence as a status offence is problematic, given the recent incorporation of the UNCRC and the CRC's warning to State parties to remove such offences. Rethinking Section 37 is therefore more imperative than ever.

Isla Callander
University of Strathclyde

[34] Chalmers (n 7) 461.
[35] ibid.
[36] ibid.
[37] For the full terms of each defence see s 3(8) of the Criminal Law (Sexual Offences) Act 2006 (Ireland) and ss 150.1(2) and 150.1(2.1) of the Criminal Code 1985 (Canada). The author is grateful to the Clark Foundation for Legal Education for its support with her research into the approach in Ireland.
[38] United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024.
[39] CRC (n 4) para 12.
[40] ibid para 22.