WORKING WITH SEXUALLY ACTIVE PEOPLE UNDER THE AGE OF 18 – A PAN-LONDON PROTOCOL
Response of the Office of the Commissioner for Children

The Office of the Children's Commissioner has read the Pan-London Protocol with interest and the text which follows paragraph 4.81 in the current draft of "Working Together" as well as the serious case review on Ian Huntley. The Commissioner wishes to make a number of comments relating to the impact of this Protocol and others that are similar and are already being used in some local authorities. This comments summarise the main concerns, but the Office of the Children's Commissioner would be happy to spend more time discussing this document in order to ensure that children's rights and interests are fully identified and implemented.

As an overall view the OCC has concerns about the concepts that underlie the London Protocol and is further concerned that the best interests of the child do not appear to be the guiding principle.

The Protocol appears to be a response to the Serious Case Review on Ian Huntley. The summary of the Serious Case Review is a rather misleading document. The conclusion, if one reads the full document, is that social services and the police did not have a functioning intelligence system that informed them when several complaints were being made about one man. In addition, it is clear that social services were deficient in offering support and services to 15 year olds who were estranged or had difficult relationships within the family and were engaged in a cohabiting sexual relationship while under the age of consent.

It is also clear from the serious case review that the 15 year old girls who were in sexual relationship with Ian Huntley had multiple needs and it was not merely their involvement in a sexual relationship that was cause for concern. General concerns, as well as concern about sexual activity, were expressed to the schools that the girls attended by parents and friends as well as the parents of other pupils. This information was passed on to social services. In some cases, the school themselves contacted social services to express their worry about certain children. However, in none of these cases was there release of confidential information without consent.

The OCC is concerned that the Protocol focuses on sexual relationships rather than the need to view the child in a holistic fashion. In addition, such an approach appears not to be child focused, but a response to the failure of police and social services to note and address Ian Huntley's sexual behaviour with under age girls.

The OCC is also concerned about the resource implications of this Protocol. Resources in social services are already stretched and obtaining services for vulnerable teenagers can be extremely difficult. If the Protocol were implemented in its present form, considerable resources would be required to carry out assessments on all under 16s, and indeed some 16 and 17 year

olds engaging in sexual activity. It is unclear whether this would be a good use of resources. But, this raises another issue. Having undertaken an assessment and determined that the young person is engaged in under age sexual activity, what will then happen? Is it intended to offer services to the young person or just to offer the advice and treatment that the young person initially sought? If support and services are to be offered, this too will have significant resource implications.

Section 2 – Assessment

Section 2.1 requires a professional who becomes aware that a young person is, or is likely to be, sexually active, to undertake an assessment of the young person's physical and emotional health, education and safeguarding needs in the context of the sexual relationship. The first question to be asked, is whether it is intended that every professional who knows of the young person's intentions is under such a duty? Further, what level of sexual activity is it envisaged this will cover? Would kissing be 'sexual activity'?

The requirement places a considerable duty on the professional and could be considered an invasion of the young person's right to private life. The current duty on professionals who are asked to provide contraceptive advice or treatment is only to determine whether the young person is Gillick competent ie complies with the Fraser guidelines: rather a different form of exercise. Essentially, if the young person has the maturity to understand the nature of a sexual relationship and its consequences, she will be viewed as Gillick competent and the doctor may provide contraceptive treatment. A doctor may also provide such treatment in order to protect the girl if she intends in any event, to have a sexual relationship. Would the young person be asked if she agrees to an assessment? What if she merely comes to the attention of the professional because she is seeking information and advice?

2.2 Indicators of risk of harm

Is the use of the word 'relationship' in the first line of this section intended to apply to a sexual relationship that involves penetrative sexual activity or any form of sexual activity? It would be helpful if this were made clear.

The first 'factor' to consider is competence. However, where information and advice are sought as opposed to treatment, the competence level will be different. Children seeking information and advice will be competent at a younger age than those seeking say, contraceptive treatment. How will competency be determined? Will any child under the age of 13 be deemed incompetent?

The requirement to report to social services and the police all cases where a young person under the age of 13 has been involved in penetrative sexual activity raises a number of issues. First, will all young people under this age be told at the start of a their relationship with a professional that if they reveal that they are engaged in penetrative sexual activity this will be reported, whether or not the young person consents? Second, how will the safety of the young person be assured if a referral is made? Third, will a policy of mandatory reporting safeguard children and be in their best interests? Or will

mandatory reporting mean that young people under the age of 13 will not seek contraception and will not confide in a professional if they are being abused because they know that the immediate response will be a referral? Has any research been undertaken on these issues and the views of those who work with children of this age been sought?

Section 2.2 requires that a great deal of information be considered. What if the young person is unwilling to give this information? Is it really necessary to go through this process with every underage young person involved in sexual activity, including non-penetrative activity? It is difficult to imagine that this could be in the best interests of the majority of young people, most of whom will quite sensibly be seeking advice.

It is highly unlikely that there will be sufficient staff and resources to undertake such an assessment on every young person involved in sexual activity under the age of 16. In addition, such an assessment is likely to be intrusive and runs the risk of being a breach of confidence and a violation of the right to private life under Article 8 of the European Convention on Human Rights.

There is no discussion in the Protocol of what is to happen where a young person is competent and refuses permission to disclose information given in confidence. At present, the law only permits confidential information to be disclosed without consent where the young person is at risk of significant harm. It would be extremely difficult in many cases to argue that a young person engaged in consensual sexual activity is at risk of significant harm. We would recommend that there be some reconsideration of the risk factors. There is no clear case here for changing the current law and procedure. Assessment should only take place where there is a clear risk that the young person is suffering significant harm: the factors that place young people at risk could then be set out. It is inappropriate to carry out assessments without the agreement of the young person where there is no risk of significant harm.

Section 2.3 Power Imbalances
How will an assessment identify possible imbalances within a relationship? Is it intended that the assessor will visit the other party in the relationship to determine this? Why is a 5 year age gap chosen? Is this gap evidence-based?

Section 2.4 Assessing risk using police information
The OCC would support the statement that young people may stop confiding in health and social care practitioners if they know the professional will automatically release confidential information without their consent to the police. It is likely that such a practice would also amount to a breach of confidentiality and be a potential breach of Article 8 ECHR. The fact that the police have agreed not to treat information as a formally referred allegation of crime, but just ‘record’ the request for intelligence purposes, will not prevent such a breach. In addition, if such information is to be recorded, this may raise human rights concerns with respect to the other party involved. This approach appears to be a sledge-hammer to crack a nut. Is it realistic and is it in the child’s best interests to report every under age sexual activity? This must be

deeply questionable. Would such a report be referred to on the child index established under s.12 Children Act 2004 as having information to share, thereby indicating that here may be a 'cause for concern'? Would the young person be informed that the police were recording information on them?

Section 4 – Information Sharing

It is well recognised that most 'confidential' services cannot offer absolute confidentiality and most young people will be informed of this. However, the law on confidentiality is clear as to when information may be shared: when a child or another child is at risk of significant harm. This would not include engaging in any sexual activity under the age of 16, though it would clearly cover sexual abuse or exploitative sexual activity.

Section 4.3 accurately records the Fraser Guidelines but this relates to ***competency*** and not to release of confidential information. The Fraser Guidelines simply set out when a child under the age of 16 may receive contraceptive treatment without the consent of the parent. It does not deal with the issue of when information may be shared or, put more accurately; confidential information may be passed without consent.

Section 5.2 sets out the situations in which confidentiality may be breached and information may be disclosed without consent. It refers to '***risk of harm'.*** This is not the accepted threshold for release of information without consent. The threshold is 'risk of ***significant*** harm': the threshold at which the state is entitled to intervene in the young person's right to family and private life. The section similarly appears to permit disclosure where '*it is possible* that the young person is being sexually abused or is at risk of sexual abuse'. This is a very low threshold and would not meet the risk of significant harm threshold permitting disclosure without consent.

Section 5.3 contains yet another threshold. It states 'if there are concerns that the child or young person *may be at risk of abuse'*. It is not clear what this means and how a professional is to determine whether the threshold for disclosure is met. This is unsatisfactory, especially in light of the fact that a referral **must** be made to the police and social services in such instances.

Section 5.4 There should be an assessment of competency. If the child is competent, his or her consent should be sought before there is any referral. Further, there is no indication of what steps are to be taken to safeguard the child in the event of such a referral. It may well be that a referral would place the child at a very real risk of harm. There must be an element of discretion, so that a referral is only made where this is in the best interests of the child.

Section 5.8 – the threshold of concern is too low: it should, once again, be risk of significant harm and not 'presents a risk of harm'. This is too nebulous.

Section 5.9- the requirement on social services and the police to obtain information about 13-18 year olds at possible risk of abuse or neglect is likely to place a considerable burden on embassies and particularly international social services, who have only a small staff. Referrals for information should

only be made where it is determined that this is relevant and necessary and in serious cases. It is likely that ISS would be overwhelmed if such referrals were commonplace for those young people who have lived overseas.

Section 7: is it seriously being suggested that all vulnerable 16 and 17 year olds should also be assessed if they engage in sexual activity, or is 7.1 meant to refer only to those young people referred to in 7.2?

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