Dear Alison

**Post-legislative scrutiny of the Sexual Offences Act 2003 and the Sexual Offences (Scotland) Act 2009**

Thank you for your letter of 20 December 2017 in relation to the above.

The two annexes to this letter responds to the issues raised in your letter.

Yours sincerely

Philip Lamont
ANNEX A

Sexual Offences Act 2003

Your letter raises issues relating to the operation of Sex Offender Notification Requirements (SONR). General information about SONR is given at the end of this response and the views offered below are within that context.

The Annex to your letter refers to convictions for sections 3-7 of the Sexual Offences (Scotland) Act 2009 which automatically results in the Sex Offender Notification Requirements (SONR) “irrespective of how serious or minor the actual offending was”. It further states “Many such offences are minor matters prosecuted at summary level, resulting in lenient sentences”.

The Scottish Government considers that to describe many of these offences as “minor matters” is a broad statement. Offences under section 3 of the 2009 Act, in particular, can involve the following types of conduct which, even without further inquiry, would be unlikely to be described as minor:

(a) intentional or reckless sexual penetration, by any means and to any extent, the vagina, anus or mouth of the victim,
(b) intentional or reckless sexual touching of the victim,
(c) any other form of sexual activity in which the perpetrator has intentional or reckless physical contact with the victim (whether bodily contact or contact by means of an implement and whether or not through clothing),
(d) intentional or reckless ejaculation of semen onto the victim,
(e) intentional or reckless sexual emission of urine or saliva onto the victim.

We consider it might be more appropriate to say that offences under sections 3-7 of the 2009 Act usually do not involve the penetrative sexual conduct that is criminalised in terms of sections 1 and 2 of the 2009 Act and thus, on one view, might be considered less serious. Although, as can be seen above, section 3 does encompass penetrative sexual conduct.

While we understand the point that is being made, we suggest it fails to consider victim impact and the victim’s sense of justice. Irrespective of whether it is a “minor or serious offence”, offenders caught by these provisions are motivated by a desire to sexually abuse. They have shown a lack of sexual self-control and subjected victims to uninvited sexual conduct. We consider that the police would want to know the whereabouts of such offenders and that these offences should trigger automatic notification.

Additionally, the first question that prosecutors require to consider is whether a report from a reporting agency, such as the Police Service of Scotland, discloses a crime known to the law of Scotland. The answer to that question is dictated by the available evidence and is not influenced by whether or not making the accused subject to the SONR is a competent disposal.

However, if a report discloses an offence in terms of sections 3-7 of the 2009 Act prosecutors are directed by internal guidance from the Lord Advocate that where
there is sufficient admissible, credible and reliable evidence and where proceedings are in the public interest those proceedings should be raised in the High Court or the Sheriff Court. This ensures that if the accused person is convicted then the court has the power to make him or her subject to the notification requirements.

In this connection, it is important to understand the effect of notification as a ‘sex offender’ and that it is not a sentence. The purpose of notification is not punitive, it is protective (with the explanation below confirming the main implications of SONR). Having said that the criminal courts can have regard to the effect of the SONR when selecting an appropriate sentence.

We consider assessment of the conviction and sentence in isolation without having full knowledge of the incident as a whole can also be misleading. Ultimately an offender may be convicted of a “minor sexual offence” when actually they were originally charged/indicted for several sexual offences or more serious sexual offences but for a variety of reasons convicted of only one “minor sexual offence”. Moreover describing the sentences passed in respect of such offences as “lenient” suggests that a more severe punishment was merited. Again this is a subjective view, with no strong evidence to support it.

It is perhaps worthwhile noting that the circumstances and severity of the offence are not the sole factors in determining the appropriate sentence. The accused’s history of offending is a crucial factor in that determination, as are his/her personal circumstances, as well as the personal circumstances of the victim and the impact that the offence has had on him/her.

Schedule 3 of the Sexual Offences Act 2003, provides the sexual offences which attract SONR across the UK. For Scotland, Schedule 3 does have thresholds for certain but not all sexual offences which need to be met before SONR can be applied.

This is considered to be a proportionate and common sense approach which protects child victims and ensures anyone aged under 18 who are accused persons are only subject of the SONR if sentenced to a term of at least 12 months imprisonment upon conviction.

Sections 3-7 of the 2009 Act, as highlighted, do not have these thresholds. In this connection we would say in the main, sections 3-7 apply to adult victims with provision of these offences for both younger and older children being covered in other sections of the 2009 Act. We would have a concern if offenders targeting adult victims were considered differently. It could be argued that an offence involving a person over 18 years is equally worthy of invoking notification.

The SONR are contingent on the offender being convicted of a relevant offence. With absolute discharges – a finding of guilt is made but no conviction is recorded. As we understand it a person who has been prosecuted in respect of an offence listed in Schedule 3 to the 2003 Act, and who has been granted an absolute discharge, does not fall within the definition of a "relevant offender" in section 80 of the 2003 Act and is therefore not subject to the SONR. We believe this view is
further supported by HM Advocate v KH 2014 SCCR 485, LJC (Carloway) at paragraph [14].

However in the case of admonitions – the finding of guilt is made and the admonition is considered a punishment and it is recorded as a conviction. Therefore a person subject to an admonition for a Schedule 3 offence would be subject to the SONR requirements.

It is noted that paragraph 60 of Schedule 3 is provided as an example of “discretionary powers” to make offenders subject to SONR. However we consider there to be a subtle difference here.

To explain, under paragraph 60 the court is permitted discretion to impose the requirements on someone who otherwise would not have been caught under them. What is suggested in your letter is a power to determine that someone should not be subject to the notification requirements when he has committed a relevant offence and otherwise should be so subject. We consider this is a subtle but important and distinct difference.

We consider it is important for certainty under the law for certain offences to always trigger SONR. Without such certainty, it creates an increased opportunity for ECHR challenge under Articles 8 and 14. Some sex offenders could challenge why the SONR operates automatically in respect of the offence of which they were convicted, while the court had discretion to determine whether the offender should be subject to the SONR for certain other offences. Indeed there is a real danger that if such an appeal were successful, the courts could become overloaded with appeals from people currently subject to SONR, which might threaten to undermine the public protection purposes of the SONR.

Furthermore the maximum sentence for sections 3 to 7 of the 2009 Act is 10 years imprisonment, whereas the maximum sentence for other offences in the 2009 Act (where the SONR applies automatically) is 5 years. Offenders sentenced in relation to those "lesser" offences could raise a challenge that such a provision is not proportionate and discriminates against them because the offence which they are sentenced for carries a lesser maximum sentence.

Background - effects of SONR

An offender who becomes subject to the notification requirements must, within 3 days of conviction, notify the police, in person and at a prescribed police station, of their name, address, date of birth, passport details, credit card, and bank details and national insurance number. If the offender is in prison on the day that this requirement falls due then they must make this notification within 3 days of their release.

Such offenders must then notify the police, within 3 days, of any changes to the details listed above. They must also notify the police, within 3 days, if they spend 7 days or more (whether consecutively or within a twelve month period) at an address they have not already notified to the police.
Offenders must also notify the police at least 7 days before departure or as soon as is reasonably practical of any foreign travel.

All offenders must ensure that they re-confirm the notified details listed above at least once every 12 months.
Sexual Offences (Scotland) Act 2009

The Committee have asked for the Scottish Government's views on the question of whether the Supreme Court's ruling that section 39(2)(a)(i) of the Sexual Offences (Scotland) Act 2009 (“the 2009 Act”) is not compatible with the European Convention on Human Rights (ECHR) is indicative that the provision did not give effect to the policy that was intended by the legislature at the time. It may be helpful to provide some background as to what the provision does and why the Supreme Court ruled that it was not compatible with ECHR.

Section 39 – “reasonable belief” defence

Sections 28 to 37 of the 2009 Act provide for a number of offences against children which relate to certain conduct which, where it involves someone aged 16 or older, would not be an offence.

Section 39(1) of the 2009 Act provides that it is a defence to an offence at sections 28-37 of that Act that the accused reasonably believed that the child had attained the age of 16 years.

Section 39(2)(a)(i) placed a restriction on the use of that defence in that it was not available to the accused if they had previously been charged by the police with a ‘relevant offence’. Relevant sexual offences are listed at Schedule 1 and comprise a number of sexual offences where the alleged victim was a child under the age of 16.

Supreme Court ruling in AB v. HMA

In 2015, an accused was prosecuted on indictment at Glasgow Sheriff Court for contraventions of sections 28 and 30 of the 2009 Act. These offences are ‘having intercourse with an older child’ and ‘engaging in sexual activity with or towards an older child’ respectively. The accused was 19 at the time and the complainer in relation to both offences was 14.

The accused had been previously charged with relevant sexual offences some 5 years earlier when he himself was 14 (two instances of lewd and libidinous practices directed towards younger children and indecent behaviour towards a girl under 16). Accordingly given the operation of the 2009 Act, he was not able to rely on the reasonable belief defence in his case.

In the Sheriff Court, the accused lodged a compatibility issue minute in which he argued that his rights under the European Convention on Human Rights (‘ECHR’) were infringed by the non-availability to him of the reasonable belief defence. The Sheriff referred the case to the High Court, which dismissed the reference and held that section 39(2)(a)(i) of the 2009 Act as it applied to the accused was compatible with ECHR.
Following this decision, the accused was granted leave to appeal the High Court decision to the UK Supreme Court (UKSC) and the case was heard in July 2016. The UKSC issued their judgement in April 2017.

In their judgement, the UKSC accepted that it was compatible with ECHR to prevent an accused person from making use of the defence where they had previously been charged with an offence relating to sexual activity with a child under the age of consent as such a previous charge could be said to amount to an ‘official warning’ that they should be especially careful in future not to engage in sexual activity with someone under the age of 16.

However, they did not accept that it was compatible with ECHR to prevent anyone who had previously been charged by the police with a sexual offence against a child to be barred from making use of the ‘reasonable belief’ defence.

They found that the restriction on the use of the defence was contrary to article 8 of the ECHR because many of the sexual offences listed as being ‘relevant’ for the purposes of restricting the use of the defence were of such a nature so as not to provide an official warning that consensual sexual activity with children between the ages of 13 and 16 was an offence.

Specifically, it was noted that the list of relevant sexual offences:

- included charges in which the age of the victim was not an essential component, and
- extended far beyond consensual sexual activity with an ‘older’ child.

The issue arises since these relevant sexual offences were not confined to sexual conduct which was illegal because it was with children (as it covered sexual activity with children where it was alleged that the child did not consent, and as such, the activity would have been criminal irrespective of the age of the complainer) and thus prior charges of such offences could not be taken to have alerted the accused to the importance of making sure that a person was over 16 before engaging in sexual activities.

It was also the case that since the definition of relevant offences included non-consensual offences, prior charges relating to those offences could not be taken to have alerted the accused to the importance of age in the context of consensual sexual conduct.

The list of ‘relevant offences’ at Schedule 1 to the 2009 Act was drawn up so as to include any sexual offence against a child. The policy approach was to bar any person who appeared to have a history of committing sexual offences against children from making use of the ‘reasonable belief’ defence (see paragraph 135 of the Policy Memorandum accompanying the Bill at introduction, which stated that the purpose of the restriction on the use of the defence was to prevent “serial sexual predators” from making use of the defence). As such, it appears that the provision did give effect to the policy intended by the legislature at the time. However, the Supreme Court have ruled that this policy approach is not compatible with article 8 of ECHR.
The effect of the Supreme Court’s decision is that section 39(2)(a)(i) is “not law” and as such, a person is not restricted from making use of the “reasonable belief” defence because they have previously been charged with, or convicted of, any offence concerning sexual activity with children (it is worth noting that the equivalent provision covering England and Wales at sections 9-12, 15 and 15A of the Sexual Offences Act 2003 does not place any restrictions on the use of the defence).