Dear Philip

Post-legislative scrutiny of the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 and the Sexual Offences (Scotland) Act 2009

Earlier in the year the Public Audit and Post-legislative Scrutiny Committee sought views from the public on which Acts would benefit from post-legislative scrutiny.

From the 24 Acts suggested the Committee agreed a shortlist of those it wished to take forward in the first instance. For the others the Committee agreed to write to the Scottish Government seeking information on the issues and concerns that were raised in the submissions.

In respect of the above Act I am writing to you seeking a written response to these issues. I would be grateful if you could provide a reply by Friday 23 February 2018.

A copy of the information provided in the submission can be found in the Annexe.

A link to our post-legislative scrutiny page can be found here:
http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/105094.aspx

Yours sincerely,

Alison Wilson
Assistant Clerk

The effect of these paragraphs is to subject those convicted of an offence under sections 3, 4, 5, 6 and 7 of the 2003 Act to the notification requirements of the 2003 Act irrespective of how serious or minor the actual offending was.

Many such offences are minor matters prosecuted at summary level, resulting in lenient sentences. As drafted these paragraphs allow no consideration to be given to whether there is actually any public interest requirement for such an imposition on the offender.

For example a very minor offence which could result in a modest fine, admonishment or even an absolute discharge subjects the offender to the requirements for 5 years; whereas someone who is placed under supervision, and thus whose offending is more concerning, is subject only for the period of supervision.

In England/NI/Wales an offender found guilty of the equivalent offences is not automatically subject to the notification requirements. Generally speaking minor offenders are not “placed on the Register”. The relevant provisions provide that an offender is subject to the requirements where:

- The victim was under 18
- Or in any other case the offender has been sentenced to a term of imprisonment, detained in a hospital or made the subject of a community sentence of at least 12 months.

Offenders under 18 are not placed on the Register unless they are sentenced to a period of imprisonment of at least 12 months.

It is suggested that this is a proportionate and common sense approach and genuinely allows the purpose of the legislation to be achieved.

This same approach is also followed in Scotland when Paragraph 60 of the Schedule is invoked and the court is asked to consider whether an offender should be subject to the Notification requirements. Judicial authority has confirmed again and again that a proportionate, common sense and purposive approach is to be adopted.

In conclusion it is suggested that the notification requirements in the Scottish legislation (particularly in the paragraphs above) should be scrutinised to allow consideration to whether such an approach should be adopted in every case.

(ii) Section 39(2) of the Sexual Offences (Scotland) Act 2009

Section 39(2) of the Sexual Offences (Scotland) Act 2009 has recently been subject to legal challenge in the case of AB v HMA [2017] UKSC 25. Arguably the Supreme Court judgement has highlighted that this provision as drafted was not what was intended by the legislature at the time.
Potentially there was no legislative intention to remove the statutory defence from an individual (i) only charged by the police as opposed to those having previously stood trial and been convicted, nor (ii) for removing it from those whose previous offence was not a “like offence”.

It is suggested this provision as presently drafted may not be underpinned by any rational legal principle and should thus be scrutinised.