

# The Police Act 1997 (Criminal Record Certificates – Children’s Hearings (Scotland) Order 2012



## RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately

### 1. Name/Organisation

Organisation Name

Not applicable

Title Mr  Ms  Mrs  Miss  Dr  Please tick as appropriate

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### 3. Permissions - I am responding as...

Individual

/

Group/Organisation

Please tick as appropriate

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate  Yes  No

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

(c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick as appropriate  Yes  No

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate  Yes  No

## CONSULTATION QUESTIONS

**1. Do you agree that all the offences listed from 1-18 in the Schedule to the order should remain?**

No.

**2. If the answer to Question 1 is no, which offences should be removed and for what reason?**

I do not understand why section 5(3) of the Criminal Law (Consolidation) (Scotland) Act 1995 (intercourse with girl aged between 13 and 16) has been included (para 9(f)). This seems inconsistent with the general scheme of the Schedule. It must be assumed that any intercourse amounting to a contravention of section 5(3) was consensual – if it were not, rape would have been the appropriate charge. It is not appropriate to proceed on the basis that a contravention of section 5(3) involved non-consensual intercourse (cf *McDade v HM Advocate*, 1998 SLT 68, applying the same principle in a different context).

The Schedule does not otherwise include offences of consensual sexual activity with older children (although see my comments immediately below) and rightly excludes the “older child” offences under the Sexual Offences (Scotland) Act 2009. This seems an appropriate response to the nature and severity of consensual but underage sexual activity, which is not analogous to the generality of offences specified in the Schedule.

Paragraph 9(f) should be deleted. I would note that one consequence of its retention would be that a person who committed the offence under section 5(3) prior to the 2009 Act coming into force would be liable to a consequence which would not follow from committing one of the equivalent offences under the 2009 Act (s 28 or s 37(3)). That differential treatment might give rise to human rights concerns unless a rational explanation could be offered for it. I do not understand the explanation offered at the start of page 7 in respect of the section 37(3) offence, because sections 5 and 6 of the CLCSA 1995 were repealed by Schedule 6 of the 2009 Act.

I would also have concerns about paras 9(h) (an offence under section 6 of the CLCSA 1995 – indecent behaviour towards girl between 12 and 16), although this offence may have been used in practice to encompass both consensual and non-consensual activity, making its position less clear cut. But unless the record makes it clear that the individual concerned engaged in non-consensual behaviour, the presumption of innocence would seem to require that they be treated as someone who engaged in consensual behaviour only.

I would make a similar objection as regards section 13(5) of the CLCSA 1995 (homosexual offences). Here, it is proposed at 9(k) to include both sub-subsections (b) (without consent) and (c) (with a person under the age

of sixteen [previously eighteen] years). I do not understand why sub-section (c) is included – again, this is inconsistent with the general scheme of the Schedule and the approach taken to offences under the 2009 Act. (I do not know whether convictions under section 13(5) are specifically recorded as being contraventions of 13(5) (b) or (c) as opposed simply to being contraventions of 13(5). If the latter, then there is clearly some difficulty here.)

**3. Do you agree that the offences listed at 1(a)-(s) and 2 of Part B of the Consultation Note should be excluded from the Schedule to the order?**

Yes. As noted above, I do not understand the reasoning offered regarding offences (n) and (o), but it seems to me that the consensual behaviour disclosed by these offences does not meet the threshold of severity required for inclusion in the Schedule.

**4. If the answer to Question 3 is no, which of the offences should be included and for what reason?**

Not applicable.

**5. Do you agree that all of the offences listed at 3(a)-(e) of Part B of the Consultation Note should be included in the Schedule to the order?**

No.

**6. If the answer to Question 5 is no, which of the offences should be excluded and for what reason?**

None of these offences should be included. The Schedule is structured on the basis that the threshold for the inclusion of assault is “assault to severe injury”.

The offences listed here are not of equivalent severity. These offences can only be prosecuted summarily and the maximum penalty which can be imposed on conviction for any of these offences is twelve months imprisonment (that is, the maximum powers available to a sheriff sitting in summary procedure).

These offences cannot, therefore, be used for more serious instances of assault. If a police officer or emergency worker is assaulted to severe injury, therefore, the case will fall to be treated as “assault to severe injury”, and

not as one of the statutory offences listed at 3(a)-(e). It should not be thought that the case would be treated as a statutory offence and fall through the net of the Schedule. The Schedule is in fact sufficient without the inclusion of these offences. Including them would be to a significant degree inconsistent with the general threshold of severity evidenced by the other offences in the Schedule.