

## RESPONSE FORM

### PREPARATION OF THE TENTH PROGRAMME OF LAW REFORM

We hope that by using this form it will be easier for you to respond to the questions set out in the consultation paper. Respondents who wish to address only some of the questions may do so. The form reproduces the questions as set out in the paper and allows you to enter comments in a box after each one. At the end of the form, there is also space for any general comments you may have.

Please note that information about this consultation paper, including copies of responses, may be made available in terms of the Freedom of Information (Scotland) Act 2002. Any confidential response will be dealt with in accordance with the 2002 Act.

We may also (i) publish responses on our website (either in full or in some other way such as re-formatted or summarised); and (ii) attribute comments and publish a list of respondents' names.

In order to access any box for comments, press the shortcut key F11 and it will take you to the next box you wish to enter text into. If you are commenting on only one or two of the questions, continue using F11 until you arrive at the box you wish to access. To return to a previous box press Ctrl+Page Up or press Ctrl+Home to return to the beginning of the form.

Please save the completed response form to your own system as a Word document and send it as an email attachment to [info@scotlawcom.gsi.gov.uk](mailto:info@scotlawcom.gsi.gov.uk). Comments not on the response form may be submitted via said email address or by using the [general comments form](#) on our website. If you prefer you can send comments by post to the Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR.

<b>Name:</b> ACC Bernard Higgins
<b>Organisation:</b> Police Scotland
<b>Address:</b> Tulliallan Castle, Kincardine, FK10 4BE
<b>Email address:</b> <a href="mailto:accoperationsandjustice@scotland.pnn.police.uk">accoperationsandjustice@scotland.pnn.police.uk</a>

## Questions

1. Do you have any suitable law reform projects to suggest?

### Comments on Question 1

1. A review of the legislation regarding child deaths and, in particular, the evidential threshold for those responsible for co-sleeping/overlying whilst under the influence of alcohol/drugs.
2. A review of the provisions in place for the service of Orders granted by Sheriffs in Summary Applications.
3. To consider reform to the Sexual Offences (Scotland) Act 2009 in respect of suspects refusing to consent to undergo forensic medical examinations, involving the taking of intimate samples.
4. To introduce legislation to control the possession and supply of adulterants used for illicit drugs or any other criminal purpose.

2. Do you have any project to suggest that would be suitable for the Commission Bill process in the Scottish Parliament; or, in relation to reserved matters, for the House of Lords procedure for Commission Bills?

### Comments on Question 2

1. A project to review and agree the "age of a child" across different areas of legislation to seek consistency in the protection of children.
2. To review Schedule 8 Certification and the impact on financial investigations and certifying communications data under Part 1 Chapter 2 of Regulation of Investigatory Powers Act 2000 (RIPA).

3. If suggesting a new project:-

- (a) Please provide us with information about the issues with the law that you have identified:

### Age of a Child

Current legislation has wide ranging ages of responsibility in relation to transition from child to adult, and individuals are protected/prevented from participating in different activities often in conflict to one another. The variance causes confusion and uneven protection, for example children are protected under trafficking legislation to a different age than sexual offences, forced marriage and non-criminal activity. Ages are further confused when considering Looked After Children. The ongoing consultation to raise the age of certain consent adds a new dimension to this debate.

### Children's and Young Persons Act 1937 - Child deaths

There are limitations under the Children's and Young Persons Act 1937, Section 12 2(b) which refers to "where it is proved that the death of a child under three years of age was caused by suffocation (not being suffocation caused by disease or the presence of any foreign body in the throat or air passages of the child) while the child was in bed with some other person who has attained the age of sixteen years, that other person shall, if he was, when he went to bed, under the influence of drink, be deemed to have neglected the child in a manner likely to cause injury to his health."

In England, Section 5 of the Domestic Violence, Crime and Victims Act 2004 (causing or allowing the death of a child or vulnerable adult) provides enhanced opportunities in situations where two persons are in sole charge of a child who dies or is subject to ill harm or neglect and refuse to provide an account.

The legislation was introduced to solve issues that arise when a child or vulnerable adult suffers an unlawful death, where it can be proven that one or more people living in the same household as the victim caused the death. The legislation places a new legal responsibility on adult household members who could be charged with the offence, even for instance where there is no charge of murder/manslaughter or where evidence submits that the offender could not themselves have committed the criminal act which killed the victim. It provides that members of a household, who have frequent contact with a child or vulnerable adult, will be guilty if they caused the death of that child or vulnerable adult if specified conditions are met.

### **Summary Court Orders**

There are inconsistencies within the various pieces of legislation that provide for service of Orders made following a Summary Application, for example Risk of Sexual Harm Orders and Sexual Offences Prevention Orders. This can lead to uncertainty around proper service and effect.

### **Sexual Offences (S) Act 2009**

Under terms of the Criminal Procedure (Scotland) Act 1995, Section 14, police officers are entitled to carry out a search of a person suspected of having committed a crime punishable by imprisonment. In addition, the police are entitled, in appropriate cases, to have any injuries or obvious marks examined and have these recorded. This can be done without the accused's consent, but should be carried out by a qualified healthcare professional, usually a Police Forensic Physician. The injuries and marks etc. should be recorded in the same way by the FP as recorded for a witness or victim – although reasonable force may be used, where necessary, to achieve this. Examination is restricted to an external examination. The taking of intimate samples and carrying out an intimate examination of a suspect is particularly common in cases of rape and other serious sexual crimes and is often critical in establishing and proving the particular crime under investigation.

A full medical examination going beyond a search of the person may be carried out with the consent of the accused person, or under a warrant granted by the court. Reasonable force may be used to have the accused person comply with a warrant, but it should be borne in mind that many doctors will not take body samples if the use of force is, or may be, required. The refusal or lack of consent may be of evidential value at trial.



Police Scotland is experiencing cases where suspects have been detained in respect of sexual crimes, including rape, and there has been a requirement for the suspect to be examined by an FP. In these cases by their own volition or the solicitor representing the suspect has advised their client to refuse to provide their consent when asked by the FP as the examination may subsequently result in them incriminating themselves. In certain cases it has been necessary to obtain a warrant in an effort to gain the samples.

### **Regulation of Investigatory Powers Act 2000 Part 1 Chapter 2.**

In relation to economic crimes, certification of documentation is controlled by Schedule 8 of the Criminal Procedure (Scotland) Act 1995 (Section 279) and the Criminal Procedure Rules 1996 and provides a procedure by which, by the addition of a docquet, a copy document may be treated as the equivalent of the original; a statement in a business document shall be admissible as evidence of any fact or opinion stated in it; and a business document may be taken to have its certified provenance. The certification of documents is not a process that is exclusive to financial investigation and affects all areas of police investigation when dealing with documents, CDs or DVDs.

The certification of documents allows the court to introduce evidence that may otherwise be considered hearsay. In relation to requiring communication data as evidence, this presents significant challenges for Police Scotland and COPFS, as the vast majority of Communications Service Providers (CSPs) are based in England and there can be confusion as to which certification should be attached to the data acquired.

It is common for errors to occur in the completion of the certificate and docquet, due to the bureaucracy of this outdated law which is no longer fit for purpose in the digital age. There are 24 different certification documents and four types of additional documents that cover different business situations.

Certification under Schedule 8 has been the subject of several court judgements in particular HMA v. Pocock 2010 which led to a full review of the certification process and a change in some of the procedures that had previously been implemented.

### **Adulterants**

In Scotland, controlled drugs in powder form are routinely adulterated to maximise weight and profit - heroin, cocaine, amphetamine and psychoactive substances. The most common adulterants for heroin are paracetamol and caffeine; benzocaine for cocaine; and lactose for amphetamine. These adulterants consist of both Active Pharmaceutical Ingredients and food supplements, and Organised Crime Groups adulterate drugs on a significant scale.

There is currently no statutory provision for law enforcement in Scotland to directly prosecute the importation and possession of APIs and food supplements, unless they can be evidentially linked to the illicit substance for which it was ultimately intended.

- (b) Please provide us with information about the impact this is having in practice:

### **Age of a Child**

The variance in legislation causes confusion in the appropriate age for protection and opens potential breach of human rights where young adults / children are prevented from participating in certain activities, but allow to participate in others. It causes conflict in

partnership working, where services transition between support and investigative partners at differing ages.

### **Summary Court Orders**

The inconsistencies that provide for service of Orders can mean that neither the subject of the order nor the police can be certain that an Order has been properly served. As a breach of these Orders is a criminal offence, it is essential both the subject of the Order and the police understand when the Order has been served and so has its protective effect and prosecution option.

### **Sexual Offences (S) act 2009**

Police Scotland is experiencing an increasing problem, where in spite of being in possession of a warrant, solicitors are maintaining their advice to clients to refuse their consent, which results in the samples not being obtained and the individual being charged with attempting to defeat the ends of justice. In *Vaughan v Griffiths* 2004 SCCR 537, the accused successfully appealed his conviction for attempting to defeat the ends of justice.

The refusal to consent to undergo a medical examination clearly has a significant detrimental effect on the ability of the police to investigate not only sexual crimes, but any crime where some degree of intimacy is involved in the examination.

Whilst it is acknowledged that in instances where suspects refuse to submit to a medical examination, whether under advice from their solicitor or by their own volition, individuals can be charged with the offence of attempting to defeat the ends of justice, there is a concern that it is unlikely that the penalty for commission of this crime would be commensurate with a likely sentence in the event of a conviction for rape or other serious sexual crime.

### **Regulation of Investigatory Powers Act 2000 Part 1 Chapter 2.**

The process of obtaining a production order, serving, collecting and receiving the subsequent data and thereafter presenting this for court purposes appears on the face of it to be a more simplified process that does not require the same standard of continuity of evidence as in Scotland.

Officer drafts and applies for production order and remits to Procurator Fiscal. PF thereafter authorises and officer attends court to have a Sheriff sign, (sometimes the PF undertakes this). Officer thereafter serves order by fax and in the majority of instances the institution then send the officer the resultant documentation by post. Officers are thereafter required to travel to the institution to have the witness complete and attach the certificates that apply to the type of documentation and sign production backing sheets.

Procedures in England and Wales appear to be far more streamlined and lean – under Section 9/10 Criminal Justice Act 1967.

**Training** is an issue for both Crown Office and Procurator Fiscal Service and Police Scotland. There are differing opinions within COPFS as to what certificate should be used where and how it is applied attached etc. This ultimately can be confusing for investigators who also receive little or no training. There needs to be a standardised approach.

**Review of Certificates** – Since the initial implementation of the process in 1996, there has been a number of different changes in the way that institutions hold documentation and consideration should be given to the number of certificates there are.

**Collection of Documents** – The main concern is the “chain of evidence” relative to the documentation. There are differing standards and opinions throughout the police and the fiscal service and as there can be a considerable cost implication.

The focus of Schedule 8 is on documents but most businesses now have computer based systems where electronic records are created. It is not uncommon to certify communications data that have over 500 pages and there are associated issues with posting this data from the CSP to Police Scotland to meet the Schedule 8 procedure when in fact Police Scotland have previously acquired this data via a secure portal at the investigation stage and have it available to be self-certified if the law allowed.

**Certification of Documents** – During a protracted investigation there may be a substantial number of documentary productions, however more consideration and consultation should be given to what requires to be certified.

**Cost** - There is a significant impact on cost as the CSP's are obliged to recover all costs. CSP staff are being cited for court in Scotland and are required to appear at court and simply confirm an accurate business record.

### **Adulterants**

A person ordering 25 kilograms of benzocaine over the internet and taking possession of it, would be unlikely to face any legal sanction. If 25 kilograms of benzocaine was added to cocaine, it would increase its value by about £1m.

Police Scotland estimate in the six months to June 2017, over 1,100 kilograms of benzocaine destined for Scotland was intercepted by law enforcement - the potential for £44m if used in illegal drug production. This is assessed to be a fraction of the real situation and highlights the scale of this criminal activity which remains unregulated.

A similar problem exists in relation to other substances albeit on a lesser scale. There has been a number of criminal cases where attempts to prosecute the possession and distribution of adulterants have failed due to lack of statutory provision. The Misuse of Drugs Act 1971 requires the drug to be proved - Benzocaine is most commonly used for cocaine, however it can be used to adulterate other controlled drugs including some psychoactive substances. The UK controlling bodies for the importation of the substances described have been met with similar challenges. This loophole in legislation allows an entire spectrum of Organised Crime Group activity around controlled drugs and psychoactive substances to operate with minimum risk.

(c) Please provide us with information about the potential benefits of law reform:

### **Age of a Child**

Reform would provide consistency and clarity, and ensure that children are protected equally from differing forms of abuse allowing different partners to work together effectively and ensure children in Scotland receive appropriate protection and safeguards.



## **Summary Court Orders**

Reform and consistency would enable more effective and efficient management and enforcement of the Orders. As community-based sanctions are increasing, it is important that the mechanisms for issue, service and enforcement are clearly understood and can withstand public scrutiny and generate public confidence in these non-custodial sanctions.

## **Sexual Offences (S) act 2009**

An Appeal Court ruling was that, notwithstanding a refusal to consent to an intimate procedure, the accused should have been taken to a hospital where his determination not to co-operate could have been put to the test under medical advice.

In the event of an indication of refusal to co-operate to a lawful medical examination, police officers should ensure the person is seen by a FP and given medical advice about the proposed examination. If following that advice the accused still refuses to consent, then it is anticipated the FP will refuse to examine the individual as per British Medical Association advice. However, once an individual refuses to co-operate with a lawful medical examination and has maintained that refusal after medical advice, the accused can be competently charged and prosecuted for an attempt to defeat the ends of justice.

The law as it stands can be seen to be dealing with these individuals, however, whilst the penalties for a conviction in these cases may well be severe, consideration must be made as to the effect this could have on the future investigation of serious sexual crime or any other circumstances under investigation where similar examinations are required. It is anticipated that most individuals would prefer to appear in court charged with attempting to defeat the ends of justice rather than a charge of rape or other serious crime. The parallel with drink driving and failing to provide a specimen comes to mind.

There is no doubt that the public expect the Police to undertake exhaustive and rigorous investigations in cases of serious crime, which attract significant media attention and risk to the force. Victim engagement is crucial to successfully prosecuting offenders and any obstacle to obtaining crucial forensic evidence from suspects in such cases is likely to have an effect on the confidence of victims in the police and wider justice processes.

Whilst reasonable force can be used to enforce warrants, it has to be recognised that this is at odds with the position of FP's who will not take any samples under circumstances where reasonable force was being exercised. There appears to be a significant risk to rape and sexual crime investigations in particular, should this practice be allowed to continue.

Reform, which resulted in the police being able to obtain any and all relevant evidence in an investigation, would protect and enhance the force's ability to investigate these crimes and secure the confidence of victims, partner organisations and the wider public.

## **Regulation of Investigatory Powers Act 2000 Part 1 Chapter 2.**

A change in legislation to allow Police Scotland to self-certify Communications Data acquired will yield benefits to COPFS and Police Scotland, including significantly reducing the margin

for human error by the CSP when completing certificates of authentication, and facilitating the ability to address any errors quickly and efficiently prior to court disclosure.

Speed is a particularly important benefit as major enquiries can be delayed due to the inefficiencies of manual intervention and by CSP staff. This delay is more evident where documents are being prepared for court and the section 67 notice has been served on the accused.

### **Adulterants**

Regulation of the importation and/or possession of substances commonly used as adulterants when there is no legitimate reason would provide law enforcement with a means to effectively impact on the illicit drug trade in Scotland.

### **General Comments**

Additional areas for consideration include:

1. To consider ways to further streamline the case progression/trial preparation to reduce the time from charge to conclusion. Summary justice must be exactly that – “court churn” benefits no-one. The Evidence and Procedure review may well address some of the issues involved.
2. There is a need for greater flexibility for the police to carry out evidential search without recourse to the warranted process. As crime becomes more complex and fast-moving such powers could mirror those available to policing in Northern Ireland, Wales & England. Appropriate internal controls would be needed to ensure full accountability and transparency, but such changes would maximise the potential for securing better evidence, earlier.
3. Telecommunications data requires authorisation at Superintendent level and this could be devolved to Inspector level for routine enquiries, where the rationale to proceed is clear.
4. Under the Psychoactive Substances Act 2016, there is no criminal offence for possession outwith a custodial institution. This means that officers who recover NPS on a person during the course of their duties have no power of seizure and/or disposal, nor an offence to report. This is an area of concern given that the MDA 1971 itself is worthy of review. The additional evidential requirement of proving a substance has a ‘psychoactive effect’ through statements contained in ‘evidence packs’ from psycho-pharmacologists does not address the inherent differences between Scots Law and that of the wider United Kingdom.

Thank you for taking the time to respond to this consultation paper. Your suggestions and comments are appreciated and will be taken into consideration when preparing our Tenth Programme of Law Reform.