

Abusive Behaviour and Sexual Harm (Scotland) Act 2016

2016 ASP 22

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The Bill for this Act of the Scottish Parliament was passed by the Parliament on 22nd March 2016 and received Royal Assent on 28th April 2016

An Act of the Scottish Parliament to make provision about abusive behaviour; and to make provision about sexual harm including provision about directions to be given to juries in sexual offence cases and provision about orders to prevent future sexual harm.


Extent

Preamble: Scotland

PART 1

ABUSIVE BEHAVIOUR

Abusive behaviour towards partner or ex-partner

 Law In Force

1 Aggravation of offence where abuse of partner or ex-partner

(1) This subsection applies where it is—

- (a) libelled in an indictment or specified in a complaint that an offence is aggravated by involving abuse of the partner or ex-partner of the person committing it, and
- (b) proved that the offence is so aggravated.

(2) An offence is aggravated as described in subsection (1)(a) if in committing the offence—

- (a) the person intends to cause the partner or ex-partner to suffer physical or psychological harm, or

- (b) in the case only of an offence committed against the partner or ex-partner, the person is reckless as to causing the partner or ex-partner to suffer physical or psychological harm.
- (3) It is immaterial for the purposes of subsection (2) that the offence does not in fact cause the partner or ex-partner physical or psychological harm.
- (4) Evidence from a single source is sufficient to prove that an offence is aggravated as described in subsection (1)(a).
- (5) Where subsection (1) applies, the court must—
- (a) state on conviction that the offence is aggravated as described in subsection (1)(a),
 - (b) record the conviction in a way that shows that the offence is so aggravated,
 - (c) take the aggravation into account in determining the appropriate sentence, and
 - (d) state—
 - (i) where the sentence imposed in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or
 - (ii) otherwise, the reasons for there being no such difference.
- (6) For the purposes of this section, a person is a partner of another person if they are—
- (a) spouses or civil partners of each other,
 - (b) living together as if spouses [...] ¹ of each other, or
 - (c) in an intimate personal relationship with each other,
- and the references to a person's ex-partner are to be construed accordingly.
- (7) In this section—
- “cause” includes contribute to causing (and “causing” is to be construed accordingly),
 - “psychological harm” includes fear, alarm or distress.

Notes

- ¹ Words repealed by Domestic Abuse (Scotland) Act 2018 asp 5 (Scottish Act) Sch.1(2) para.11(2) (April 1, 2019 in respect of proceedings commenced on or after April 1, 2019 subject to transitional provision specified in SSI 2018/387 reg.7(2))

Commencement

Pt 1 s. 1(1)-(7) definition of "psychological harm": April 24, 2017 subject to transitional provision specified in SSI 2017/93 reg.3 (SSI 2017/93 reg. 2(1)(a), reg. 3)

Extent

Pt 1 s. 1-(7) definition of "psychological harm": Scotland

 Law In Force

[1A Presumption as to the relationship

- (1) In proceedings for an offence that is aggravated as described in section 1(1)(a), the matter of a person being another person's partner or ex-partner is to be taken as established—
- (a) according to the stating of the matter in the charge of the offence in the complaint or indictment, and
 - (b) unless the matter is challenged as provided for in subsection (2).

- (2) The matter is challenged—
- (a) in summary proceedings, by—
 - (i) preliminary objection before the plea is recorded, or
 - (ii) later objection as the court allows in special circumstances,
 - (b) in proceedings on indictment, by giving notice of a preliminary objection in accordance with section 71(2) or 72(6)(b)(i) of the 1995 Act.

] ¹


Notes

- ¹ Added by Domestic Abuse (Scotland) Act 2018 asp 5 (Scottish Act) Sch.1(2) para.11(3) (April 1, 2019 in respect of proceedings commenced on or after April 1, 2019 subject to transitional provision specified in SSI 2018/387 reg.7(2))

Extent

Pt 1 s. 1A(1)-(2)(b): Scotland

Disclosure of an intimate photograph or film

 Law In Force

2 Disclosing, or threatening to disclose, an intimate photograph or film

- (1) A person (“A”) commits an offence if—
- (a) A discloses, or threatens to disclose, a photograph or film which shows, or appears to show, another person (“B”) in an intimate situation,
 - (b) by doing so, A intends to cause B fear, alarm or distress or A is reckless as to whether B will be caused fear, alarm or distress, and
 - (c) the photograph or film has not previously been disclosed to the public at large, or any section of the public, by B or with B's consent.
- (2) For the purposes of this section, a photograph or film is disclosed if it, or any data or other thing which is capable of being converted into it, is given, shown or made available to a person other than B.
- (3) In proceedings for an offence under subsection (1), A has a defence if any of the following facts is established—
- (a) B consented to the photograph or film being disclosed,
 - (b) A reasonably believed that B consented to the photograph or film being disclosed,
 - (c) A reasonably believed that disclosure of the photograph or film was necessary for the purposes of the prevention, detection, investigation or prosecution of crime, or
 - (d) A reasonably believed that disclosure of the photograph or film was in the public interest.
- (4) For the purposes of subsection (3), consent to the photograph or film being disclosed may be—
- (a) consent which is specific to the particular disclosure or (as the case may be) the particular threatened disclosure, or
 - (b) consent to disclosure generally where that consent covers the particular disclosure or (as the case may be) the particular threatened disclosure.

(5) In proceedings for an offence under subsection (1), A has a defence if the following matter is established—

- (a) B was in the intimate situation shown in the photograph or film,
- (b) B was not in the intimate situation as a result of a deliberate act of another person to which B did not agree, and
- (c) when B was in the intimate situation—
 - (i) B was in a place to which members of the public had access (whether or not on payment of a fee), and
 - (ii) members of the public were present.

(6) For the purposes of subsection (3), a fact is established, and for the purposes of subsection (5), the matter is established, if—

- (a) sufficient evidence is adduced to raise an issue as to whether that is the case, and
- (b) the prosecution does not prove beyond reasonable doubt that it is not the case.

(7) A person who commits an offence under subsection (1) is liable—

- (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both),
- (b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or a fine (or both).

Commencement

Pt 1 s. 2(1)-(7)(b): July 3, 2017 (SSI 2017/183 reg. 2(a))

Extent

Pt 1 s. 2(1)-(7)(b): Scotland

 Law In Force

3 Interpretation of section 2

(1) For the purposes of section 2, a person is in an “intimate situation” if—

- (a) the person is engaging or participating in, or present during, an act which—
 - (i) a reasonable person would consider to be a sexual act, and
 - (ii) is not of a kind ordinarily done in public, or
- (b) the person's genitals, buttocks or breasts are exposed or covered only with underwear.

(2) In section 2—

“film” means a moving image in any form, whether or not the image has been altered in any way, that was originally captured by making a recording, on any medium, from which a moving image may be produced, and includes a copy of the image,

“photograph” means a still image in any form, whether or not the image has been altered in any way, that was originally captured by photography, and includes a copy of the image.

Commencement

Pt 1 s. 3(1)-(2) definition of "photograph": July 3, 2017 (SSI 2017/183 reg. 2(b))

Extent

Pt 1 s. 3(1)-(2) definition of "photograph": Scotland

✔ Law In Force

4 Section 2: special provision in relation to providers of information society services

Schedule 1 makes special provision in connection with the operation of section 2 in relation to persons providing information society services (as defined in paragraph 4(1) of that schedule).

Commencement

Pt 1 s. 4: July 3, 2017 (SSI 2017/183 reg. 2(c))

Extent

Pt 1 s. 4: Scotland

Non-harassment orders

✔ Law In Force

5 Making of non-harassment orders in criminal cases

(1) Section 234A of the 1995 Act is amended as follows.

(2) For subsection (1), substitute—

“(1) This section applies where a person is—

- (a) convicted of an offence involving misconduct towards another person (“the victim”),
- (b) acquitted of such an offence by reason of the special defence set out in section 51A, or
- (c) found by a court to be unfit for trial under section 53F in respect of such an offence and the court determines that the person has done the act or made the omission constituting the offence.

(1A) The prosecutor may apply to the court to make (instead of or in addition to dealing with the person in any other way) a non-harassment order against the person.

(1B) A non-harassment order is an order requiring the person to refrain, for such period (including an indeterminate period) as may be specified in the order, from such conduct in relation to the victim as may be specified in the order.”.

(3) In subsection (2), for “(1)” substitute “(1A)”.

(4) In subsection (2A)(a)—

- (a) in sub-paragraph (i), for “offender” substitute “person against whom the order is sought”,
- (b) in sub-paragraph (ii), for “offender” substitute “person against whom the order is sought”.

(5) After subsection (2B), insert—

“(2BA) The court may, for the purpose of subsection (2) above, have regard to any information given to it for that purpose by the prosecutor about any other offence involving misconduct towards the victim—

- (a) in respect of which the person against whom the order is sought was acquitted by reason of the special defence set out in section 51A, or
- (b) in respect of which the person against whom the order is sought was found by a court to be unfit for trial under section 53F and the court determined that the person had done the act or made the omission constituting the offence.”.

(6) In subsection (2C), for “offender” substitute “person against whom the order is sought”.

(7) For subsection (3), substitute—

“(3) A non-harassment order made by a criminal court may be appealed against—

- (a) if the order was made in a case falling within subsection (1)(a) above, as if the order were a sentence,
- (b) if the order was made in a case falling within subsection (1)(b) or (c) above, as if the person had been convicted of the offence concerned and the order were a sentence passed on the person for the offence.

(3A) A variation or revocation of a non-harassment order made under subsection (6) below may be appealed against—

- (a) if the order was made in a case falling within subsection (1)(a) above, as if the variation or revocation were a sentence,
- (b) if the order was made in a case falling within subsection (1)(b) or (c) above, as if the person had been convicted of the offence concerned and the variation or revocation were a sentence passed on the person for the offence.”.

Commencement

Pt 1 s. 5(1)-(7): April 24, 2017 (SSI 2017/93 reg. 2(1)(b))

Extent

Pt 1 s. 5(1)-(7): Scotland

PART 2

SEXUAL HARM

CHAPTER 1

JURY DIRECTIONS RELATING TO SEXUAL OFFENCES

✓ Law In Force

6 Jury directions relating to sexual offences

In the 1995 Act, after section 288D insert—

"Jury directions relating to sexual offences

288DA Jury direction relating to lack of communication about offence

- (1) Subsection (2) applies where, in a trial on indictment for a sexual offence—
- (a) evidence is given which suggests that the person against whom the offence is alleged to have been committed—
 - (i) did not tell, or delayed in telling, anyone, or a particular person, about the offence, or
 - (ii) did not report, or delayed in reporting, the offence to any investigating agency, or a particular investigating agency, or
 - (b) a question is asked, or a statement is made, with a view to eliciting, or drawing attention to, evidence of that nature.
- (2) In charging the jury, the judge must advise that—
- (a) there can be good reasons why a person against whom a sexual offence is committed may not tell others about it or report it to an investigating agency, or may delay in doing either of those things, and
 - (b) this does not, therefore, necessarily indicate that an allegation is false.
- (3) Subsection (2) does not apply if the judge considers that, in the circumstances of the case, no reasonable jury could consider the evidence, question or statement by reason of which subsection (2) would otherwise apply to be material to the question of whether the alleged offence is proved.
- (4) For the purposes of this section—
- “investigating agency” means—
 - (a) a police force maintained for the area where the offence is alleged to have been committed,
 - (b) any other person who has functions (to any extent) of investigating crime in the area where the offence is alleged to have been committed,
 - “sexual offence” has the same meaning as in section 210A, except that it does not include—
 - (a) an offence under section 170 of the Customs and Excise Management Act 1979, or
 - (b) an offence under section 52A of the Civic Government (Scotland) Act 1982.

288DB Jury direction relating to absence of physical resistance or physical force

- (1) Subsection (2) applies where, in a trial on indictment for a sexual offence—
- (a) evidence is given which suggests that the sexual activity took place without physical resistance on the part of the person against whom the offence is alleged to have been committed, or
 - (b) a question is asked, or a statement is made, with a view to eliciting, or drawing attention to, evidence of that nature.
- (2) In charging the jury, the judge must advise that—
- (a) there can be good reasons why a person against whom a sexual offence is committed might not physically resist the sexual activity, and
 - (b) an absence of physical resistance does not, therefore, necessarily indicate that an allegation is false.
- (3) Subsection (2) does not apply if the judge considers that, in the circumstances of the case, no reasonable jury could consider the evidence, question or statement by reason of which subsection (2) would otherwise apply to be material to the question of whether the alleged offence is proved.
- (4) Subsection (5) applies where, in a trial on indictment for a sexual offence—
- (a) evidence is given which suggests that the sexual activity took place without the accused using physical force to overcome the will of the person against whom the offence is alleged to have been committed, or
 - (b) a question is asked, or a statement is made, with a view to eliciting, or drawing attention to, evidence of that nature.
- (5) In charging the jury, the judge must advise that—
- (a) there can be good reasons why a person may, in committing a sexual offence, not need to use physical force to overcome the will of the person against whom the offence is committed, and
 - (b) an absence of physical force does not, therefore, necessarily indicate that an allegation is false.
- (6) Subsection (5) does not apply if the judge considers that, in the circumstances of the case, no reasonable jury could consider the evidence, question or statement by reason of which subsection (5) would otherwise apply to be material to the question of whether the alleged offence is proved.
- (7) For the purposes of this section—
- “sexual activity” means the sexual activity which is the subject of the alleged sexual offence,
 - “sexual offence” means—
 - (a) rape (whether at common law or under section 1(1) of the Sexual Offences (Scotland) Act 2009),
 - (b) indecent assault,
 - (c) sodomy,
 - (d) clandestine injury to women,
 - (e) an offence under section 2 of the Sexual Offences (Scotland) Act 2009 (sexual assault by penetration),
 - (f) an offence under section 3 of that Act (sexual assault),

(g) an offence under section 4 of that Act (sexual coercion).”.

Commencement

Pt 2 c. 1 s. 6: April 24, 2017 (SSI 2017/93 reg. 2(1)(c))

Extent

Pt 2 c. 1 s. 6: Scotland

CHAPTER 2**SEXUAL ACTS OUTSIDE SCOTLAND**

✓ Law In Force

7 Incitement to commit certain sexual acts elsewhere in the United Kingdom

(1) Section 54 of the 2009 Act is amended as follows.

(2) In subsection (1), for “the United Kingdom” substitute “Scotland”.

(3) For subsection (2), substitute—

“(2) However—

(a) a person who is not a habitual resident of Scotland commits an offence by virtue of subsection (1) in respect of relevant conduct intended to occur elsewhere in the United Kingdom only if, and

(b) a person who is not a UK national commits an offence by virtue of subsection (1) in respect of relevant conduct intended to occur outside the United Kingdom only if,

the condition in subsection (2A) is met.

(2A) That condition is that the relevant conduct would also involve the commission of an offence under the law in force in the country where the whole or any part of it was intended to take place.”.

(4) In subsection (3), for “(2)” substitute “(2A)”.

(5) In subsection (4), for “(2)” substitute “(2A)”.

(6) In subsection (8)—

(a) after the definition of “listed offence” insert—

““habitual resident of Scotland” means an individual who was at the time the act mentioned in subsection (1) took place habitually resident in Scotland,”,

(b) in the definition of “UK national” omit “, or who has subsequently become”.

(7) The title becomes “**Incitement to commit certain sexual acts outside Scotland**”.

Commencement

Pt 2 c. 2 s. 7(1)-(7): April 24, 2017 (SSI 2017/93 reg. 2(1)(d))

Extent

Pt 2 c. 2 s. 7(1)-(7): Scotland

✔ Law In Force

8 Commission of certain sexual offences elsewhere in the United Kingdom

After section 54 of the 2009 Act, insert—

“54A Offences committed outside Scotland

(1) If a person does an act elsewhere in the United Kingdom which would, if it had been done in Scotland, constitute a listed offence then the person commits that offence.

(2) However, a person who is not a habitual resident of Scotland commits an offence by virtue of subsection (1) only if the act would also constitute an offence under the law in force in the country where it took place.

(3) For the purposes of subsection (2), an act punishable under the law in force in the country is an offence under that law however it is described in that law.

(4) The condition specified in subsection (2) is to be taken to be satisfied unless, not later than such time as may be prescribed by Act of Adjournal, the accused serves on the prosecutor a notice—

- (a) stating that, on the facts as alleged with respect to the act in question, the condition is not in the accused's opinion satisfied,
- (b) setting out the grounds for the accused's opinion, and
- (c) requiring the prosecutor to prove that the condition is satisfied.

(5) But the court, if it thinks fit, may permit the accused to require the prosecutor to prove that the condition is satisfied without the prior service of a notice under that subsection.

(6) In proceedings on indictment, the question whether the condition is satisfied is to be determined by the judge alone.

(7) A person may be prosecuted, tried and punished for any offence to which this section applies—

- (a) in any sheriff court district in Scotland in which the person is apprehended or in custody, or
- (b) in such sheriff court district as the Lord Advocate may determine,

as if the offence had been committed in that district; and the offence is, for all purposes incidental to or consequential on trial or punishment, to be deemed to have been committed in that district.

(8) In this section—

“habitual resident of Scotland” means an individual who was at the time the act mentioned in subsection (1) took place habitually resident in Scotland,
“listed offence” means an offence listed in Part 2 of schedule 4,
“sheriff court district” is to be construed in accordance with section 307(1) of the Criminal Procedure (Scotland) Act 1995.

54B Offence committed by virtue of section 54A(1): limitations on prosecution

(1) Subject to section 54C, this section applies in relation to a listed offence committed by a person by virtue of section 54A(1).

(2) Prosecution in respect of the listed offence—

(a) is not competent if the person has been, or is being, prosecuted in respect of the act constituting the listed offence, in the country where the act took place, and

(b) is competent only if—

(i) before the prosecution is initiated, the prosecutor has consulted the relevant director of public prosecutions about the prosecution, and

(ii) the person is prosecuted, on the same indictment or complaint, in respect of an act in Scotland constituting a listed offence.

(3) For the purposes of subsection (2)(a), a person is not to be regarded as having been prosecuted in respect of the act constituting the listed offence, in the country where the act took place, if a prosecution in that country was withdrawn in order to enable the prosecution of the person in Scotland.

(4) For the purposes of subsection (2)(b)(i)—

(a) the prosecution is initiated when the indictment or complaint is served,

(b) the relevant director of public prosecutions is—

(i) in the case of an act which took place in England and Wales, the Director of Public Prosecutions (that is, the head of the Crown Prosecution Service),

(ii) in the case of an act which took place in Northern Ireland, the Director of Public Prosecutions for Northern Ireland.

(5) In this section, “listed offence” means an offence listed in Part 2 of schedule 4.

54C Listed offence: limitations on prosecution if country not specified

(1) The indictment or complaint in which a listed offence is charged need not contain information from which the country in the United Kingdom in which the act constituting the listed offence took place can be determined.

(2) If the indictment or complaint does not contain that information, prosecution in respect of the listed offence—

(a) is not competent if the person charged with the offence has been, or is being, prosecuted, in respect of the act constituting the listed offence elsewhere in the United Kingdom, and

(b) is competent only if the conditions in subsection (3) which are applicable in the case are met.

(3) Those conditions are—

- (a) if it can be determined from the indictment or complaint that the act constituting the offence took place—
- (i) either in Scotland or in England and Wales, or
 - (ii) either in Scotland or in Northern Ireland,
- that before the indictment or complaint was served, the prosecutor consulted the relevant director of public prosecutions about the prosecution,
- (b) if it can be determined from the indictment or complaint that the act constituting the offence took place either in England and Wales or in Northern Ireland but not in Scotland, that—
- (i) before the indictment or complaint was served, the prosecutor consulted both directors of public prosecutions about the prosecution, and
 - (ii) the person is prosecuted, on the same indictment or complaint, in respect of an act in Scotland constituting a listed offence,
- (c) if neither paragraph (a) nor (b) applies, that before the indictment or complaint was served, the prosecutor consulted both directors of public prosecutions about the prosecution.
- (4) For the purposes of subsection (3)—
- (a) the relevant director of public prosecutions is—
 - (i) in relation to subsection (3)(a)(i), the Director of Public Prosecutions (that is, the head of the Crown Prosecution Service),
 - (ii) in relation to subsection (3)(a)(ii), the Director of Public Prosecutions for Northern Ireland,
 - (b) the references to both directors of public prosecutions are to the Director of Public Prosecutions and the Director of Public Prosecutions for Northern Ireland.
- (5) For the purposes of subsection (2)(a), a person is not to be regarded as having been prosecuted in respect of the act constituting the listed offence, elsewhere in the United Kingdom, if a prosecution elsewhere in the United Kingdom was withdrawn in order to enable the prosecution of the person in Scotland.
- (6) In this section, “listed offence” means an offence listed in Part 2 of schedule 4.”.

Commencement

Pt 2 c. 2 s. 8: April 24, 2017 (SSI 2017/93 reg. 2(1)(e))

Extent

Pt 2 c. 2 s. 8: Scotland

 Law In Force

9 Commission of certain sexual offences outside the United Kingdom

(1) Section 55 of the 2009 Act is amended as follows.

(2) After subsection (2), insert—

“(2A) If—

(a) a person who is not a UK national or a UK resident does an act in a country outside the United Kingdom which would, if it had been done in Scotland, constitute a listed offence,
 (b) the act constitutes an offence under the law in force in that country, and
 (c) the person meets the nationality or residence condition at the relevant time,
 proceedings may be brought against the person in Scotland for that listed offence as if the person had done the act there.

(2B) The person meets the nationality or residence condition at the relevant time if the person is a UK national or a UK resident at the time when the indictment or complaint is served on the person.”.

(3) In subsection (3), for “subsection (2)(b)” substitute “subsections (2)(b) and (2A)(b)”.

(4) In subsection (4), after “(2)(b)” insert “or (2A)(b)”.

(5) In subsection (8), for the definition of “UK national” substitute—

““UK national” means an individual who was at the time the act mentioned in subsection (1) or (2A) took place—

- (a) a British citizen, a British overseas territories citizen, a British National (Overseas) or a British Overseas citizen,
- (b) a person who under the British Nationality Act 1981 is a British subject, or
- (c) a British protected person within the meaning of that Act,”.

(6) In subsection (8), in the definition of “UK resident”—

- (a) after “(2)” insert “or (2A)”,
- (b) omit “, or who has subsequently become”.

Commencement

Pt 2 c. 2 s. 9(1)-(6)(b): April 24, 2017 (SSI 2017/93 reg. 2(1)(f))

Extent

Pt 2 c. 2 s. 9(1)-(6)(b): Scotland

CHAPTER 3

SEXUAL HARM PREVENTION ORDERS

Meaning of sexual harm

 Not Yet In Force

10 Meaning of sexual harm

In this Chapter, “sexual harm”, from a person, means physical or psychological harm caused—

- (a) by the person committing one or more of the offences listed in schedule 3 of the 2003 Act, or
- (b) (in the context of harm outside the United Kingdom) by the person doing, outside the United Kingdom, anything which would constitute an offence listed in schedule 3 of the 2003 Act if done in the United Kingdom.


Commencement

Pt 2 c. 3 s. 10(a)-(b): Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Pt 2 c. 3 s. 10(a)-(b): Scotland

Circumstances where sexual harm prevention order may be made

 Not Yet In Force

11 Making of order on dealing with person for offence

- (1) This section applies where a person is—
- (a) convicted of an offence listed in schedule 3 of the 2003 Act,
 - (b) acquitted of an offence listed in schedule 3 of the 2003 Act by reason of the special defence set out in section 51A of the 1995 Act, or
 - (c) found by a court, in respect of an offence listed in schedule 3 of the 2003 Act, to be unfit for trial under section 53F of the 1995 Act and the court determines that the person has done the act or made the omission constituting the offence.
- (2) The court dealing with the person may (in addition to dealing with the person in any other way) make a sexual harm prevention order (see section 16(1)) against the person.
- (3) A court may make a sexual harm prevention order under this section—
- (a) at its own instance, or
 - (b) on the motion of the prosecutor.
- (4) A court may make a sexual harm prevention order only if it is satisfied that it is necessary to do so, for the purpose of—
- (a) protecting the public, or any particular members of the public, from sexual harm from the person, or
 - (b) protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the person outside the United Kingdom.
- (5) Before deciding whether to make a sexual harm prevention order under this section, a court must—
- (a) if subsection (6) applies, hold a hearing at which the person against whom the order would be made and the prosecutor may appear or be represented,
 - (b) if subsection (6) does not apply, either—
 - (i) hold a hearing at which the person against whom the order would be made and the prosecutor may appear or be represented, or

(ii) give an opportunity to make written representations to the person against whom the order would be made and the prosecutor.

(6) This subsection applies if, not later than rules of court may provide, the person against whom the order would be made gives notice to the court of a wish for a hearing to be held.

Commencement

Pt 2 c. 3 s. 11(1)-(6): Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Pt 2 c. 3 s. 11(1)-(6): Scotland

 Not Yet In Force

12 Making of order against qualifying offender on application to sheriff

(1) On the application of the chief constable, an appropriate sheriff may make a sexual harm prevention order (see section 16(1)) against a person.

(2) An appropriate sheriff may make a sexual harm prevention order against a person only if satisfied that—

- (a) the person is a qualifying offender, and
- (b) the person's behaviour since the appropriate date makes it necessary to make such an order, for the purpose of—
 - (i) protecting the public, or any particular members of the public, from sexual harm from the person, or
 - (ii) protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the person outside the United Kingdom.

(3) Before determining an application under this section, a sheriff must—

- (a) if subsection (4) applies, hold a hearing at which the person against whom the order is sought and the chief constable may appear or be represented,
- (b) if subsection (4) does not apply, either—
 - (i) hold a hearing at which the person against whom the order is sought and the chief constable may appear or be represented, or
 - (ii) give an opportunity to make written representations to the person against whom the order is sought and the chief constable.

(4) This subsection applies if, not later than rules of court may provide, the person against whom the order is sought gives notice to the sheriff of a wish for a hearing to be held.

(5) In this section—

“appropriate date”, in relation to a qualifying offender, means the date or, as the case may be, the first date on which the person was convicted, cautioned or the subject of a finding as mentioned in sections 13, 14 and 15,

“appropriate sheriff” means—

- (a) a sheriff in whose sheriffdom the person resides,
- (b) a sheriff in whose sheriffdom the person is believed by the chief constable to be,


- (c) a sheriff to whose sheriffdom the person is believed by the chief constable to be intending to come, or
 - (d) a sheriff whose sheriffdom includes any place where it is alleged that the person acted in a way giving reasonable cause to believe that it is necessary for a sexual harm prevention order to be made,
- “qualifying offender” means a person to whom section 13, 14 or 15 applies.

Commencement

Pt 2 c. 3 s. 12(1)-(5) definition of "qualifying offender": Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Pt 2 c. 3 s. 12(1)-(5) definition of "qualifying offender": Scotland

 Not Yet In Force

13 Qualifying offender: conviction etc. in Scotland

(1) This section applies to a person if the person has, whether before or after this Chapter comes into force—

- (a) been convicted of an offence listed in paragraphs 36 to 60 of schedule 3 of the 2003 Act, or
- (b) been the subject, in respect of such an offence, of any of the following—
 - (i) acquittal by reason of the special defence set out in section 51A of the 1995 Act,
 - (ii) acquittal by reason of insanity,
 - (iii) a finding by a court of being unfit for trial under section 53F of the 1995 Act and the court determining that the person has done the act or made the omission constituting the offence,
 - (iv) a finding by a court that the person is under a disability and did the act or made the omission charged.

(2) This section also applies to a person if—


- (a) before 1 May 2004, the person was in Scotland—
 - (i) convicted of an offence other than an offence listed in paragraphs 36 to 59 of schedule 3 of the 2003 Act,
 - (ii) found not guilty of such an offence by reason of insanity, or
 - (iii) found by a court, in respect of such an offence, to be under a disability and to have done the act or made the omission charged, and
- (b) the sheriff who is considering the application for the sexual harm prevention order is satisfied that there was a significant sexual aspect to the person's behaviour in committing the offence.

Commencement

Pt 2 c. 3 s. 13(1)-(2)(b): Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Pt 2 c. 3 s. 13(1)-(2)(b): Scotland

 Not Yet In Force

14 Qualifying offender: conviction etc. elsewhere in United Kingdom

This section applies to a person if the person has, whether before or after this Chapter comes into force, in England and Wales or Northern Ireland—

- (a) been convicted of an offence listed in schedule 3 or schedule 5 of the 2003 Act,
- (b) been found not guilty of such an offence by reason of insanity,
- (c) been found by a court, in respect of such an offence, to be under a disability and to have done the act or made the omission charged, or
- (d) been cautioned in respect of such an offence following an admission of it.

Commencement

Pt 2 c. 3 s. 14(a)-(d): Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Pt 2 c. 3 s. 14(a)-(d): Scotland

 Not Yet In Force

15 Qualifying offender: conviction etc. outside United Kingdom

(1) This section applies to a person if, whether before or after this Chapter comes into force, under the law in force in a country outside the United Kingdom—

- (a) the person has been convicted of an equivalent offence (whether or not the person has been punished for it),
- (b) a court exercising jurisdiction under that law has made in respect of an equivalent offence a finding equivalent to a finding that the person is not guilty by reason of insanity,
- (c) such a court has made in respect of an equivalent offence a finding equivalent to a finding that, in respect of the offence, the person is under a disability and has done the act or made the omission charged, or
- (d) the person has been cautioned, or received another type of warning equivalent to a caution in England and Wales or Northern Ireland, in respect of an equivalent offence following an admission of it.

(2) In subsection (1), “equivalent offence” means an act or omission which, at the time it was done or made—

- (a) constituted an offence under the law in force in the country concerned, and

(b) would have constituted an offence listed in schedule 3 (other than at paragraph 60) or schedule 5 of the 2003 Act if it had been done or made in any part of the United Kingdom.

(3) For the purposes of subsection (2), an act or omission punishable under the law in force in a country outside the United Kingdom constitutes an offence under that law however it is described in that law.

(4) In relation to an application under section 12 where subsection (1) is alleged to apply, subsection (2)(b) is to be taken to be satisfied unless—

(a) not later than rules of court may provide, the person against whom the order is sought (“the respondent”) serves on the chief constable a notice—

(i) stating that, on the facts as alleged with respect to the act or omission concerned, it is not in the respondent's opinion satisfied,

(ii) setting out the respondent's grounds for that opinion, and

(iii) requiring the chief constable to prove that it is satisfied, or

(b) the court permits the respondent to require the chief constable to prove that subsection (2)(b) is satisfied without service of such a notice.

Commencement

Pt 2 c. 3 s. 15(1)-(4)(b): Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Pt 2 c. 3 s. 15(1)-(4)(b): Scotland

What order does

 Not Yet In Force

16 Content and duration of order

(1) A sexual harm prevention order is an order prohibiting the person against whom it is made from doing, or requiring the person to do, a thing or things described in the order.

(2) A prohibition or requirement contained in a sexual harm prevention order applies throughout the United Kingdom (unless expressly confined to particular localities).

(3) A prohibition or requirement contained in a sexual harm prevention order has effect for a fixed period, specified in the order, of not less than 5 years.

(4) Different periods may be provided for different prohibitions or requirements.

(5) Subsection (3) is subject, in the case of a prohibition on foreign travel, to subsection (1) of section 17.

(6) The prohibitions and requirements which may be imposed in a sexual harm prevention order are those necessary for the purpose of—

(a) protecting the public, or any particular members of the public, from sexual harm from the person against whom the order is made, or

(b) protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the person against whom the order is made outside the United Kingdom.

(7) Where a court makes a sexual harm prevention order in relation to a person already subject to such an order (whether made by that court or another), the earlier order ceases to have effect.


(8) A sexual harm prevention order ceases to have effect, if it has not already done so, when all of the prohibitions or requirements contained in it have ceased to have effect.

Commencement

Pt 2 c. 3 s. 16(1)-(8): Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Pt 2 c. 3 s. 16(1)-(8): Scotland

 Not Yet In Force

17 Prohibitions on foreign travel

(1) A prohibition on foreign travel contained in a sexual harm prevention order must be for a fixed period of not more than 5 years.

(2) A “prohibition on foreign travel” means—

- (a) a prohibition on travelling to any country outside the United Kingdom named or described in the order,
- (b) a prohibition on travelling to any country outside the United Kingdom other than a country named or described in the order, or
- (c) a prohibition on travelling to any country outside the United Kingdom.

(3) Subsection (1) does not prevent a prohibition on foreign travel from being extended for a further period (of no more than 5 years each time) under section 20.

(4) A sexual harm prevention order that contains a prohibition within subsection (2)(c) must require the person who is subject to the order to surrender all of the person's passports at a police station specified in the order—

- (a) on or before the date when the prohibition takes effect, or
- (b) within a period specified in the order.

(5) In this section, “passport” means—

- (a) a United Kingdom passport within the meaning of the Immigration Act 1971,
- (b) a passport issued by or on behalf of the authorities of another country,
- (c) a passport issued by or on behalf of an international organisation,
- (d) a document that can be used (in some or all circumstances) instead of a passport.

(6) Any passports surrendered in accordance with the requirement must be returned as soon as reasonably practicable after the person ceases to be subject to a sexual harm prevention order containing such a prohibition (unless the person is subject to an equivalent prohibition under another order).

(7) Subsection (6) does not apply in relation to—

- (a) a passport issued by or on behalf of the authorities of another country if the passport has been returned to those authorities,
- (b) a passport issued by or on behalf of an international organisation if the passport has been returned to that organisation.


Commencement

Pt 2 c. 3 s. 17(1)-(7)(b): Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Pt 2 c. 3 s. 17(1)-(7)(b): Scotland

Interaction with notification requirements

 Not Yet In Force

18 Application of notification requirements where order made


- (1) This section applies to a person against whom a sexual harm prevention order is made.
- (2) Where the person—
 - (a) was a relevant offender immediately before this section applied to the person, and
 - (b) would (apart from this subsection and sections 88F and 88G of the 2003 Act) cease to be subject to the notification requirements of Part 2 of the 2003 Act while the order has effect,the person remains subject to the notification requirements while the order has effect.
- (3) Where the person was not a relevant offender immediately before this section applied to the person—
 - (a) the person, by virtue of this section, becomes subject to the notification requirements of Part 2 of the 2003 Act from the time this section first applies to the person and remains so subject until the order ceases to have effect, and
 - (b) that Part of that Act applies to the person subject to the modification set out in subsection (4).
- (4) The “relevant date” is the date of service of the order.
- (5) In this section, “relevant offender” has the meaning given by section 80(2) of the 2003 Act.

Commencement

Pt 2 c. 3 s. 18(1)-(5): Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Pt 2 c. 3 s. 18(1)-(5): Scotland

 Not Yet In Force

19 Cessation of order: relevant sexual offenders

- (1) This section applies where—
 - (a) a sexual harm prevention order is in effect in relation to a relevant sexual offender, and
 - (b) by virtue of section 88F or 88G of the 2003 Act, the relevant sexual offender ceases to be subject to the notification requirements of Part 2 of the 2003 Act.
- (2) The sexual harm prevention order ceases to have effect.
- (3) For the purposes of this section, a person is a “relevant sexual offender” if the person falls within section 88A(1)(a) or (b) of the 2003 Act.


Commencement

Pt 2 c. 3 s. 19(1)-(3): Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Pt 2 c. 3 s. 19(1)-(3): Scotland

Variation, renewal and discharge

 Not Yet In Force

20 Variation, renewal and discharge

- (1) On the application of a person mentioned in subsection (2), the appropriate court may make an order varying, renewing or discharging a sexual harm prevention order.
- (2) The persons are—
 - (a) the person against whom the order has effect (“the subject”),
 - (b) the chief constable,
 - (c) in the case only of an order made under section 11, the prosecutor.
- (3) In subsection (1), the “appropriate court” means—
 - (a) where the order was made under section 11 by the High Court of Justiciary, that court,
 - (b) where the order was made under section 11 in the sheriff court—
 - (i) a sheriff exercising criminal jurisdiction in the sheriffdom in which the subject resides, or
 - (ii) if the subject does not reside in a sheriffdom, any sheriff exercising criminal jurisdiction in the sheriffdom of the sheriff who made the order,
 - (c) where the order was made under section 12, an appropriate sheriff.
- (4) In subsection (3)(c), an “appropriate sheriff” means—
 - (a) the sheriff who made the order,
 - (b) another sheriff of the same sheriffdom,
 - (c) a sheriff in whose sheriffdom the subject resides, or
 - (d) where the application is made by the chief constable—

- (i) a sheriff in whose sheriffdom the subject is believed by the chief constable to be, or
 - (ii) a sheriff to whose sheriffdom the subject is believed by the chief constable to be intending to come.
- (5) A sexual harm prevention order may be renewed, or varied so as to impose an additional prohibition or requirement on the subject, only if it is necessary to do so for the purpose of—
- (a) protecting the public, or any particular members of the public, from sexual harm from the subject, or
 - (b) protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the subject outside the United Kingdom,
- and any renewed or varied order may contain only such prohibitions and requirements as are necessary for one or other of these purposes.
- (6) A sexual harm prevention order may be discharged, or varied so as to remove a prohibition or requirement, only if the order or, as the case may be, prohibition or requirement, is no longer necessary for the purpose of—
- (a) protecting the public, or any particular members of the public, from sexual harm from the subject, or
 - (b) protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the subject outside the United Kingdom.
- (7) Before determining an application under this section, a court must—
- (a) if subsection (8) applies, hold a hearing at which the subject and the chief constable, and in the case of an order made under section 11, the prosecutor, may appear or be represented,
 - (b) if subsection (8) does not apply, either—
 - (i) hold a hearing at which the subject and the chief constable, and in the case of an order made under section 11, the prosecutor, may appear or be represented, or
 - (ii) give an opportunity to make written representations to the subject and the chief constable and, in the case of an order made under section 11, the prosecutor.
- (8) This subsection applies if, not later than rules of court may provide, the subject or the chief constable, or, in the case of an order made under section 11, the prosecutor, gives notice to the court of a wish for a hearing to be held.
- (9) In subsections (7) and (8), “court” includes “sheriff” (except in “rules of court”).

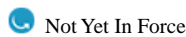
Commencement

Pt 2 c. 3 s. 20(1)-(9): Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Pt 2 c. 3 s. 20(1)-(9): Scotland

Interim orders



Not Yet In Force

21 Interim orders

- (1) On the application of the chief constable, an appropriate sheriff may make an interim sexual harm prevention order against a person in respect of whom the chief constable is applying for an order under section 12.
- (2) An interim sexual harm prevention order may be made if the sheriff considers it just to do so.
- (3) An interim sexual harm prevention order is an order prohibiting the person against whom it is made from doing, or requiring that person to do, a thing or things described in the order.
- (4) A prohibition or requirement contained in an interim sexual harm prevention order applies throughout the United Kingdom (unless expressly confined to particular localities).
- (5) A prohibition or requirement contained in an interim sexual harm prevention order has effect for a fixed period, specified in the order.
- (6) Different periods may be provided for different prohibitions or requirements.
- (7) An application for an interim sexual harm prevention order—
 - (a) may be made in the application for an order under section 12 to which it relates, or
 - (b) if the application for that order has been made, may be made in such way as rules of court may provide.
- (8) Section 18 applies to a person against whom an interim sexual harm prevention order is made as it applies to a person against whom a sexual harm prevention order is made.
- (9) An interim sexual harm prevention order ceases to have effect, if it has not already done so, when either of the following events occurs—
 - (a) the related application for an order under section 12 is determined, or
 - (b) all of the prohibitions or requirements contained in it have ceased to have effect.
- (10) On the application of a person mentioned in subsection (11), an appropriate sheriff may vary, renew or discharge an interim sexual harm prevention order.
- (11) Those persons are—
 - (a) the person against whom the interim sexual harm prevention order has effect,
 - (b) the chief constable.
- (12) In this section, an “appropriate sheriff” means—
 - (a) the sheriff to whom the related application for an order under section 12 is made, or
 - (b) another sheriff of the same sheriffdom.

Commencement

Pt 2 c. 3 s. 21(1)-(12)(b): Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Pt 2 c. 3 s. 21(1)-(12)(b): Scotland

Appeals

 Not Yet In Force

22 Appeals

- (1) An order made under section 11, and any order granting or refusing a variation, renewal or discharge of such an order may be appealed against as if the order were a sentence.
- (2) On such an appeal, the court hearing the appeal may suspend the order appealed against pending the disposal of the appeal.
- (3) An order under section 11 made on appeal is to be regarded for the purposes of section 20(3) as having been made by the court which dealt with the question of whether an order under that section should be made at first instance.
- (4) A decision of a sheriff mentioned in subsection (5) may be appealed against as if it were a decision constituting final judgment in civil proceedings within the meaning of the 2014 Act.
- (5) A decision to—
 - (a) make, or refuse to make, an order under section 12 or 21,
 - (b) vary, renew or discharge, or refuse to vary, renew or discharge, an order made under either of those sections.
- (6) An order under section 12 made on appeal is to be regarded for the purposes of section 20(3) as having been made by the sheriff who determined the application for the order at first instance.

Commencement

Pt 2 c. 3 s. 22(1)-(6): Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Pt 2 c. 3 s. 22(1)-(6): Scotland

Requirement to serve order

 Not Yet In Force

23 Requirement for clerk of court to serve order

- (1) Where a court makes, varies or renews a sexual harm prevention order or an interim sexual harm prevention order, the clerk of the court must serve a copy of the order as made, varied or renewed (as the case may be) on the person against whom the order has effect.
- (2) Where a court discharges a sexual harm prevention order or an interim sexual harm prevention order, the clerk of the court must serve a copy of the order effecting the discharge on the person against whom the order had effect.
- (3) In this section, “court” includes “sheriff”.

Commencement

Pt 2 c. 3 s. 23(1)-(3): Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Pt 2 c. 3 s. 23(1)-(3): Scotland

Enforcement

 Not Yet In Force

24 Offence of breaching order

- (1) A person commits an offence if, without reasonable excuse, the person—
- (a) does something which the person is prohibited from doing, or
 - (b) fails to do something which the person is required to do,
- by a sexual harm prevention order or an interim sexual harm prevention order.
- (2) A person who commits an offence under subsection (1) is liable—
- (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both),
 - (b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or a fine (or both).
- (3) Where a person is convicted of an offence under subsection (1), it is not open to the court by or before which the person is convicted—
- (a) to make a community payback order in respect of the offence, or
 - (b) to dispose of the matter by—
 - (i) dismissing the person with an admonition, or
 - (ii) discharging the person absolutely.
- (4) A person may be prosecuted, tried and punished for an offence under subsection (1) of failing to comply with a prohibition on foreign travel—
- (a) in any sheriff court district in which the person is apprehended or in custody, or
 - (b) in such sheriff court district as the Lord Advocate may determine,
- as if the offence had been committed in that district (and the offence is, for all purposes incidental to or consequential on the trial or punishment, to be deemed to have been committed in that district).


Commencement

Pt 2 c. 3 s. 24(1)-(4)(b): Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Pt 2 c. 3 s. 24(1)-(4)(b): Scotland

Interpretation

 Not Yet In Force

25 Interpretation of Chapter

(1) In this Chapter—

“vulnerable adult” means a person who is 18 or over whose ability to protect himself or herself from physical or psychological harm is significantly impaired through physical or mental disability or illness, through old age, or otherwise,

“the chief constable” means the chief constable of the Police Service of Scotland,

“child” means a person under 18,

“interim sexual harm prevention order” means (except in section 21(1) to (3)) an order made under section 21,

“prohibition on foreign travel” has the meaning given by section 17(2),

“the public” means the public in the United Kingdom,

“sexual harm prevention order” means (except in sections 11, 12 and 16(1)) an order made under section 11 or 12.

(2) Subsection (3) applies for the purposes of sections 11 to 15.

(3) In construing any reference to an offence listed in schedule 3 of the 2003 Act, any condition subject to which an offence is so listed that relates—

(a) to the way in which a person is dealt with in respect of the offence or a relevant finding (within the meaning of section 132(9) of the 2003 Act) in relation to the offence, or

(b) to the age of any person,

is to be disregarded.

Commencement

Pt 2 c. 3 s. 25(1)-(3)(b): Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)


Extent

Pt 2 c. 3 s. 25(1)-(3)(b): Scotland

CHAPTER 4

SEXUAL RISK ORDERS

Meaning of harm

 Not Yet In Force

26 Meaning of harm

In this Chapter, “harm”, from a person, means physical or psychological harm caused by the person doing an act of a sexual nature.


Commencement

Pt 2 c. 4 s. 26: Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Pt 2 c. 4 s. 26: Scotland

Making of order

 Not Yet In Force

27 Making of order

(1) On the application of the chief constable, an appropriate sheriff may make a sexual risk order (see section 28(1)) against a person (“the respondent”).

(2) An appropriate sheriff may make a sexual risk order only if satisfied that the respondent has (whether before or after this Chapter comes into force) done an act of a sexual nature as a result of which it is necessary to make such an order for the purpose of—

- (a) protecting the public, or any particular members of the public, from harm from the respondent, or
- (b) protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from harm from the respondent outside the United Kingdom.

(3) In this section, an “appropriate sheriff” means—

- (a) a sheriff in whose sheriffdom the respondent resides,
- (b) a sheriff in whose sheriffdom the respondent is believed by the chief constable to be,
- (c) a sheriff to whose sheriffdom the respondent is believed by the chief constable to be intending to come, or
- (d) a sheriff whose sheriffdom includes any place where it is alleged that the respondent did an act of a sexual nature giving rise to reasonable cause to believe that it is necessary for a sexual risk order to be made.

(4) Before determining an application under this section, a sheriff must—

- (a) if subsection (5) applies, hold a hearing at which the respondent and the chief constable may appear or be represented,
- (b) if subsection (5) does not apply, either—
 - (i) hold a hearing at which the respondent and the chief constable may appear or be represented, or
 - (ii) give an opportunity to make written representations to the respondent and the chief constable.

(5) This subsection applies if, not later than rules of court may provide, the respondent gives notice to the sheriff of a wish for a hearing to be held.

Commencement

Pt 2 c. 4 s. 27(1)-(5): Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Pt 2 c. 4 s. 27(1)-(5): Scotland

What order does

 Not Yet In Force

28 Content and duration of order

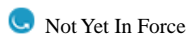
- (1) A sexual risk order is an order prohibiting the person against whom it is made from doing, or requiring the person to do, a thing or things described in the order.
- (2) A prohibition or requirement contained in a sexual risk order applies throughout the United Kingdom (unless expressly confined to particular localities).
- (3) A prohibition or requirement in a sexual risk order has effect for a fixed period, specified in the order, of not less than 2 years.
- (4) Different periods may be provided for different prohibitions or requirements.
- (5) The prohibitions and requirements which may be imposed in a sexual risk order are those necessary for the purpose of—
 - (a) protecting the public, or any particular members of the public, from harm from the respondent, or
 - (b) protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from harm from the respondent outside the United Kingdom.
- (6) Where a sheriff makes a sexual risk order in relation to a person already subject to such an order (whether made by that sheriff or another), the earlier order ceases to have effect.
- (7) A sexual risk order ceases to have effect, if it has not already done so, when all of the prohibitions or requirements in it have ceased to have effect.

Commencement

Pt 2 c. 4 s. 28(1)-(7): Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Pt 2 c. 4 s. 28(1)-(7): Scotland



Not Yet In Force

29 Prohibitions on foreign travel

- (1) A prohibition on foreign travel contained in a sexual risk order must not be for a period of more than 5 years.
- (2) A “prohibition on foreign travel” means—
- (a) a prohibition on travelling to any country outside the United Kingdom named or described in the order,
 - (b) a prohibition on travelling to any country outside the United Kingdom other than a country named or described in the order, or
 - (c) a prohibition on travelling to any country outside the United Kingdom.
- (3) Subsection (1) does not prevent a prohibition on foreign travel from being extended for a further period (of no more than 5 years each time) under section 30.
- (4) A sexual risk order that contains a prohibition within subsection (2)(c) must require the person who is subject to the order to surrender all of the person's passports at a police station specified in the order—
- (a) on or before the date when the prohibition takes effect, or
 - (b) within a period specified in the order.
- (5) In this section, “passport” means—
- (a) a United Kingdom passport within the meaning of the Immigration Act 1971,
 - (b) a passport issued by or on behalf of the authorities of another country,
 - (c) a passport issued by or on behalf of an international organisation,
 - (d) a document that can be used (in some or all circumstances) instead of a passport.
- (6) Any passports surrendered in accordance with the requirement must be returned as soon as reasonably practicable after the person ceases to be subject to a sexual risk order containing such a prohibition (unless the person is subject to an equivalent prohibition under another order).
- (7) Subsection (6) does not apply in relation to—
- (a) a passport issued by or on behalf of the authorities of another country if the passport has been returned to those authorities,
 - (b) a passport issued by or on behalf of an international organisation if the passport has been returned to that organisation.

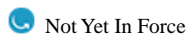
Commencement

Pt 2 c. 4 s. 29(1)-(7)(b): Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Pt 2 c. 4 s. 29(1)-(7)(b): Scotland

Variation, renewal and discharge



Not Yet In Force

30 Variation, renewal and discharge

- (1) On the application of a person mentioned in subsection (2), an appropriate sheriff may make an order varying, renewing or discharging a sexual risk order.
- (2) The persons are—
- (a) the person against whom the order has effect (“the subject”),
 - (b) the chief constable.
- (3) In subsection (1), an “appropriate sheriff” means—
- (a) the sheriff who made the sexual risk order,
 - (b) another sheriff of the same sheriffdom,
 - (c) a sheriff in whose sheriffdom the subject resides, or
 - (d) where the application is made by the chief constable—
 - (i) a sheriff in whose sheriffdom the subject is believed by the chief constable to be, or
 - (ii) a sheriff to whose sheriffdom the subject is believed by the chief constable to be intending to come.
- (4) A sexual risk order may be renewed, or varied so as to impose an additional prohibition or requirement on the subject, only if it is necessary to do so for the purpose of—
- (a) protecting the public, or any particular members of the public, from harm from the subject, or
 - (b) protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from harm from the subject outside the United Kingdom,
- and any renewed or varied order may contain only such prohibitions and requirements as are necessary for one or other of these purposes.
- (5) A sexual risk order may be discharged, or varied so as to remove a prohibition or requirement, only if the order or, as the case may be, prohibition or requirement, is no longer necessary for the purpose of—
- (a) protecting the public, or any particular members of the public, from harm from the subject, or
 - (b) protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from harm from the subject outside the United Kingdom.
- (6) Before determining an application under this section, a sheriff must—
- (a) if subsection (7) applies, hold a hearing at which the subject and the chief constable may appear or be represented,
 - (b) if subsection (7) does not apply, either—
 - (i) hold a hearing at which the subject and the chief constable may appear or be represented, or
 - (ii) give an opportunity to make written representations to the subject and the chief constable.
- (7) This subsection applies if, not later than rules of court may provide, the subject or the chief constable gives notice to the sheriff of a wish for a hearing to be held.

Commencement

Pt 2 c. 4 s. 30(1)-(7): Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Pt 2 c. 4 s. 30(1)-(7): Scotland

Interim orders

 Not Yet In Force

31 Interim orders

- (1) On the application of the chief constable, an appropriate sheriff may make an interim sexual risk order against a person in respect of whom the chief constable is applying for an order under section 27.
- (2) An interim sexual risk order may be made if the sheriff—
 - (a) considers that there is a prima facie case that the person has done an (or, as the case may be, the) act of a sexual nature which is being relied on for the purposes of subsection (2) of section 27 in relation to the application for an order under that section, and
 - (b) considers it just to make an interim sexual risk order.
- (3) An interim sexual risk order is an order prohibiting the person against whom it is made from doing, or requiring that person to do, a thing or things described in the order.
- (4) A prohibition or requirement contained in an interim sexual risk order applies throughout the United Kingdom (unless expressly confined to particular localities).
- (5) A prohibition or requirement contained in an interim sexual risk order has effect for a fixed period, specified in the order.
- (6) Different periods may be provided for different prohibitions or requirements.
- (7) An application for an interim sexual risk order—
 - (a) may be made in the application for an order under section 27 to which it relates, or
 - (b) if the application for that order has been made, may be made in such way as rules of court may provide.
- (8) An interim sexual risk order ceases to have effect, if it has not already done so, when either of the following events occurs—
 - (a) the related application for an order under section 27 is determined, or
 - (b) all of the prohibitions or requirements contained in it have ceased to have effect.
- (9) On the application of a person mentioned in subsection (10), an appropriate sheriff may vary, renew or discharge an interim sexual risk order.
- (10) Those persons are—
 - (a) the person against whom the interim sexual risk order has effect,
 - (b) the chief constable.

- (11) In this section, an “appropriate sheriff” means—
- (a) the sheriff to whom the related application for an order under section 27 is made, or
 - (b) another sheriff of the same sheriffdom.


Commencement

Pt 2 c. 4 s. 31(1)-(11)(b): Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Pt 2 c. 4 s. 31(1)-(11)(b): Scotland

Appeals

 Not Yet In Force

32 Appeals

- (1) A decision of a sheriff mentioned in subsection (2) may be appealed against as if it were a decision constituting final judgment in civil proceedings within the meaning of the 2014 Act.
- (2) A decision to—
- (a) make, or refuse to make, an order under section 27 or 31,
 - (b) vary, renew or discharge, or refuse to vary, renew or discharge, an order made under either of those sections.
- (3) An order under section 27 made on appeal is to be regarded for the purposes of section 30(1) as having been made by the sheriff who determined the application for the order at first instance.

Commencement

Pt 2 c. 4 s. 32(1)-(3): Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Pt 2 c. 4 s. 32(1)-(3): Scotland

Requirement to serve order

 Not Yet In Force

33 Requirement for clerk of court to serve order

- (1) Where a court makes, varies or renews a sexual risk order or an interim sexual risk order, the clerk of the court must serve a copy of the order as made, varied or renewed (as the case may be) on the person against whom the order has effect.

(2) Where a court discharges a sexual risk order or an interim sexual risk order, the clerk of the court must serve a copy of the order effecting the discharge on the person against whom the order had effect.

(3) In this section, “court” includes “sheriff”.

Commencement

Pt 2 c. 4 s. 33(1)-(3): Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Pt 2 c. 4 s. 33(1)-(3): Scotland

Enforcement

 Not Yet In Force

34 Offence of breaching order


- (1) A person commits an offence if, without reasonable excuse, the person—
- (a) does something which the person is prohibited from doing, or
 - (b) fails to do something which the person is required to do,
- by a sexual risk order or an interim sexual risk order.
- (2) A person who commits an offence under subsection (1) is liable—
- (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both),
 - (b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or a fine (or both).
- (3) Where a person is convicted of an offence under subsection (1), it is not open to the court by or before which the person is convicted—
- (a) to make a community payback order in respect of the offence, or
 - (b) to dispose of the matter by—
 - (i) dismissing the person with an admonition, or
 - (ii) discharging the person absolutely.
- (4) A person may be prosecuted, tried and punished for an offence under subsection (1) of failing to comply with a prohibition on foreign travel—
- (a) in any sheriff court district in which the person is apprehended or in custody, or
 - (b) in such sheriff court district as the Lord Advocate may determine,
- as if the offence had been committed in that district (and the offence is, for all purposes incidental to or consequential on the trial or punishment, to be deemed to have been committed in that district).

Commencement

Pt 2 c. 4 s. 34(1)-(4)(b): Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Pt 2 c. 4 s. 34(1)-(4)(b): Scotland

 Not Yet In Force

35 Application of notification requirements on breach of order

- (1) This section applies to a person who—
- (a) is convicted of an offence under section 34,
 - (b) is acquitted of such an offence by reason of the special defence set out in section 51A of the 1995 Act, or
 - (c) is found, in respect of such an offence, to be unfit for trial under section 53F of the 1995 Act and the court determines that the person has done the act or made the omission constituting the offence.
- (2) Where the person—
- (a) was a relevant offender immediately before this section applied to the person, and
 - (b) would (apart from this subsection) cease to be subject to the notification requirements of Part 2 of the 2003 Act while the relevant order has effect,
- the person remains subject to those notification requirements while the relevant order has effect.
- (3) Where the person was not a relevant offender immediately before this section applied to the person—
- (a) the person, by virtue of this section, becomes subject to the notification requirements of Part 2 of the 2003 Act from the time this section first applies to the person and remains so subject until the relevant order ceases to have effect, and
 - (b) that Part of that Act applies to the person subject to the modification set out in subsection (4).
- (4) The “relevant date” is the date on which this section first applies to the person.
- (5) In this section—
- “relevant offender” has the meaning given by section 80(2) of the 2003 Act,
 - “relevant order” means—
 - (a) where the conviction, finding or acquittal by virtue of which this section applies to the person is in respect of a breach of a sexual risk order, that order,
 - (b) where the conviction, finding or acquittal by virtue of which this section applies to the person is in respect of an interim sexual risk order—
 - (i) any sexual risk order made on the hearing of the application to which the interim order relates, or
 - (ii) if no such order is made, the interim order.

Commencement

Pt 2 c. 4 s. 35(1)-(5) definition of "relevant order" (b)(ii): Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Pt 2 c. 4 s. 35(1)-(5) definition of "relevant order" (b)(ii): Scotland

Interpretation

 Not Yet In Force

36 Interpretation of Chapter

In this Chapter—

“vulnerable adult” means a person who is 18 or over whose ability to protect himself or herself from physical or psychological harm is significantly impaired through mental or physical disability or illness, through old age, or otherwise,

“the chief constable” means the chief constable of the Police Service of Scotland,

“child” means a person under 18,

“interim sexual risk order” means (except in section 31(1) to (3)) an order made under section 31,

“prohibition on foreign travel” has the meaning given by section 29(2),

“the public” means the public in the United Kingdom,

“sexual risk order” means (except in sections 27 and 28(1)) an order made under section 27.

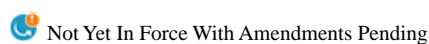
Commencement

Pt 2 c. 4 s. 36 definition of "vulnerable adult" - definition of "sexual risk order": Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Pt 2 c. 4 s. 36 definition of "vulnerable adult" - definition of "sexual risk order": Scotland

CHAPTER 5**EQUIVALENT ORDERS ELSEWHERE IN UNITED KINGDOM**



37 Breach of orders equivalent to orders in Chapters 3 and 4: offence

(1) A person commits an offence if, without reasonable excuse, the person does something which the person is prohibited from doing by an equivalent order from elsewhere in the United Kingdom.

(2) A person who commits an offence under subsection (1) is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both),

(b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or a fine (or both).

(3) Where a person is convicted of an offence under subsection (1), it is not open to the court by or before which the person is convicted—

(a) to make a community payback order in respect of the offence, or

(b) to dispose of the matter by—

(i) dismissing the person with an admonition, or

(ii) discharging the person absolutely.

(4) For the purposes of this section, prohibitions imposed by an equivalent order from elsewhere in the United Kingdom apply, unless expressly confined to particular localities, to every part of the United Kingdom.

(5) In this section, “equivalent order from elsewhere in the United Kingdom” means—

(a) a sexual harm prevention order made under section 103A of the 2003 Act [or Chapter 2 of Part 11 of the Sentencing Code]¹ ,

(b) an interim sexual harm prevention order made under section 103F of the 2003 Act,

(c) a sexual risk order made under section 122A of the 2003 Act,

(d) an interim sexual risk order made under section 122E of the 2003 Act,

(e) a sexual offences prevention order made under section 104 of the 2003 Act (but excluding such an order made in Scotland),

(f) an interim sexual offences prevention order made under section 109 of the 2003 Act (but excluding such an order made in Scotland),

(g) a foreign travel order made under section 114 of the 2003 Act (but excluding such an order made in Scotland),

(h) a risk of sexual harm order made under section 123 of the 2003 Act,

(i) an interim risk of sexual harm order made under section 126 of the 2003 Act,

(j) a restraining order made under section 5A of the Sex Offenders Act 1997,

(k) a sex offender order made under section 2 of the Crime and Disorder Act 1998.

Notes

¹ Words inserted by Sentencing Act 2020 c. 17 Sch.24(3) para.311 (December 1, 2020 as amended by SI 2020/1236 reg.4(5)(a))

Proposed Draft Amendments

Pt 2 c. 5 s. 37(1A): added by Police, Crime, Sentencing and Courts Bill 2021-22 (HL Bill 40) Pt 10 c. 2 s. 151(7)(a) (Lords' Second Reading, September 14, 2021) (date to be appointed)

Pt 2 c. 5 s. 37(2): words inserted by Police, Crime, Sentencing and Courts Bill 2021-22 (HL Bill 40) Pt 10 c. 2 s. 151(7)(b) (Lords' Second Reading, September 14, 2021) (date to be appointed)

Pt 2 c. 5 s. 37(3): words inserted by Police, Crime, Sentencing and Courts Bill 2021-22 (HL Bill 40) Pt 10 c. 2 s. 151(7)(b) (Lords' Second Reading, September 14, 2021) (date to be appointed)

Pt 2 c. 5 s. 37(4): words inserted by Police, Crime, Sentencing and Courts Bill 2021-22 (HL Bill 40) Pt 10 c. 2 s. 151(7)(c) (Lords' Second Reading, September 14, 2021) (date to be appointed)

Commencement

Pt 2 c. 5 s. 37(1)-(5)(k): Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Pt 2 c. 5 s. 37(1)-(5)(k): Scotland



Not Yet In Force

38 Breach of certain equivalent orders: application of notification requirements

(1) This section applies to a person who—

- (a) is convicted of an offence under section 37 in respect of a breach of an order under section 122A, 122E, 123 or 126 of the 2003 Act,
- (b) is acquitted of such an offence by reason of the special defence set out in section 51A of the 1995 Act, or
- (c) is found, in respect of such an offence, to be unfit for trial under section 53F of the 1995 Act and the court determines that the person has done the act constituting the offence.

(2) This section also applies to a person who—

- (a) is convicted of an offence under section 122H or 128 of the 2003 Act,
- (b) is found not guilty of such an offence by reason of insanity,
- (c) is found, in respect of such an offence, to be under a disability and to have done the act charged in respect of the offence, or
- (d) is cautioned in respect of such an offence following an admission of it.

(3) Where the person—

- (a) was a relevant offender immediately before this section applied to the person, and
- (b) would (apart from this subsection) cease to be subject to the notification requirements of Part 2 of the 2003 Act while the relevant order has effect,

the person remains subject to those notification requirements while the relevant order has effect.

(4) Where the person was not a relevant offender immediately before this section applied to the person—

- (a) the person, by virtue of this section, becomes subject to the notification requirements of Part 2 of the 2003 Act from the time this section first applies to the person and remains so subject until the relevant order ceases to have effect, and
- (b) that Part of that Act applies to the person subject to the modification set out in subsection (5).

(5) The “relevant date” is the date on which this section first applies to the person.

(6) In this section, “relevant order” means—

- (a) where the conviction, finding, acquittal or caution by virtue of which this section applies to the person is in respect of a breach of an order under section 122A or 123 of the 2003 Act, that order,
- (b) where the conviction, finding, acquittal or caution by virtue of which this section applies to the person is in respect of an order under section 122E or 126 of the 2003 Act—
- (i) any order under section 122A or 123 of the 2003 Act made on the hearing of the application to which the order under section 122E or 126 of the 2003 Act relates, or
 - (ii) if no such order is made, the order under section 122E or 126 of the 2003 Act.

Commencement

Pt 2 c. 5 s. 38(1)-(6)(b)(ii): Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Pt 2 c. 5 s. 38(1)-(6)(b)(ii): Scotland

CHAPTER 6

PREVIOUS ORDERS

 Not Yet In Force

39 Repeals of provisions as to previous orders

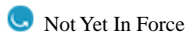
- (1) The following provisions of the 2003 Act (which make provision as to sexual offences prevention orders and foreign travel orders) are repealed—
- (a) sections 104 to 109,
 - (b) sections 110 to 117,
 - (c) section 117B,
 - (d) section 118,
 - (e) sections 120 to 122.
- (2) Sections 2 to 8 of the 2005 Act (which make provision as to risk of sexual harm orders) are repealed.

Commencement

Pt 2 c. 6 s. 39(1)-(2): Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Pt 2 c. 6 s. 39(1)-(2): Scotland



Not Yet In Force

40 Saving and transitional provision

(1) In this section—

“existing order” means—

- (a) a sexual offences prevention order under section 104 or 105 of the 2003 Act,
- (b) a foreign travel order under section 114 of the 2003 Act,
- (c) a risk of sexual harm order under section 2 of the 2005 Act,
- (d) an interim sexual offences prevention order under section 109 of the 2003 Act,
- (e) an interim risk of sexual harm order under section 5 of the 2005 Act,

“old order” means an order made under section 20 of the Crime and Disorder Act 1998.

(2) The repeals made by section 39 do not apply in relation to—

- (a) an application for an existing order made before this section comes into force,
- (b) an existing order applied for before then (and whether made before or after then),
- (c) anything done in connection with such an application or order.

(3) But—

- (a) as from when this section comes into force, there may be no variation of an existing order that extends the period of the order or any of its provisions,
- (b) as from the end of the period of 5 years beginning with when this section comes into force, the relevant sections of this Act apply, with any necessary modifications, in relation to any existing order that is still in force as if the provisions of the order were provisions of a corresponding new order.

(4) In subsection (3)(b)—

a “corresponding new order” means—

- (a) in the case of a sexual offences prevention order, a sexual harm prevention order,
- (b) in the case of a foreign travel order, a sexual harm prevention order containing a prohibition on foreign travel (as defined in section 17(2)),
- (c) in the case of a risk of sexual harm order, a sexual risk order made under section 27,
- (d) in the case of an interim sexual offences prevention order, an interim sexual harm prevention order made under section 21,
- (e) in the case of an interim risk of sexual harm order, an interim sexual risk order made under section 31,

the “relevant sections of this Act” means—

- (a) in the case of a sexual offences prevention order, sections 19, 20 and 24,
- (b) in the case of a foreign travel order, sections 20 and 24,
- (c) in the case of a risk of sexual harm order, sections 30 and 34,
- (d) in the case of an interim sexual offences prevention order, sections 21(10) to (12) and 24,
- (e) in the case of an interim risk of sexual harm order, sections 31(9) to (11) and 34.

(5) Sections 20 and 24 apply to an old order as they apply to a sexual harm prevention order.

(6) In this section, “sexual harm prevention order” means an order made under section 11 or 12.

Commencement

Pt 2 c. 6 s. 40(1)-(6): Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Pt 2 c. 6 s. 40(1)-(6): Scotland

PART 3**GENERAL**

✔ Law In Force

41 Interpretation

In this Act—

“the 1995 Act” means the Criminal Procedure (Scotland) Act 1995,

“the 2003 Act” means the Sexual Offences Act 2003,

“the 2005 Act” means the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005,

“the 2009 Act” means the Sexual Offences (Scotland) Act 2009,

“the 2014 Act” means the Courts Reform (Scotland) Act 2014.

Commencement

Pt 3 s. 41 definition of "the 1995 Act"- definition of "the 2014 Act": April 24, 2017 (SSI 2017/93 reg. 2(1)(g))

Extent

Pt 3 s. 41 definition of "the 1995 Act"- definition of "the 2014 Act": Scotland

✔ Law In Force

42 Ancillary provision

(1) The Scottish Ministers may by regulations make any incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, in connection with, or for giving full effect to, this Act.

(2) Regulations under subsection (1) may—

(a) modify any enactment (including this Act),

(b) make different provision for different purposes.

(3) Regulations under subsection (1)—

(a) are subject to the affirmative procedure if they add to, replace or omit any part of the text of this or any other Act,


(b) otherwise, are subject to the negative procedure.

Commencement

Pt 3 s. 42(1)-(3)(b): April 29, 2016 (2016 asp 22 Pt 3 s. 45)

Extent

Pt 3 s. 42(1)-(3)(b): Scotland

 Partially In Force

43 Minor and consequential modifications


Schedule 2 makes minor and consequential modifications of other enactments.

Commencement

Pt 3 s. 43: April 24, 2017 for the provision specified in SSI 2017/93 reg.2(2); not yet in force otherwise (SSI 2017/93 reg. 2(1)(h), reg. 2(2))

Extent

Pt 3 s. 43: Scotland

 Law In Force

44 Crown application

(1) No contravention by the Crown of any provision of, or made under, this Act makes the Crown criminally liable.

(2) But the Court of Session may, on the application of the Scottish Ministers or any public body or office-holder having responsibility for enforcing the provision, declare unlawful any act or omission which constitutes such a contravention.

(3) Despite subsection (1), any provision of, or made under, this Act applies to persons in the public service of the Crown as it applies to other persons.

Commencement

Pt 3 s. 44(1)-(3): April 29, 2016 (2016 asp 22 Pt 3 s. 45)

Extent

Pt 3 s. 44(1)-(3): Scotland

✔ Law In Force

45 Commencement

- (1) Sections 42, 44 and 46, and this section, come into force on the day after Royal Assent.
- (2) The other provisions of this Act come into force on such day as the Scottish Ministers may by regulations appoint.
- (3) Regulations under subsection (2) may—
 - (a) appoint different days for different purposes,
 - (b) include transitional, transitory or saving provision.

Commencement

Pt 3 s. 45(1)-(3)(b): April 29, 2016

Extent

Pt 3 s. 45(1)-(3)(b): Scotland

✔ Law In Force

46 Short title

The short title of this Act is the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.

Commencement

Pt 3 s. 46: April 29, 2016 (2016 asp 22 Pt 3 s. 45)

Extent

Pt 3 s. 46: Scotland

SCHEDULE 1

SECTION 2: SPECIAL PROVISION IN RELATION TO PROVIDERS OF INFORMATION SOCIETY SERVICES

(introduced by section 4)

✔ Law In Force

1 Exceptions for mere conduits

- (1) A service provider is not capable of being guilty of an offence under section 2 in respect of anything done in the course of providing so much of an information society service as consists in—
 - (a) the provision of access to a communication network, or
 - (b) the transmission in a communication network of information provided by a recipient of the service,

if the transmission condition is satisfied.

(2) The transmission condition is satisfied if the service provider does not—

- (a) initiate the transmission,
- (b) select the recipient of the transmission, or
- (c) select or modify the information contained in the transmission.

(3) For the purposes of sub-paragraph (1)—

- (a) the provision of access to a communication network, and
- (b) the transmission of information in a communication network,

includes the automatic, intermediate and transient storage of the information transmitted as far as the storage is solely for the purpose of carrying out the transmission in the network.


(4) Sub-paragraph (3) does not apply if the information is stored for longer than is reasonably necessary for the transmission.

Commencement

Sch. 1 para. 1(1)-(4): July 3, 2017 (SSI 2017/183 reg. 2(c))

Extent

Sch. 1 para. 1(1)-(4): Scotland

 Law In Force

2 Exception for caching

(1) This paragraph applies where an information society service consists in the transmission in a communication network of information provided by a recipient of the service.

(2) The service provider is not capable of being guilty of an offence under section 2 in respect of the automatic, intermediate and temporary storage of information so provided, if—

- (a) the storage of the information is solely for the purpose of making more efficient the onward transmission of the information to other recipients of the service at their request, and
- (b) the condition in sub-paragraph (3) is satisfied.

(3) The condition is that the service provider—

- (a) does not modify the information,
- (b) complies with any conditions attached to having access to the information, and
- (c) where sub-paragraph (4) applies, expeditiously removes the information or disables access to it.

(4) This sub-paragraph applies if the service provider obtains actual knowledge that—

- (a) the information at the initial source of transmission has been removed from the network,
- (b) access to it has been disabled, or
- (c) a court or administrative authority has ordered the removal from the network of, or the disablement of access to, the information.

Commencement

Sch. 1 para. 2(1)-(4)(c): July 3, 2017 (SSI 2017/183 reg. 2(c))

Extent

Sch. 1 para. 2(1)-(4)(c): Scotland

✔ Law In Force

3 Exception for hosting

(1) A service provider is not capable of being guilty of an offence under section 2 in respect of anything done in the course of providing so much of an information society service as consists of the storage of information provided by a recipient of the service, if sub-paragraph (2) or (3) is satisfied.

(2) This sub-paragraph is satisfied if the service provider had no actual knowledge when the information was provided that the provision of the information amounted to an offence under section 2.

(3) This sub-paragraph is satisfied if, on obtaining such knowledge, the service provider expeditiously removed the information or disabled access to it.

(4) Sub-paragraph (1) does not apply if the recipient of the service is acting under the authority or control of the service provider.

Commencement

Sch. 1 para. 3(1)-(4): July 3, 2017 (SSI 2017/183 reg. 2(c))

Extent

Sch. 1 para. 3(1)-(4): Scotland

✔ Law In Force

4 Interpretation

(1) In this schedule—

“information society services” —

(a) has the meaning given in Article 2(a) of the E-Commerce Directive (which refers to Article 1(2) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations), and

(b) is summarised in recital 17 of the E-Commerce Directive as covering “any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service”,

“recipient”, in relation to a service, means a person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible,

“service provider” means a person providing an information society service.

(2) In Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 sub-paragraph (1), “the E-Commerce Directive” means Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

Commencement

Sch. 1 para. 4(1)-(2): July 3, 2017 (SSI 2017/183 reg. 2(c))

Extent

Sch. 1 para. 4(1)-(2): Scotland

SCHEDULE 2

MINOR AND CONSEQUENTIAL MODIFICATIONS

(introduced by section 43)

 Not Yet In Force

1 Criminal Procedure (Scotland) Act 1995

(1) The 1995 Act is amended as follows.

(2) In section 19AA(1)—

(a) in paragraph (b), for “section 2 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) (a risk of sexual harm order)” substitute “section 27 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016”,

(b) in paragraph (c), for “section 2 of that Act of 2005” substitute “section 27 of that Act of 2016”.

(3) In section 19AB—

(a) in subsection (4), for “risk of sexual harm orders” substitute “sexual risk orders”,

(b) in subsection (5)—

(i) for “risk of sexual harm order” substitute “sexual risk order”,

(ii) for the words from “under” to the end substitute “of a court considering an appeal against the making of a sexual risk order suspending the effect of the order pending the determination of the appeal”,

(c) in subsection (7)—

(i) omit the definitions of “risk of sexual harm order” and “the 2005 Act”,

(ii) insert, immediately before the definition of “the 2003 Act”, the following definition—

““sexual risk order” means an order under section 27 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, and also includes an order under section 122A or 123 of the 2003 Act;”,

(d) the title becomes “Section 19AA: **supplementary provision in sexual risk order cases**”.

Commencement

Sch. 2 para. 1(1)-(3)(d): Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Sch. 2 para. 1(1)-(3)(d): Scotland

 Not Yet In Force

2 Police Act 1997

(1) The Police Act 1997 is amended as follows.

(2) In section 113CA(2)—

(a) after paragraph (fb) insert—

“(fc) if a sexual harm prevention order, made under section 11(2) or 12(1) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, is in effect in respect of the applicant—

- (i) the prohibitions and requirements contained in that order;
- (ii) the date of that order;
- (iii) the period for which each of the prohibitions and requirements contained in that order has effect by virtue of section 16(3) or, as the case may be, 17(1) of that Act;
- (iv) details as to whether that order has been varied or renewed under section 20(1) of that Act;

(fd) if an interim sexual harm prevention order, made under section 21 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, is in effect in respect of the applicant—

- (i) the prohibitions and requirements contained in that order;
- (ii) the date of that order;
- (iii) the period for which each of the prohibitions and requirements contained in that order has effect by virtue of section 21(5) of that Act;
- (iv) details as to whether that order has been varied or renewed under section 21(10) of that Act;”,

(b) after paragraph (ib) insert—

“(ic) if a sexual risk order, made under section 27(1) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, is in effect in respect of the applicant—

- (i) the prohibitions and requirements contained in that order;

- (ii) the date of that order;
 - (iii) the period for which each of the prohibitions and requirements contained in that order has effect by virtue of section 28(3) or, as the case may be, 29(1) of that Act;
 - (iv) details as to whether that order has been varied or renewed under section 30(1) of that Act;
- (id) if an interim sexual risk order, made under section 31(1) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, is in effect in respect of the applicant—
- (i) the prohibitions and requirements contained in that order;
 - (ii) the date of that order;
 - (iii) the period for which each of the prohibitions and requirements contained in that order has effect by virtue of section 31(5) of that Act;
 - (iv) details as to whether that order has been varied or renewed under section 31(9) of that Act;”,

(c) paragraphs (l) and (m) are repealed.

(3) In section 113CB(2)—

(a) after paragraph (fb) insert—

“(fc) if a sexual harm prevention order, made under section 11(2) or 12(1) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, is in effect in respect of the applicant—

- (i) the prohibitions and requirements contained in that order;
- (ii) the date of that order;
- (iii) the period for which each of the prohibitions and requirements contained in that order has effect by virtue of section 16(3) or, as the case may be, 17(1) of that Act;
- (iv) details as to whether that order has been varied or renewed under section 20(1) of that Act;

(fd) if an interim sexual harm prevention order, made under section 21 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, is in effect in respect of the applicant—

- (i) the prohibitions and requirements contained in that order;
- (ii) the date of that order;
- (iii) the period for which each of the prohibitions and requirements contained in that order has effect by virtue of section 21(5) of that Act;
- (iv) details as to whether that order has been varied or renewed under section 21(10) of that Act;”,

(b) after paragraph (ib) insert—

“(ic) if a sexual risk order, made under section 27(1) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, is in effect in respect of the applicant—

- (i) the prohibitions and requirements contained in that order;
- (ii) the date of that order;

- (iii) the period for which each of the prohibitions and requirements contained in that order has effect by virtue of section 28(3) or, as the case may be, 29(1) of that Act;
- (iv) details as to whether that order has been varied or renewed under section 30(1) of that Act;
- (id) if an interim sexual risk order, made under section 31(1) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, is in effect in respect of the applicant—
 - (i) the prohibitions and requirements contained in that order;
 - (ii) the date of that order;
 - (iii) the period for which each of the prohibitions and requirements contained in that order has effect by virtue of section 31(5) of that Act;
 - (iv) details as to whether that order has been varied or renewed under section 31(9) of that Act;”,
- (c) paragraphs (l) and (m) are repealed.

Commencement

Sch. 2 para. 2(1)-(3)(c): Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Sch. 2 para. 2(1)-(3)(c): Scotland

 Not Yet In Force

3 Sexual Offences Act 2003

(1) The 2003 Act is amended as follows.

(2) In section 88—

- (a) in subsection (1), for “Subsections (2) to (4)” substitute “Subsections (2) and (2A)”,
- (b) subsections (4) and (5) are repealed.

(3) In section 89, after subsection (1) insert—

“(1A) In the Table—


- (a) the reference to a sexual harm prevention order includes an order made under section 11 or 12 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016,
- (b) the reference to an interim sexual harm prevention order includes an order made under section 21 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.”.

Commencement

Sch. 2 para. 3(1)-(3): Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Sch. 2 para. 3(1)-(3): Scotland

 Not Yet In Force

4 Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005

Subsections (1) to (5) of section 17 of the 2005 Act are repealed.

Commencement

Sch. 2 para. 4: Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Sch. 2 para. 4: Scotland

 Not Yet In Force

5 Protection of Vulnerable Groups (Scotland) Act 2007

Paragraph 1 of schedule 1 of the Protection of Vulnerable Groups (Scotland) Act 2007 is amended as follows—

- (a) paragraph (r) is repealed,
- (b) after paragraph (zr), insert—

“(zra) an offence under section 34 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016,

(zrb) an offence under section 37 of that Act in respect of a breach of—


- (i) a sexual risk order made under section 122A of the Sexual Offences Act 2003,
- (ii) an interim sexual risk order made under section 122E of the Sexual Offences Act 2003,
- (iii) a risk of sexual harm order made under section 123 of the Sexual Offences Act 2003, or
- (iv) an interim risk of sexual harm order made under section 126 of the Sexual Offences Act 2003,”.

Commencement

Sch. 2 para. 5(a)-(b): Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Sch. 2 para. 5(a)-(b): Scotland

 Law In Force

6 Sexual Offences (Scotland) Act 2009

In section 54(8) of the 2009 Act, in the definition of “UK national”, for “relevant conduct” substitute “act mentioned in subsection (1)”.

Commencement

Sch. 2 para. 6: April 24, 2017 (SSI 2017/93 reg. 2(2))

Extent

Sch. 2 para. 6: Scotland

 Not Yet In Force

7 Criminal Justice and Licensing (Scotland) Act 2010

The following provisions of the Criminal Justice and Licensing (Scotland) Act 2010 are repealed—


- (a) section 103,
 - (b) section 104,
 - (c) paragraph 75 of schedule 7.
-

Commencement

Sch. 2 para. 7(a)-(c): Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Sch. 2 para. 7(a)-(c): Scotland

 Not Yet In Force

8 Police and Fire Reform (Scotland) Act 2012

Paragraph 26 of schedule 7 of the Police and Fire Reform (Scotland) Act 2012 is repealed.

Commencement

Sch. 2 para. 8: Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Sch. 2 para. 8: Scotland

 Not Yet In Force

9 Sexual Offences Act 2003 (Remedial) (Scotland) Order 2011 (S.S.I. 2011/45)


Article 4(1) of the Sexual Offences Act 2003 (Remedial) (Scotland) Order 2011 (S.S.I. 2011/45) is repealed.

Commencement

Sch. 2 para. 9: Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Sch. 2 para. 9: Scotland

 Not Yet In Force

10 Anti-social Behaviour, Crime and Policing Act 2014

Paragraphs 78 and 79 of schedule 11 of the Anti-social Behaviour, Crime and Policing Act 2014 are repealed.

Commencement

Sch. 2 para. 10: Date to be appointed (not yet in force) (2016 asp 22 Pt 3 s. 45)

Extent

Sch. 2 para. 10: Scotland

EXPLANATORY NOTES**INTRODUCTION**

1. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by the Parliament.
2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

COMMENTARY ON PARTS

3. The Act's overarching objective is to improve how the justice system responds to abusive behaviour, including domestic abuse and sexual harm, helping to improve public safety by ensuring that perpetrators are appropriately held to account for their conduct.
4. The Act is in three Parts.
5. Part 1 (Abusive behaviour) includes provision for a new specific “domestic abuse” aggravator, for a specific offence concerning the non-consensual sharing of private, intimate images (often called “revenge porn”) and makes provision to allow courts to make a non-harassment order in

cases where the court is satisfied that a person did harass another person but a conviction does not take place due to the mental or physical condition of the person.

6. Part 2 (Sexual harm) makes provision to require juries in sexual offence cases to be given specific directions about how to consider the evidence, ensures that sexual offences against children committed in England and Wales by Scottish residents are capable of being prosecuted in Scotland and reforms the system of civil orders available to protect communities from sexual offences.

7. Part 3 contains general and ancillary provision.

Part 1– Abusive Behaviour

Abusive behaviour towards partner or ex-partner

Section 1– *Aggravation of offence where abuse of partner or ex-partner*

8. Section 1 provides for a statutory aggravation that an offence is aggravated by constituting abuse of a partner or ex-partner where the person convicted of the offence either intended to cause, or else was reckless as to whether their actions would cause, physical or psychological harm to their partner or ex-partner.

9. Subsection (2)(a) provides that, where it is libelled that the accused acted with the *intent* of causing their partner to suffer physical or psychological harm the offence itself does not have to have been committed against the person's partner or ex-partner. As such, the aggravation could be libelled where, for example, a person commits an assault against their ex-partner's child with the intent of causing psychological harm to their ex-partner.

10. Subsection (2)(b) provides that, where the offence is committed against the person's partner or ex-partner, the offence is aggravated where the convicted person is reckless as to causing the partner or ex-partner to suffer physical or psychological harm. As such, the aggravation applies where, for example, someone assaults their partner or damages their partner's property, irrespective of whether it was their *intent* to cause such harm to that person.

11. Subsection (5) requires that, where the aggravation is proved, the court must take that aggravation into account when determining sentence. It must also explain how the aggravation has affected the sentence (if at all) and record the conviction in a manner which shows that the offence was aggravated by constituting abuse of a partner or ex-partner.

12. Subsection (6) provides that, for the purpose of the aggravation, “partner” means a person's spouse or civil partner (or cohabiting equivalent), or a person in an intimate personal relationship with the applicant. Former relationships of the specified types are covered in addition to current relationships. The phrase “intimate personal relationship” is intended to cover relationships between boyfriends and girlfriends (including same-sex relationships), although the relationship need not be sexual. Other family relationships and other types of relationship (e.g. between friends or business partners or work colleagues) are not covered by the aggravation.

Disclosure of an intimate photograph or film

Section 2– *Disclosing, or threatening to disclose, an intimate photograph or film*

13. Section 2 creates an offence relating to disclosure of intimate images.

14. Subsection (1) provides that the offence can be committed in two ways. Firstly, it is an offence to disclose a photograph or film showing a person in an intimate situation. Secondly, it is an offence to threaten to disclose a photograph or film showing a person in an intimate situation. The *mens*

rea of the offence is intention to cause fear, alarm or distress to the person shown in the intimate situation or recklessness as to fear, alarm or distress being caused. However an offence will not be committed where the intimate image has already been made publicly available with the consent of the person shown in the intimate situation.

15. Subsection (2) brings within the scope of the offence disclosure of material in a format from which a photograph or film can be created, for example a photographic negative or data stored electronically on a portable hard drive or disk.

16. Subsection (3) provides for four defences to the offence. The defence at subsection (3)(c) is that the disclosure was reasonably believed to be necessary for the prevention, detection, investigation or prosecution of crime (for example, disclosing to the police an image believed to be portraying illegal activity). It is anticipated that there will be few occasions on which disclosure of intimate photographs or images could be reasonably believed to be in the public interest in terms of the defence at subsection (3)(d), bearing in mind that what is of interest to the public is not the same thing as what is in the public interest; this will be a matter for the courts to assess in the particular circumstances of a case. Subsection (4) provides clarification of the meaning of “consent” for the purpose of the defences at subsection (3)(a) and (b).

17. Subsection (5) provides that it is a defence that the intimate photograph or film was taken in a public place and members of the public were present. This has the effect of excluding from the scope of the offence photographs or films taken of, for example, someone protesting when naked in a public place or someone “streaking” in a public place. Subsection (5)(b) provides that the defence is not available where a person is in an intimate situation in public against their will. This could be, for example, where the person has been stripped naked in a public place, or sexually assaulted, then photographed.

18. Subsection (6) provides that, for the purpose of the defences at subsections (3) and (5), an evidential burden of proof is placed on the accused to bring forward sufficient evidence to raise an issue with respect to the defence, but the legal burden of disproving the defence and proving that the offence has been committed remains with the prosecution.

19. Subsection (7) makes provision for the maximum penalties which will attach to the offence. The maximum penalties are the same whether the offence has been committed by disclosing a photograph or image or by threatening to disclose a photograph or image.

Section 3– *Interpretation of section 2*

20. Section 3 defines the meaning of certain terms for the purpose of section 2.

21. Subsection (2) provides definitions of “film” and “photograph”. Those terms include any material that was originally captured by photography or by making a recording of a moving image, whether or not it has been altered in any way. As such, the offence applies to digitally enhanced or manipulated photographs or films, but it does not apply to material that looks like a photograph or film but does not in fact contain any photographic element (for example, because it had been generated entirely by computer).

Section 4– Section 2: *special provision in relation to providers of information society services*

22. Section 4 introduces schedule 1, which addresses the position of information society services in respect of the new offence at section 2, to give effect to Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services,

in particular electronic commerce, in the Internal Market, often referred to as the E-Commerce Directive (“the Directive”).

23. Paragraph 1 of schedule 1 sets out the conditions under which service providers may be exempted from liability under the section 2 offence where acting as “mere conduits” for the transmission of, or provision of access to, information. This means that, providing the conditions in paragraph 1 are met, a business providing access to the internet (e.g. a home internet service provider) is exempted from liability if the person using their service discloses an intimate image while making use of the internet. This accords with Article 12 of the Directive.

24. Paragraph 2 of schedule 1 sets out the conditions under which service providers may be exempted from liability for “caching” information, that is, for the automatic, intermediate and temporary storage of information. This means that when an internet service provider automatically makes and “caches” a local copy of a file accessed by a user of its service (which is done in order to provide a more efficient service) it is not criminally liable in the event that the information consists of an intimate image, providing the conditions in paragraph 2 are met. This accords with Article 13 of the Directive.

25. Paragraph 3 of schedule 1 sets out the conditions under which service providers may be exempted from liability for “hosting” information, that is, storing information at the request of a recipient of the service. For example, if a person discloses an intimate image using a social network, then, providing the conditions in paragraph 3 are met, the social network is exempt from criminal liability. This accords with Article 14 of the Directive.

26. Paragraph 4 of schedule 1 defines certain terms used in schedule 1.

Non-harassment orders

Section 5– *Making of non-harassment orders in criminal cases*

27. Section 234A of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) provides that the prosecutor may apply to a court to impose a non-harassment order where a person is convicted of an offence involving harassment of a person. The court may, if it is satisfied on the balance of probabilities that it is necessary to do so to protect the victim from further harassment, make a non-harassment order.

28. Section 5(2) amends section 234A of the 1995 Act to empower a court to make a non-harassment order where a person has been found unfit to stand trial under section 53F by reason of a mental or physical condition and the court has determined that the person has done the act or made the omission constituting the offence, or where the accused is acquitted under section 51A of the 1995 Act because they were not criminally responsible for their actions at the time of the offence by reason of mental disorder.

29. Sections 5(3) and 5(4) make consequential amendments to section 234A to reflect the changes to the structure of section 234A(1) and to take account of the fact that the person upon whom a non-harassment order may be imposed will not necessarily have been convicted of a criminal offence.

30. Section 5(5) inserts new subsection 234A(2BA), which enables the prosecutor to put information to the court about previous instances on which the person against whom the order is sought has, in relation to the same victim, been found to have done acts constituting an offence, but has not been fit to stand trial, or has been acquitted of the offence on the basis of a lack of criminal responsibility.

31. Section 5(6) makes a consequential amendment to section 234A(2C) to reflect the fact that the person against whom a non-harassment order is sought may not have been convicted of a criminal offence.

32. Section 5(7) amends section 234A(3) to provide that non-harassment orders, including orders granted by virtue of the amendments in section 5, and any variations or revocations of those orders, are to be appealed as if they were a sentence. This means that the procedural safeguards of the 1995 Act will apply to such appeals.

Part 2– Sexual Harm

Chapter 1– *Jury directions relating to sexual offences*

Section 6– *Jury directions relating to sexual offences*

33. Section 6 inserts two new sections, 288DA and 288DB, into the 1995 Act, which provide that jury directions must be given by the judge in sexual offence trials where certain conditions apply.

34. Jury directions form part of the judge's charge to the jury. The judge's charge is given after the prosecution and defence have given their concluding address but prior to the jury returning their verdict or retiring to consider their verdict. Jury directions will ordinarily include those matters which require to be considered by the jury in determining whether they are of the view that a particular offence has been committed. The provisions set out in section 6 provide that the judge will be required to set out certain matters to the jury if particular circumstances arise during the trial. The wording of the jury directions will remain a matter for the particular judge.

35. Section 288DA applies in relation to certain sexual offences defined at section 288DA(4), where it is revealed at trial that the victim has not told anyone about the offence or has not reported it to the authorities, or has delayed in doing so.

36. Section 288DA(1) provides that when these offences are being tried on indictment the requirement to give a direction as set out in subsection (2) applies in two general circumstances: firstly where evidence is given which suggests that the complainer did not tell, or delayed in telling, anyone, or a particular person (such as a partner, friend or family member), about the offence or did not report, or delayed reporting, the offence to any investigating agency or a particular investigating agency, such as the police; and secondly, where a question is asked or a statement is made with a view to eliciting or drawing attention to evidence of that nature.

37. Section 288DA(2) provides that where subsection (1) applies, the judge must advise the jury that there can be good reasons why a person may not tell another person that they have been a victim of a sexual offence, or not report that matter to the police, or may delay in doing so, and that this does not necessarily indicate that the allegation is false.

38. Section 288DA(3) provides that a direction need not be given if the judge considers that the circumstances of the case are such that no reasonable jury could consider the fact that there was a delay or failure to report the offence, or tell another person about the offence, to be relevant to the question of whether the offence has been proven. This may be the case where, for example, the offence is alleged to have been committed against someone who was a baby or very young child at the time the offence was alleged to have been committed and could not understand that an offence had been committed against them.

39. Section 288DA(4) defines the meaning of certain terms for the purpose of this section. Sexual offence takes its meaning from section 210A of the 1995 Act which itself lists a variety of offences. However, offences under section 170 of the Customs and Excise Management Act 1979, in relation

to goods prohibited to be imported under section 42 of the Customs Consolidation Act 1876 (where the prohibited goods include indecent photographs of persons), or under 52A of the Civic Government (Scotland) Act 1982 (possession of indecent images of children) are excluded from the definition of sexual offence as used in section 288DA as it is considered that neither of these offences could be committed “against” a person who may not tell or report it, or delay in telling or reporting it.

40. Section 288DB makes provision that directions must be given by the trial judge to the jury when, during a trial for a sexual offence listed at section 288DB(7), evidence is led that the person against whom the offence is alleged to have been committed did not offer physical resistance or that the alleged perpetrator did not use physical force to overcome the will of the alleged victim.

41. Section 288DB(1) provides that subsection (2) applies where, during a trial for a sexual offence, evidence is given which suggests that sexual activity took place between the accused and the complainer and the complainer did not physically resist their alleged attacker, or where a question is asked or a statement is made with a view to eliciting or drawing attention to that evidence.

42. Section 288DB(2) provides that the judge must advise the jury that there can be good reasons why a person against whom a sexual offence is committed may not physically resist their attacker and that this does not necessarily indicate that the allegation is false. Examples of a lack of physical resistance which this provision is designed to cover are instances such as where a person may freeze in fright, or may fear that offering physical resistance will provoke their attacker to become more violent.

43. Section 288DB(3) provides that the judge does not need to give such a direction where the judge considers that the circumstances of the case are such that no reasonable jury could consider the fact that the complainer did not offer physical resistance to their alleged attacker to be relevant to the question of whether the offence was proven. This may be the case where, for example, the person against whom the offence is alleged to have been committed was asleep or unconscious at the time of the alleged offence.

44. Section 288DB(4) provides that subsection (5) applies where during a trial for a sexual offence, evidence is given which suggests that sexual activity took place between the accused and the complainer without the accused using physical force to overcome the will of the person against whom the offence is alleged to have been committed, or where a question is asked or a statement is made with a view to eliciting or drawing attention to that evidence.

45. Section 288DB(5) provides that where subsection (4) applies, the judge must advise the jury that there can be good reasons why a person may not need to use physical force to overcome the will of the person against whom a sexual offence is committed and that the fact that the accused did not use physical force does not necessarily indicate the allegation is false. Examples where a person may not need to use physical force to overcome the will of a person could include where the victim has frozen in fear and offers no resistance.

46. Section 288DB(6) provides that the judge does not need to give such a direction where the judge considers that the circumstances of the case are such that no reasonable jury could consider the fact that the complainer did not offer physical resistance to their alleged attacker to be relevant to the question of whether the offence was proven. This may be the case where, for example, the person against whom the offence is alleged to have been committed was asleep or unconscious at the time of the alleged offence.

47. Section 288DB(7) defines the meaning of certain terms for the purpose of this section. The definition of “sexual offence” is narrower than that provided for at section 288DA as it is restricted to those offences which involve physical contact between the perpetrator and the victim.

Chapter 2– *Sexual acts outside Scotland*

Section 7– *Incitement to commit certain sexual acts elsewhere in the United Kingdom*

48. Section 7 amends section 54 of the Sexual Offences (Scotland) Act 2009 (“the 2009 Act”) so as to provide that it is a criminal offence for a person to incite the commission of a sexual act that would constitute a “listed offence” (that is, a sexual offence listed at Part 1 of schedule 4 to the 2009 Act) in Scotland, where the act in question is intended to occur outside Scotland, whether within or outside the United Kingdom. Section 54 of the 2009 Act previously only provided for the incitement offence to have extraterritorial effect where the criminal act is intended to occur outside the United Kingdom.

49. The offences listed in Part 1 of schedule 4 to the 2009 Act are in general sexual offences committed against children or young people under 18 (for example, rape, sexual assault, sexual exposure, voyeurism, sexual abuse of trust, indecent assault).

50. Subsection (3) amends section 54(2) of the 2009 Act and inserts a new section 54(2A). This provides that where the person inciting the commission of a sexual act elsewhere in the United Kingdom is not a habitual resident of Scotland, they only commit an offence if the act which they are inciting involves the commission of a criminal offence in the part of the United Kingdom in which it is intended to take place. This means that in the event that, for example, a person habitually resident in Northern Ireland incites the commission of a sexual act in Northern Ireland which is a criminal offence under Scots law listed at part 1 of schedule 4 of the 2009 Act, but which is not unlawful in Northern Ireland, they would not commit the offence. But if a Scottish habitual resident incited an offence in Northern Ireland in the same circumstances, the section 54 incitement offence would be committed, because in that case there is no requirement for the intended conduct to be a criminal offence in both jurisdictions.

51. Subsections (4) and (5) make consequential amendments.

52. Subsection (6)(a) amends section 54(8) of the 2009 Act to add a definition of “a habitual resident of Scotland” as someone who was at the time the act of incitement took place habitually resident in Scotland. Habitual residence is a much-used concept in private international law and it is expected that the courts would interpret this provision in accordance with those principles. Subsection (6)(b) amends the definition of a “UK national” at section 54(8) of the 2009 Act so that it applies only to persons who met the listed criteria at the time the relevant conduct took place, and not to those who became UK citizens or residents at a later date.

53. Subsection (7) amends the heading to section 54 to reflect the fact that it now applies to incitement to commit certain sexual acts anywhere outside Scotland.

Section 8– *Commission of certain sexual offences elsewhere in the United Kingdom*

54. Section 8 inserts new sections 54A, 54B and 54C into the 2009 Act, so as to provide that the Scottish courts may take jurisdiction over an act which takes place elsewhere in the United Kingdom that would have constituted a “listed offence” had it taken place in Scotland. For the purposes of these provisions, “listed offence” means the sexual offences listed at Part 2 of schedule 4 to the 2009 Act (see section 54A(8)), which includes all the sexual offences against children or young people under 18 to which section 54 of the 2009 Act applies, as well as a number of other sexual

offences (for example, offences involving indecent images, sexual services and pornography committed against children or young people under 18).

55. The effect of these provisions is that the extra-territorial jurisdiction of Scottish courts in relation to sexual offences against children and young people under 18 is expanded to cover the other jurisdictions of the United Kingdom, as well as places outwith the United Kingdom (which is already provided for at section 55 of the 2009 Act).

56. Section 54A(2) and (3) restrict the extra-territorial offence by providing that it may be committed by a person who is not a habitual resident of Scotland only if the act in question is also a criminal offence, however described, in the country where it took place. If it is proven that the act took place somewhere in the United Kingdom but the particular country where it took place is not proven, the person could only be found guilty of the offence if the act is a criminal offence in all of the countries in which it is alleged it may have taken place.

57. Sections 54A(4) to 54A(6) set out the procedure that a person accused of an offence must follow if they intend to argue that the conduct did not constitute a criminal offence in the part of the United Kingdom in which it took place.

58. Section 54A(8) sets out some relevant definitions, including a definition of habitual resident of Scotland in the same terms as in the amendments to section 54 of the 2009 Act by section 7.

59. New section 54B places limitations on the use of section 54A to prosecute listed sexual offences which were committed elsewhere in the United Kingdom. This applies whether the person committing the offence is a Scottish habitual resident or not. These limitations apply only if the country in the United Kingdom in which the listed offence took place can be determined from the indictment or complaint. If the country cannot be determined, the limitations in new section 54C apply instead.

60. Section 54B(2)(a) provides that, subject to the exception at section 54B(3), the offence cannot be prosecuted in the Scottish courts if the person is being or has been prosecuted for the same conduct in the country within the United Kingdom where the act took place.

61. Section 54B(2)(b)(i) provides that, before initiating a prosecution for a listed offence which is alleged to have occurred in another country within the United Kingdom, the prosecutor must consult the director of public prosecutions in the country in which the offence is alleged to have been committed.

62. Section 54B(2)(b)(ii) provides that prosecution for a listed offence which is alleged to have occurred in another country within the United Kingdom is only competent where the accused is also charged, on the same indictment, with an act in Scotland constituting a listed offence. This is intended to ensure that the Scottish courts can only hear a case relating to an offence alleged to have been committed elsewhere in the United Kingdom where it forms part of a course of conduct of offending, a part of which took place in Scotland.

63. Section 54B(3) provides that the restriction at section 54B(2)(a) prohibiting a prosecution in the Scottish courts where the person is being or has been prosecuted for the same conduct in the country within the United Kingdom where the act took place does not apply in circumstances where that prosecution has been withdrawn in order to enable the prosecution of the person in Scotland. This may occur where, for example, such a prosecution brings to light more serious offences committed by that person in Scotland and prosecutors agree that it is appropriate to prosecute all the offences on a single indictment or complaint in the Scottish courts.

64. New section 54C sets out limitations on the prosecution of listed sexual offences where it is not known in which jurisdiction within the United Kingdom the offence is alleged to have been committed. This may occur where, for example, the offence was committed in an unknown location close to the border between Scotland and England. Another example would be where the offences have taken place over a long period within a family unit and the family have lived in different parts of the United Kingdom at different times as the children grew up.

65. Section 54C(1) provides that it is not necessary that an indictment or complaint contains information from which it is possible to determine the jurisdiction in which the act constituting the listed offence is alleged to have taken place. This ensures that it is legally competent for an indictment to be served in which there is uncertainty as to the jurisdiction within which an offence is alleged to have been committed.

66. Section 54C(2) provides that where an indictment or complaint does not contain such information, subject to the exception at section 54C(5), the offence cannot be prosecuted in the Scottish courts if the person is being or has been prosecuted for the same conduct elsewhere in the United Kingdom and that a prosecution is only competent if the applicable conditions in section 54C(3) are met.

67. Section 54C(3) provides that, before serving an indictment or complaint in respect of a listed offence where the jurisdiction in which the act constituting the offence is alleged to have occurred is not known, the prosecutor must consult the Director of Public Prosecutions in the other jurisdiction or jurisdictions in which the act may have been committed.

68. Section 54C(5) provides that the restriction at section 54C(2)(a) prohibiting a prosecution in the Scottish courts where the person is being or has been prosecuted for the same conduct in the country within the United Kingdom where the act took place does not apply in circumstances where that prosecution has been withdrawn in order to enable the prosecution of the person in Scotland.

Section 9– *Commission of certain sexual offences outside the United Kingdom*

69. Section 9 amends section 55 of the 2009 Act, which provides Scottish courts with extra-territorial jurisdiction (beyond the United Kingdom) over certain sexual offences committed against children. Section 9(2) adds new subsections 55(2A) and 55(2B), which provide that a person who was not a UK resident or a UK national at the time they did an act outside the UK which would, if it had been done in Scotland, constitute a listed offence, can be prosecuted for that offence if they subsequently become a UK national or UK resident and the act constituted a criminal offence under the law in force in the country in which it was done.

70. Section 9(5) and (6) amend the definitions of UK national and UK resident in section 55 of the 2009 Act so as to provide that a person is to be regarded as a UK national or resident for the purpose of this section only if they were a UK national or resident at the time at which the act constituting an offence is alleged to have taken place. Read with new section 55(2A), the effect is that a person who was not a UK national or UK resident at the time they did an act constituting a listed offence cannot be prosecuted in the Scottish courts if the act did not amount to a criminal offence in the country where the act took place.

Chapter 3– *Sexual harm prevention orders*

71. Sections 10 to 25 make provision for the sexual harm prevention order (“SHPO”). This is a preventative order designed to protect the public from sexual harm. The order replaces the sexual offences prevention order (SOPO) and the foreign travel order (FTO provided for in sections 104 and 113 of the Sexual Offences Act 2003 (“the 2003 Act”).

Meaning of sexual harm

Section 10– *Meaning of sexual harm*

72. Section 10 defines “sexual harm” to mean physical or psychological harm caused by a person committing an offence or offences listed in schedule 3 of the 2003 Act (or equivalent offences outside the UK). The offences in schedule 3 are exclusively sexual offences.

Circumstances where sexual harm prevention order may be made

Section 11– *Making of order on dealing with person for offence*

73. Section 11 provides that a court may, in certain circumstances, in addition to dealing with the person in any other way, make a SHPO on sentencing the person (subsection (2)).

74. Subsection (1) sets out the three circumstances where the court may make a SHPO against a person on sentencing. The first is on conviction when it deals with a person in respect of an offence listed in schedule 3 of the 2003 Act. The second circumstance is acquittal of such an offence by reason of the special defence set out in section 51A of the 1995 Act (which provides a defence where a person is unable by reason of mental disorder to appreciate the nature or wrongfulness of their conduct). The third circumstance is a finding of unfitness for trial in relation to such an offence under section 53F of that Act (which provides that a person is unfit for trial if it is established on the balance of probabilities that the person is incapable, by reason of a mental or physical condition, of participating effectively in that trial). In relation to the third circumstance there must also be a finding that the person has done the act or made the omission constituting the offence.

75. Subsection (3) provides that the court may make a SHPO at its own instance or on the motion of the prosecutor.

76. Subsection (4) provides the tests for making a SHPO on sentencing. The court must be satisfied that it is necessary to do so for the purpose of protecting the public or any particular members of the public from sexual harm from the person or protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the person outside the United Kingdom.

77. Subsection (5) provides that before deciding whether to make a SHPO at sentencing the court must, if the person against whom the order would be granted requests it (by virtue of subsection (6)), hold a hearing at which both the person and the prosecutor are entitled to make representations to the court. If the person does not request a hearing the court is nevertheless obliged either to hold a hearing or provide an opportunity for the person and the prosecutor to make written representations.

Section 12– *Making of order against qualifying offender on application to sheriff*

78. Section 12 provides that a court may make a SHPO when an application for such an order is made to it by the chief constable of the Police Service of Scotland in respect of a person.

79. Subsection (2) sets out the tests for making a SHPO on application. The sheriff must be satisfied that the person in respect of whom the order is sought is a qualifying offender (see subsection (5) and sections 13 to 15) and that the person's behaviour since the person first became a qualifying offender makes it necessary to make the prohibitions or requirements in the order for the purpose of protecting persons generally, or particular persons, from sexual harm or protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the person outside the UK.

80. Subsection (3) provides that before deciding whether to make a SHPO on application the court must, if the person against whom the order would be granted requests it (by virtue of subsection (4)), hold a hearing at which both the person and the chief constable are entitled to make representations to the court. If the person does not request a hearing the court is nevertheless obliged either to hold a hearing or provide an opportunity for the person and the chief constable to make written representations.

81. Subsection (5) defines certain terms for the purposes of section 12.

Section 13– *Qualifying offender: conviction etc. in Scotland*

82. Section 13 provides part of the definition of “qualifying offender” for the purposes of section 12.

83. Subsection (1) provides that a person is a qualifying offender if any of the court disposals listed in the subsection have been made in Scotland in relation to that person.

84. Subsection (2) provides that for the purposes of section 12 a person is also a “qualifying offender” if any of the court disposals listed were made before 1 May 2004 (i.e. before the 2003 Act came into force) and the sheriff is satisfied that there was a significant sexual element to the person's behaviour in committing the offence or having done the act or made the omission constituting the offence.

Section 14– *Qualifying offender: conviction etc. elsewhere in the United Kingdom*

85. Section 14 provides that a person is a “qualifying offender” for the purposes of section 12 if any of the court disposals listed have been made elsewhere in the UK in relation to that person.

Section 15– *Qualifying offender: conviction etc. outside United Kingdom*

86. Section 15 provides that a person is a “qualifying offender” for the purposes of section 12 if any of the court disposals listed have been made outside the UK in relation to that person.

87. Subsection (1) refers to convictions, insanity or disability disposals or cautions outside the UK for “equivalent offences”. Subsection (2) defines the phrase “equivalent offence” as an act or omission which at the time it was done or made constituted an offence under the law in force in that country and would have also constituted an offence listed in certain parts of the 2003 Act if done within the UK.

88. Subsection (3) makes clear, in relation to the definition in subsection (2), that an act or omission punishable under the law in force in a country outside the United Kingdom will constitute an offence under that law however it is described under that law.

89. Subsection (4) provides that the assertion that the act carried out or the omission made would have constituted an offence listed in certain parts of the 2003 Act is to be accepted by the court unless either it is challenged by way of notice served on the chief constable by the person (the details of which are set out in subsection (4)(a)), or the court, without requiring the person to serve such a notice, allows the person to require the chief constable to prove that assertion.

What order does

Section 16– *Content and duration of order*

90. Section 16 makes provision about the prohibitions or requirements (or both) that may be contained in a SHPO. Each prohibition and requirement in a SHPO is for a fixed period. The order and the prohibitions and requirements may all be for the same period. The order ceases to have

effect, if it has not already done so, when all of the requirements and prohibitions in the order have ceased to have effect.

91. Subsection (2) provides that those prohibitions or requirements will relate to things to be done or not done throughout the UK (unless expressly confined to particular localities).

92. Subsection (3) provides that any prohibition or requirement in the order must have a specified fixed period of not less than five years. This is subject to a further condition that requirements relating to a prohibition on foreign travel (dealt with in section 17) must be for a fixed period of not more than five years. As a result, prohibitions on foreign travel must always be for five years exactly.

93. The order can include any prohibition or requirement the court considers necessary for the purpose of subsection (6), including the prohibition of foreign travel to the country or countries specified in the order (or to all foreign countries, if that is what the order provides), as set out in section 17.

94. A SHPO may prohibit the person in respect of whom the order is made from doing things or require that person to do things. Subsection (4) provides that different prohibitions and requirements may have effect for different periods.

95. Subsection (6) sets out the tests for imposing prohibitions and requirements in a SHPO, namely that they are necessary to protect the public or any particular members of the public from sexual harm from the person (subsection (6)(a)) or to protect children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the person outside the UK (subsection (6)(b)).

96. Subsection (7) provides that, if the court makes a SHPO in respect of a person already subject to such an order, the earlier order will cease to have effect.

Section 17– *Prohibitions on foreign travel*

97. Section 17 makes provision about prohibitions on foreign travel in SHPOs.

98. Subsection (1) provides that the duration of the foreign travel prohibition may not exceed 5 years. Section 16(3) provides that SHPO prohibitions and requirements may not have effect for less than 5 years. Section 16(5) makes the rule in section 16(3) subject to section 17(1). As a result, foreign travel prohibitions will always apply for a period of 5 years exactly.

99. Subsection (2) provides that the order may prohibit the subject from travelling to a country outside the UK identified in the order; or from travelling to any country outside the UK other than a country identified in the order (for example, this may be needed where the offender is banned from travelling anywhere in the world other than to a named country which he/she may need to visit for family reasons); or from travelling to any country outside the UK (where the offender is such a risk to children or vulnerable adults that a universal ban is required).

100. Subsection (3) determines that a prohibition on foreign travel may be extended for further fixed periods of no more than five years each time (following an application under section 20).

101. Subsection (4) provides that a SHPO with a prohibition from travelling to any country outside the UK must include a requirement that the person surrenders their passports at a police station specified in the order.

102. Subsection (6) requires the police to return any surrendered passport as soon as reasonably practicable after the relevant foreign travel prohibition ceases, unless the person subject to the order

is subject to an equivalent prohibition specified in another order. Circumstances where this subsection would not apply are provided for at subsection (7) (for example where, in relation to passports issued by another country or by an international organisation, the passport has already been returned to the relevant authority).

Interaction with notification requirements

Section 18– Application of notification requirements where order made

103. Subsection (2) provides that if the person is subject to notification requirements under Part 2 of the 2003 Act (sex offender notification requirements) and would, if not for the order, cease to be subject to the notification requirements, they will remain subject to the requirements for the duration of the order.

104. Subsection (3) provides that where the person is not subject to the notification requirements under Part 2 of the 2003 Act, the order makes them subject to the notification requirements for registered sex offenders (as set out in Part 2 of the 2003 Act) for the duration of the order.

Section 19– Cessation of order: relevant sexual offenders

105. Section 19 provides that where a review is successfully and finally completed by virtue of sections 88F or 88G of the 2003 Act, so that a person is no longer subject to sex offender notification requirements, if the person was also subject to a SHPO that order ceases to have effect.

Variation, renewal and discharge

Section 20– Variation, renewal and discharge

106. Section 20 provides that a court can vary, renew or discharge a SHPO upon application from the person in respect of whom the order was made, the chief constable or, in appropriate cases, the prosecutor.

107. Subsections (1) and (2) provide that the person in respect of whom the SHPO is made, the chief constable or, in appropriate cases, the prosecutor may apply for variation, renewal or discharge of such a SHPO. Subsection (3) provides that the application is to be made to the High Court where that court made the order and to the sheriff otherwise (but see section 22(3) and (6)). Subsection (3)(b) and (c) and subsection (4) makes provision about shrieval jurisdiction in this connection. Where the relevant court receives such an application, it may vary, renew or discharge individual prohibitions or requirements or add new prohibitions or requirements, it may renew the whole order or it may discharge the whole order.

108. Subsection (5) sets out the tests the court must consider when deciding whether to vary, renew or discharge SHPOs (including by adding new prohibitions or requirements) or any prohibitions or requirements within them. Subsections (5) and (6) apply the tests for the making of a SHPO to any variation (including an increase or a relaxation of a requirement or prohibition), renewal, addition or discharge.

109. Subsection (7) provides that before deciding whether to vary, renew or discharge a SHPO the court must, if the person against whom the order has effect or the chief constable (or in the case of an order made under section 11 only, the prosecutor) requests it by virtue of subsection (8), hold a hearing at which both the person, the chief constable (and, if the order is made under section 11, the prosecutor) are entitled to make representations to the court. In the absence of a request for a hearing the court is nevertheless obliged either to hold a hearing or provide an opportunity for the

person, the chief constable (and, if the order is made under section 11, the prosecutor) to make written representations.

Interim orders

Section 21– *Interim orders*

110. Section 21 allows the chief constable to apply for an interim SHPO where an application has been made for a full order.

111. Subsection (1) gives power to a sheriff to make an interim SHPO while the main application under section 12 is being determined. The sheriff may make such an order if the sheriff considers it just to do so (subsection (2)) and such an order may contain prohibitions or requirements (or both) in relation to the person in respect of whom the order is to have effect, for a fixed period (subsection (5)). Different periods may apply to different prohibitions and requirements (subsection (6)). The prohibitions or requirements will apply throughout the United Kingdom (unless expressly confined to particular localities) (subsection (4)).

112. Subsection (7) makes procedural provision for an interim SHPO application to be made at the same time as an application for a full SHPO, or separately in accordance with rules of court.

113. Subsection (8) provides that sex offender notification requirements will apply to interim SHPOs in the same way as they do to full SHPOs.

114. Subsection (9) provides that an interim SHPO will cease to have effect on the determination of the related application for a SHPO under section 12 or when all prohibitions or requirements in the order cease to have effect.

115. Subsections (10) and (11) allow for an application for variation, renewal or discharge of an interim SHPO to be made to a sheriff in the sheriffdom of the sheriff who dealt with main application for a full SHPO under section 12. Such an application may be made by the person in respect of whom the order was made or the chief constable.

Appeals

Section 22– *Appeals*

116. Section 22 provides for an appeals process in relation to SHPOs and interim SHPOs.

117. Subsection (1) makes provision about SHPOs made on sentencing under section 11 and any order granting or refusing a variation, renewal or discharge of such a SHPO. These are to be treated as sentences only for the purposes of any appeal. SHPOs made post-sentencing under sections 12 or 21, on the other hand, may be appealed under civil appeal structures: see subsections (4) and (5).

118. Subsections (3) and (6) provide that where an appeal results in a SHPO being granted by the appeal court, any subsequent application for variation, renewal or discharge of that order should revert to the court which dealt with the matter initially and could have granted the SHPO in the first place.

Requirement to serve order

Section 23– *Requirement for clerk of court to serve order*

119. Section 23 requires the clerk of court to serve on the person against whom an order has effect a copy of any order granting, varying, renewing or discharging a SHPO or interim SHPO.

Enforcement

Section 24– *Offence of breaching order*

120. Section 24 makes provision about breach of SHPOs.

121. Subsection (1) provides that breach of SHPO, without reasonable excuse, will be a criminal offence. Subsection (2) specifies that a person convicted of such an offence at a summary trial will be liable to a term of imprisonment of up to 12 months or to a fine or both; a person convicted on indictment will be liable to a term of imprisonment of up to five years or to a fine or both.

122. Subsection (3) provides that a person convicted under section 24 cannot be dealt with by way of a community payback order, or dismissed with an admonition or discharged absolutely.

123. Subsection (4) makes jurisdictional provision in relation to breach of a prohibition on foreign travel; such cases may be tried in the sheriff court district where the person is being held in custody or in a sheriff court district determined by the Lord Advocate.

Interpretation

Section 25– *Interpretation of Chapter*

124. Section 25 defines certain terms used in Chapter 3 of Part 2 of the Act.

Chapter 4– *Sexual risk orders*

125. Sections 26 to 36 make provision for the sexual risk order (“SRO”), a civil preventative order designed to protect the public from sexual harm. The order replaces the risk of sexual harm order (RSHO) as provided for by sections 2 to 8 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (“the 2005 Act”). The person in respect of whom the SRO is made may or may not have a conviction for a sexual (or any other) offence.

Meaning of harm

Section 26– *Meaning of harm*

126. Section 26 defines “harm” to mean physical or psychological harm caused by a person doing an act of a sexual nature.

Making of order

Section 27– *Making of order*

127. Section 27 provides that the chief constable may apply to a sheriff for a SRO against a person. A SRO differs from a SHPO in that it may be made where a person has not previously been convicted of a sexual offence (or any offence) but the person's behaviour indicates a risk that others may be harmed.

128. Subsection (2) sets out the tests for making a SRO. The sheriff may only make an order if satisfied that the person in respect of whom the order is sought has done an act of a sexual nature and, as a result, an order is necessary to protect the public or any particular members of the public from harm from the person (subsection (2)(a)), or to protect children or vulnerable adults generally, or any particular children or vulnerable adults, from harm from the person outside the United Kingdom (subsection (2)(b)).

129. Subsection (4) provides that before deciding whether to make a SRO the court must, if the person against whom the order would be granted requests it (by virtue of subsection (5)), hold a hearing at which both the person and the chief constable are entitled to make representations to the

court. If the person does not request a hearing the court is nevertheless obliged either to hold a hearing or provide an opportunity for the person and the chief constable to make written representations.

What order does

Section 28– *Content and duration of order*

130. Section 28 makes provision about the prohibitions or requirements (or both) that may be contained in a SRO. Each prohibition and requirement in a SRO is for a fixed period. The order ceases to have effect, if it has not already done so, if all of the requirements and prohibitions in the order have ceased to have effect.

131. Subsection (2) provides that those prohibitions or requirements will apply throughout the UK (unless expressly confined to particular localities).

132. Subsection (3) provides that a prohibition or requirement in a SRO must be for a fixed period and last a minimum of two years. There is no maximum period, with the exception of any foreign travel restriction which expires after a maximum of five years, unless renewed (see section 29).

133. Subsection (4) provides that different prohibitions and requirements may have effect for different periods.

134. Subsection (5) sets out the tests for imposing prohibitions and requirements in a SRO, namely that they are necessary to protect the public or any particular members of the public from sexual harm from the person (subsection (5)(a)) or to protect children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the person outside the UK (subsection (5)(b)).

135. Subsection (7) provides that, if the court makes a SRO in respect of a person already subject to such an order, the earlier order will cease to have effect.

Section 29– *Prohibitions on foreign travel*

136. Section 29 makes provision about prohibitions on foreign travel in SROs.

137. Subsection (1) provides that the duration of the foreign travel prohibition may not exceed 5 years.

138. Subsection (2) provides that the order may prohibit the subject from travelling to a country outside the UK identified in the order or from travelling to any country outside the UK other than a country identified in the order (for example, this may be needed where the offender is banned from travelling anywhere in the world other than to a named country which he/she may need to visit for family reasons); or from travelling to any country outside the UK (where the offender is such a risk to children or vulnerable adults that a universal ban is required).

139. Subsection (3) determines that a prohibition on foreign travel may be extended for further fixed periods of no more than five years each time (following an application under section 30).

140. Subsection (4) provides that a SRO prohibiting a person from travelling to any country outside the UK must contain a requirement that the person surrenders their passports at a police station specified in the order.

141. Subsection (6) requires the police to return any surrendered passport as soon as reasonably practicable after the relevant foreign travel prohibition ceases, unless the person subject to the order is subject to an equivalent prohibition specified in another order. Circumstances where this subsection

would not apply are provided for at subsection (7) (where a passport issued by another country or by an international organisation has already been returned to the relevant authority).

Variation, renewal and discharge

Section 30– *Variation, renewal and discharge*

142. Section 30 makes provision about the variation, renewal or discharge of SROs.

143. Subsections (1) and (2) provide that a court can vary, renew or discharge a SRO upon the application of the subject of the order or the chief constable.

144. Subsection (3) makes provision about shrieval jurisdiction in this connection.

145. Subsections (4) and (5) set out the tests the sheriff must consider when deciding whether to vary, renew or discharge a SRO (including by adding new prohibitions or requirements) or any prohibitions or requirements within them.

146. Subsection (6) provides that before deciding whether to vary, renew or discharge a SRO the court must, if the person against whom the order has effect or the chief constable requests it (by virtue of subsection (7)), hold a hearing at which both the person and the chief constable are entitled to make representations to the court. If a hearing is not requested, the court is nevertheless obliged either to hold a hearing or provide an opportunity for the person and the chief constable to make written representations.

Interim orders

Section 31– *Interim orders*

147. Section 31 allows the chief constable to apply for an interim SRO where an application has been made for a full order.

148. Subsection (1) gives power to a sheriff to make an interim SRO while the main application under section 27 is being determined.

149. Subsection (2) provides that the sheriff may make such an order if the sheriff considers that there is a prima facie case that the person has done an act of a sexual nature that is being relied upon in relation to a connected application for a (full) SRO under section 27(2), and that it is just.

150. Subsection (4) provides that the prohibitions or requirements contained in an interim SRO will apply throughout the United Kingdom (unless expressly confined to particular localities). The prohibitions or requirements will have effect for a fixed period (subsection (5)). Different periods may be applied to different prohibitions and requirements (subsection (6)).

151. Subsection (7) makes procedural provision for an interim SRO application to be made at the same time as an application for a full SRO, or separately in accordance with rules of court.

152. Subsection (8) provides that an interim SRO will cease to have effect on the determination of the related application for a SRO under section 27 or earlier, if all prohibitions or requirements cease to have effect.

153. Subsections (9) and (10) allow for variation, renewal or discharge of interim SROs by application to a sheriff in the sheriffdom of the sheriff who dealt with the main application for a full SRO under section 27. Such an application may be made by the person in respect of whom the order was made or the chief constable.

Appeals

Section 32– *Appeals*

154. Section 32 provides for appeals against a decision to make, refuse to make, vary, renew or discharge (or refuse to vary, renew or discharge) a SRO under sections 27 or 31.

155. Subsection (3) provides that where an appeal results in a SRO being granted by the appeal court, any subsequent application for variation, renewal or discharge of that order should revert to the court which dealt with the matter initially and could have granted the SRO in the first place.

Requirement to serve order

Section 33– *Requirement for clerk of court to serve order*

156. Section 33 requires the clerk of court to serve on the person against whom an order has effect a copy of any order granting, varying, renewing or discharging a SRO or interim SRO.

Enforcement

Section 34– *Offence of breaching order*

157. Section 34 makes provision about breach of SROs.

158. Subsections (1) and (2) provide that breach of a SRO, without reasonable excuse, is a criminal offence, punishable by a term of imprisonment of up to 12 months or to a fine or both if the offence is tried summarily; or by imprisonment of up to five years or to a fine or both if tried on indictment.

159. Subsection (3) provides that a person convicted under section 34 cannot be sentenced to a community payback order, or dismissed with an admonition or discharged absolutely.

160. Subsection (4) makes jurisdictional provision in relation to breach of a prohibition on foreign travel; such cases may be tried in the sheriff court district where the person is being held in custody or in a sheriff court district determined by the Lord Advocate.

Section 35– *Application of notification requirements on breach of order*

161. Section 35 sets out the circumstances in which breach of a SRO or interim SRO renders a person subject to the notification requirements of Part 2 of the 2003 Act (sex offender notification requirements).

162. These circumstances will occur if a person is convicted of the section 34 offence, or is acquitted by reason of the special defence set out in section 51A of the 1995 Act (which provides a defence where a person is unable by reason of mental disorder to appreciate the nature or wrongfulness of their conduct), or if a court finds the person unfit to stand trial under section 53F of that Act (which provides that a person is unfit for trial if it is established on the balance of probabilities that the person is incapable, by reason of a mental or physical condition, of participating effectively in that trial). In relation to the third circumstance there must also be a finding that the person has done the act or made the omission constituting the section 34 offence.

163. The notification requirements will remain in place for the duration of the breached SRO. If the conviction is for breach of an interim SRO, the restrictions or requirements will remain in place for the duration of the interim order or, if a full order is subsequently made, for the duration of the full order.

Interpretation

Section 36– *Interpretation of Chapter*

164. Section 36 defines certain terms used in Chapter 4 of Part 2 of the Act.

Chapter 5– *Equivalent orders elsewhere in United Kingdom*

Section 37– *Breach of orders equivalent to orders in Chapters 3 and 4: offence*

165. Subsection (1) makes it an offence in Scotland to contravene a SHPO, interim SHPO, SRO or interim SRO made in England and Wales. It also makes it an offence in Scotland to contravene a SOPO, interim SOPO, RSHO, interim RSHO or FTO made elsewhere in the UK. Such orders can continue to be made in Northern Ireland, and although such orders can no longer be made in England and Wales some such orders remain in effect. Finally, it also makes it an offence to contravene two old forms of England and Wales order – a restraining order made under section 5A of the Sex Offenders Act 1997 and a sex offender order made under section 2 of the Crime and Disorder Act 1998. Again, although such orders can no longer be made some such orders remain in effect.

166. Subsection (2) specifies that a person convicted of such an offence on summary conviction will be liable to a term of imprisonment of up to 12 months or to a fine, or both; a person convicted on indictment will be liable to a term of imprisonment of up to five years or to a fine or both.

167. Subsection (3) provides that a person convicted under subsection (1) cannot be dealt with by a community payback order, or dismissed with an admonition or discharged absolutely.

168. Subsection (4) provides that the prohibitions imposed by the equivalent order from elsewhere in the UK apply throughout the United Kingdom (unless expressly confined to particular localities).

Section 38– *Breach of certain equivalent orders: application of notification requirements*

169. Section 38 sets out the circumstances in which breach of an SRO or interim SRO made in England and Wales or a RSHO or interim RSHO in Northern Ireland will render the person subject to the notification requirements of Part 2 of the 2003 Act (sex offender notification requirements). The circumstances are similar to those described in section 35, that is, where there is a conviction or an alternative court disposal relating to the person's mental or physical fitness to stand trial or ability to understand the nature or wrongfulness of their conduct. The conviction or other disposals may relate to the section 37 offence in Scotland (subsection (1)) or the equivalent offences in England and Wales or Northern Ireland (subsection (2)). The notification requirements will remain in place for the duration of the breached order. If the conviction is for breach of an interim order, the restrictions will remain in place for the duration of the interim order or, if a full order is subsequently made, for the duration of the full order.

Chapter 6– *Previous orders*

Section 39– *Repeals of provisions as to previous orders*

170. Subsection (1) repeals various sections of the 2003 Act relating to SOPOs and FTOs.

171. Subsection (2) repeals sections 2 to 8 of the 2005 Act, which made provision for RSHOs.

Section 40– *Saving and transitional provision*

172. Section 40 makes provision to facilitate the transition between the existing regime of orders (SOPOs, FTOs and RSHOs) and the new regime (SHPOs, SROs).

173. Subsection (2) provides that the repeals made by section 39 of this Act do not apply to an existing order made or applied for before the commencement of the provisions in this Act, or anything done in connection with such orders or applications.

174. However, subsection (3) prevents any variation of existing SOPOs, FTOs, RSHOs that would extend their duration and provides that five years after the new regime of orders comes into force, the provisions in any SOPO, interim SOPO, FTO, RSHO or interim RSHO which continue to have effect will be treated as if they were provisions in a new corresponding order (as defined in subsection (4)).

Part 3– *General*

Section 41– *Interpretation*

175. Section 41 defines certain terms for the purpose of this Act.

Section 42– *Ancillary provision*

176. Section 42 provides a power for the Scottish Ministers to make, by regulations, incidental, supplementary, consequential, transitional, transitory or saving provision relating to this Act.

Section 43– *Minor and consequential modifications*

177. Section 43 introduces schedule 2, which makes minor amendments and amendments consequential on the provisions of the Act.

Section 44– *Crown application*

178. Section 44 provides that none of the provisions made by or under the Act are capable of making the Crown criminally liable. However, the Court of Session may issue a civil declarator of non-compliance in relation to the acts or omissions of Crown, on application by the Scottish Ministers or any other public body or office-holder with responsibility for enforcing a provision in the Act. Subsection (3) provides that the Act applies to persons in the public service of the Crown.

Section 45– *Commencement*

179. Section 45 provides that sections 42, 44, 45 and 46 of the Act come into force on the day after Royal Assent. All other provisions are to come into force on a day appointed by regulations made by the Scottish Ministers.

PARLIAMENTARY HISTORY

180. The following table sets out, for each Stage of the proceedings in the Scottish Parliament on the Bill for this Act, the dates on which the proceedings at that Stage took place, and the references to the Official Report of those proceedings. It also shows the dates on which Committee reports and other papers relating to the Bill were published, and gives references to those reports and other papers.

PROCEEDINGS AND REPORTS	REFERENCE
INTRODUCTION	
Bill as introduced – 8 October 2015	SP Bill 81 – Session 4 (2015)
SPICe briefing on Bill (as introduced) – published 12 November 2015	SPICe briefing SB 15/74
STAGE 1	
(a) Lead committee – Justice Committee	
Stage 1 report – published 21 January 2016	2nd Report, 2016 (Session 4)
(b) Delegated Powers and Law Reform Committee	
31st Meeting, 10 November 2015	Official Report 10 November 2015

PROCEEDINGS AND REPORTS	REFERENCE
Report	68th Report, 2015 (Session 4)
(c) Consideration by the Parliament	
Stage 1 debate – 28 January 2016	Official Report 28 January 2016
STAGE 2	
Consideration of amendments by Justice Committee – 1 March, 8 March 2016	Official Report 1 March 2016 Official Report 8 March 2016
Bill (as amended at Stage 2) – published 9 March 2016	SP Bill 81A – Session 4 (2016)
AFTER STAGE 2	
Consideration of the Bill (as amended at Stage 2) by Delegated Powers and Law Reform Committee – 17 March 2016	Official Report 17 March 2016
Report	27 th Report, 2016 (Session 4)
STAGE 3	
Consideration by the Parliament	
Stage 3 proceedings – 22 March 2016	Official Report 22 March 2016
Bill (as passed) – published 23 March 2016	SP Bill 81B – Session 4 (2016)
ROYAL ASSENT	
Act (Royal Assent) – 28 April 2016	The Abusive Behaviour and Sexual Harm (Scotland) Act 2016 (asp 22)

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