

# CRIMINAL JUSTICE (SCOTLAND) ACT 2003

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## EXPLANATORY NOTES

### THE ACT THE ACT IS IN 12 PARTS.

#### Part 6 – Non-Custodial Punishments

##### *Section 43 – Restriction of liberty orders*

208. **Section 43** makes provision in connection with the powers of the court:
- when making a restriction of liberty order in circumstances where an offender resides or is to reside in another court district; and
  - when considering an application to vary such an order in circumstances where an offender already subject to a restriction of liberty order wishes to reside in another court district; and
  - when considering a breach of a restriction of liberty order.
209. Restriction of liberty orders (RLOs) were introduced in Scotland by section 5 of the Crime and Punishment (Scotland) Act 1997. RLOs require an offender to be restricted as regards his/her being in a specified place for up to 12 hours per day or not being in a specified place for up to 24 hours per day, or both, for a maximum period of 12 months. Compliance with an RLO is monitored by remote monitoring equipment.
210. This section deals with the situation where an offender who has been given an RLO intends to move outwith the jurisdiction of the court which made the order. It provides that the court is to have the power to vary the terms of the order, including the arrangements for monitoring. The court in the area in which the offender is to reside will be given the power to deal with any breach, application for review or variation of the RLO as if it has made the original order.
211. The court is also to have the power to impose an RLO on an offender who resides, or is to reside, outwith the jurisdiction of the court. The court with jurisdiction for the area in which the offender resides or is to reside has the power to vary, review and deal with a breach of the order.
212. Subsection (2) amends section 245A(5)(a) of the Criminal Procedure (Scotland) Act 1995 (the 1995 Act) to provide that, in cases where the offender resides (or is to reside) in a place outwith the jurisdiction of the court, the clerk of the court will send a copy of the RLO both to the person responsible for monitoring the offender's compliance with the order and to the clerk of a court which has jurisdiction over that place where the offender resides (or is to reside).
213. Subsection (3) amends subsection (1) of, and inserts new subsections (5) to (8) into, section 245E of 1995 Act. The amendment to section 245E(1) has the effect that where an offender with an RLO is residing outwith the jurisdiction of the court which made the order and the order has been transferred, under either sections 245A(5)(a)(ii) or 245E(7)(a) of the 1995 Act (as amended by the Act), to a court which has jurisdiction

over the offender's place of residence, any application to review the order should be made to that court to which the order has been transferred.

214. The effect of the new section 245E(5) is to provide that when an RLO is in force in respect of an offender and the offender proposes to change his or her place of residence to one outwith the district of the court which made the order, the offender may make application to the court which made the order to vary it. If the court is satisfied that arrangements can be made to monitor the offender's compliance with the order, by the means of monitoring specified in the order, in the district to which the offender proposes to take up residence, the court will have the power to vary the terms of the order to allow these arrangements to be made. In addition, if the offender's change in residence requires a change in the person responsible for monitoring compliance with the order, the court will have the power to vary the order accordingly.
215. The new section 245E(6) provides that, in cases where the RLO requires the offender to remain in a specified place or places, the court may not vary the order in response to an application by the offender to relocate to a place outwith the jurisdiction of that court without first obtaining and considering information about the place or places, including information about the attitude of any persons likely to be affected by the enforced presence there of the offender.
216. If the court is not satisfied that suitable monitoring arrangements can be put in place in the district in which the offender is to reside, the new section 245E(8) provides that the court may refuse the application or revoke the order.
217. New section 245E(7) provides for notification in cases where the order is varied to allow the offender to relocate to an area outwith the jurisdiction of the court.
218. [Section 43\(4\)](#) of the Act amends the procedures set out in section 245F of the Criminal Procedure (Scotland) Act 1995 for dealing with breach of an RLO to make provision for cases in which the offender resides outwith the jurisdiction of the court which made the order and the order has been transferred, under either section 245A(5)(a)(ii) or 245E(7) (a) of the 1995 Act (as amended by the Act), to a court which has jurisdiction over the offender's place of residence. The effect is to permit the court in which the offender is now resident, which has received a copy of the original order or a copy of the varied order, to issue a citation or warrant for the offender to appear before it for a failure to comply with the order and, at the resulting hearing, to dispose of the case if a failure to comply has been established to the court's satisfaction.

#### ***Section 44 – Interim anti-social behaviour orders***

219. [Section 44](#) amends the Crime and Disorder Act 1998 (the 1998 Act) to empower a sheriff to make an interim anti-social behaviour order in an application for an anti-social behaviour order under section 19 of the 1998 Act.
220. Section 19 of the 1998 Act provides that a local authority may apply to the sheriff for an anti-social behaviour order (ASBO) on the grounds that:
  - a person has acted in an anti-social manner (i.e. in a manner that caused or was likely to cause alarm or distress); or
  - a person has pursued a course of anti-social conduct that caused or was likely to cause alarm or distress to one or more persons not of the same household as him or herself and that an order is necessary to protect persons in the authority's area from further anti-social acts or conduct by the person concerned.
221. If satisfied that these conditions are fulfilled the sheriff may make an anti-social behaviour order which will prohibit the person named in the order from doing anything described in the order.

222. There is no provision for interim anti-social behaviours in the 1998 Act. Section 44 amends sections 19, 21 and 22 of the 1998 Act, which makes provision for anti-social behaviour orders.
223. **Section 44** inserts new subsection (2A) into section 19 of the 1998 Act which enables interim anti-social behaviour orders (“an interim ASBO”) to be made. Subsection (2A) provides that when an anti-social behaviour order is applied for a sheriff may grant an interim order pending the final decision, if satisfied that:
- if the actions complained of were established the criteria for an ASBO would be satisfied; and
  - an interim order is necessary to protect persons in the local authority area from further anti-social acts or conduct by the person against whom the order is sought.
224. The person in respect of whom the application is made must have received intimation of the application for an interim ASBO and it will be open to the court in its discretion to take account of any representations made following intimation.
225. Subsection (2) amends section 21 of the 1998 Act, which regulates the procedural provisions with respect to ASBOs, to make provision for an appeal against the granting of an interim ASBO and provides that the interim ASBO may continue in force whilst subject to an appeal. Subsection (3) makes provision for an amendment to section 22 of the 1998 Act in order that a breach of an interim ASBO may be treated as a criminal offence.

***Section 45 - Application by registered social landlord for anti-social behaviour order***

226. **Section 45** amends the 1998 Act to extend the power to apply for anti-social behaviour orders (ASBOs) and interim ASBOs to registered social landlords (“RSLs”) (as defined by section 57 of the Housing (Scotland) Act 2001). This will allow RSLs to obtain ASBOs against persons behaving anti-socially on or in the vicinity of properties provided or managed by RSLs. At present only local authorities, in consultation with the police, can apply for ASBOs in Scotland.
227. Extending the power to RSLs will be without prejudice to the power of the local authority to seek an ASBO in respect of RSL premises.
228. **Section 45** also has the effect of amending section 21 of the 1998 act to make clear that RSLs must consult the police and notify the local authority before applying for an ASBO or interim ASBO.

***Sections 46 and 47 – Requirement for remote monitoring in probation order and requirement for remote monitoring in drug treatment and testing order***

229. **Sections 46 and 47** amend the Criminal Procedure (Scotland) Act 1995 to allow the court, when it makes a probation order or a drug treatment and testing order (DTTO), to include as a condition of that order that the offender comply with certain restrictions on his or her movements and any requirement to enable remote monitoring of his or her compliance with those restrictions.
230. A probation order is an order made under section 228 of the Criminal Procedure Scotland Act 1995, which requires an offender to be under supervision in the community for a specified period. The principal focus of the order, which requires the offender’s consent, is to challenge the offender’s criminality and behaviour.
231. A drug treatment and testing order is an order made under section 234B of the Criminal Procedure Scotland Act 1995 (as inserted by section 89 of the Crime and Disorder Act 1998). A DTTO is a disposal targeted on serious offenders with a dependency on

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drugs who consent to the imposition of the order. The offender is placed on specialist treatment programmes and subject to regular review by the court.

232. Section 245A of the Criminal Procedure (Scotland) Act 1995 contains provisions concerning a Restriction of Liberty Order (RLO). RLOs were introduced in Scotland by section 5 of the Crime and Punishment (Scotland) Act 1997. They require an offender to be restricted to a specified place for up to 12 hours per day or from a specified place for up to 24 hours per day, or both, for a maximum period of 12 months. Compliance with an RLO is monitored by remote monitoring equipment.
233. Subject to the provisions in section 245A of the Criminal Procedure (Scotland) Act 1995, section 47 inserts a new section 234CA into the 1995 Act which provides that a DTTO may include a requirement that an offender comply with restrictions on movement for a specified period of up to 12 months. Section 46 inserts a new section 230A which provides that a probation order may also include a requirement that an offender comply with restrictions on his or her movement for a specified period of up to 12 months. Restrictions may be applied to both provisions as set out in section 245A(2) of the 1995 Act (periods and places).
234. [Section 47\(2\)](#) amends the 1995 Act by inserting a new section 234CA. Subsection (2) of this new section provides that where such a requirement is made as part of a DTTO a copy of the order shall be sent from the clerk of the court to the person who is responsible for monitoring the offender's compliance with the requirement. Similarly the new section 230A(2) (inserted by section 46(2) of the Act) provides for such a procedure where such a requirement is made as a condition of a probation order.
235. New section 234CA(3) provides that if the person responsible for monitoring the offender's compliance with the remote monitoring conditions of the DTTO finds that they have failed to comply with any of the requirements they should inform the supervising officer, who will inform the court. The supervising officer is the person appointed or assigned by the local authority under section 234C of the 1995 Act.
236. [Section 46\(2\)](#) amends the 1995 Act by inserting a new section 230A. Subsection (3) of new section 230A provides that if the person responsible for monitoring the offender's compliance with the remote monitoring conditions of the probation order finds that they have failed to comply with any of the requirements they should inform the supervising officer, who will inform the court. The supervising officer is the person appointed or assigned by the local authority under section 228(3) of the 1995 Act.
237. New section 234CA(4) provides that where the supervising officer reports an alleged breach of the remote monitoring condition in relation to a DTTO, the court may exercise the existing powers in section 234G of the 1995 Act. The new section 230A(4) inserted by section 46(2) provides that where such a breach is reported in relation to a probation order the court may exercise the existing powers in section 232 of the 1995 Act. The documentary evidence required in proceedings concerning an alleged breach of the remote monitoring condition is to be that prescribed for RLOs in section 245H. Where the court is satisfied that the offender has failed without reasonable excuse to comply with any of the requirements of the remote monitoring condition, the court is to have the powers in section 234G(2) to impose a fine, vary or revoke the order. The DTTO may continue in force notwithstanding that a remote monitoring condition is removed.
238. New sections 234CA(5) and 230A(5) each apply sections 245A(6), (8) to (11), 245B and 245C of the 1995 Act, in relation to the imposition of, or compliance with the requirements of, an RLO, to the arrangements for remote monitoring set out in sections 234CA(1) and 245A(1) respectively.
239. New section 234CA(6) modifies section 234E of the 1995 Act in relation to a drug treatment and testing order with remote monitoring requirements. Section 234E of the 1995 Act sets out the procedures for the variation of the remote monitoring conditions in a drug treatment and testing order.

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240. Section 234E(1) provides that where a DTTO is in force either the offender or the supervising officer may apply to the appropriate court for variation or revocation of the order. However, new section 234CA(6) provides that where a remote monitoring condition has been included in a DTTO the monitoring officer is only able to apply for a variation or revocation in relation to the remote monitoring requirement.
241. Section 234E(3) provides that where an application for variation or revocation of a DTTO is made, the offender and the supervising officer should be heard. New section 234CA(6) provides that the responsible person should also be heard if a remote monitoring condition forms part of the DTTO.
242. Section 234E(3)(a) provides that the court may vary the order. New section 234CA(6) (d) provides that this can include increasing or decreasing the period of monitoring as set out in the order.
243. New section 230A(6) provides that where a probation order has such a requirement, a request to amend the order may come from the person responsible for monitoring the requirement, but only in respect of that part of the order. New section 230A(7) provides that where such an application is made by the probationer or the supervising officer a copy shall be sent to the person responsible for monitoring compliance with the order. It also provides that where the responsible person applies for an amendment to the order they should copy the application to the probationer and supervising officer.
244. New section 234CA(7) provides that where such a requirement is varied in relation to a DTTO, the clerk of the court shall send a copy of the amended order to the person responsible for monitoring the offenders compliance with the order. New section 230A(7) provides that where such a requirement is varied in relation to a probation order, the clerk of the court shall send a copy of the amended order to the person responsible for monitoring the offenders compliance with the order.
245. [Section 46\(3\)](#) amends section 232 of the Criminal Procedure (Scotland) Act 1995 to provide that the maximum period for an extension to a requirement of a probation order is twelve months as set out in new section 230A(1).

***Section 48 – Breach of certain orders: adjourning hearing and remanding in custody etc***

246. [Section 48](#) amends the Criminal Procedure (Scotland) Act 1995 by insertion of a new section 245J to provide clarification of the powers of courts to remand to custody (or release on bail) offenders, who are appearing before the court in relation to an apparent breach of a community disposal.
247. New subsection 245J(1) provides for the court in dealing with an offender, who is alleged to be in breach of a community disposal previously imposed by the court, to adjourn the hearing to allow further enquiries to be made. It sets out the community disposals to be dealt with under this sub-section i.e. probation orders, drug treatment and testing orders, supervised attendance orders, community service orders or restriction of liberty orders.
248. An offender who is remanded to custody under this section has the right of appeal within 24 hours under new subsection 245J(4) to contest the refusal of bail or against the conditions of the bail order. Subsection 245J(5) requires a note of appeal to be presented to the High Court, who can consider the case either in court or in chambers. In reaching its decision after hearing the prosecutor and the appellant the High Court can confirm the order or grant bail on such conditions as it sees fit or alternatively ordain the appellant to appear at the adjourned hearing.

***Section 49 – Power of arrest where breach of non-harassment order***

249. **Section 49** amends the Criminal Procedure (Scotland) Act 1995 and the Protection from Harassment Act 1997 to provide for a statutory power of arrest, by the police, for breach of a non-harassment order.
250. The police already have powers at common law to arrest without warrant if necessary in the interests of justice, and the new statutory power of arrest given by section 34 is to be exercised without prejudice to other common law and statutory powers of arrest. Section 49 makes provision for a constable to arrest without warrant a person reasonably suspected of breaching a non-harassment order. The power may be exercised where the non-harassment order is imposed in criminal proceedings following conviction for an offence involving harassment or where it has been granted in civil proceedings following an application to the court.
251. Section 8 of the Protection from Harassment Act 1997 defines a non-harassment order (NHO) as an order which the court may grant in an action for harassment to protect a person from further harassment. The NHO prohibits the defender from specified conduct in relation to the pursuer for a specified period of time. It is for the court to determine any specified conduct or time period to be included in the order. The court may also make a NHO following conviction for an offence involving harassment. Section 9 of the 1997 Act makes provision for the penalties to be imposed following a breach of the order, and designates a breach of an order as a criminal offence.
252. Section 234A of the Criminal Procedure (Scotland) Act 1995 makes provision that where a person has been convicted of a criminal offence, the prosecutor may apply to the court for a non-harassment order requiring the offender to refrain from such conduct, in relation to the victim, as may be specified by the court in the order. It permits the court to impose a non-harassment order, the procedure to be followed before such an order may be imposed and the penalties that may be imposed for a breach of such an order.
253. **Section 49(1)** amends section 234A of the 1995 Act by inserting two new subsections. The new subsection (4A) makes provision for a police constable to arrest without warrant a person the constable reasonably believes is breaching a non-harassment order. The new subsection (4B) specifies that the new power of arrest created by subsection (4A) is without prejudice to any other power of arrest.
254. **Section 49(2)** amends section 9 of the 1997 Act by inserting two new subsections. New subsection (3) makes provision for a police constable to arrest without warrant a person the constable reasonably believes is breaching a non-harassment order. New subsection (4) specifies that the new power of arrest created by subsection (3) is without prejudice to any other power of arrest.

***Section 50 – Amendments in relation to certain non-custodial sentences***

255. **Section 50** amends the Criminal Procedure (Scotland) Act 1995 in relation to the arrangements for supervised attendance orders (SAOs) and restriction of liberty orders (RLOs).
256. A SAO is an order available to criminal courts in Scotland, which requires an offender who has failed to pay a fine to undertake a programme of designated activities for a specified number of hours.
257. Section 235 of the 1995 Act makes provision that where an offender who is 18 years or over, fails to pay a fine and is liable for imprisonment for that failure, and the court believes that it is appropriate to do so, it may impose a SAO. Section 235 permits the court to impose a SAO of not less than 10 hours and up to a maximum of 50 hours (for a fine not exceeding level 1 on the standard scale) and up to 100 hours in any other case. Section 236 of the 1995 Act permits the court to impose a SAO on an offender aged 16 or 17 years where the offender is convicted of a summary offence and the

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court believes that a fine is the appropriate disposal. The court is required to consider whether the offender is likely to pay the fine within 28 days. If the offender is likely to pay within 28 days the court may impose the fine with the alternative of a fixed period of a SAO in default in payment. If the offender is unlikely to pay within 28 days the court may impose a SAO.

258. Subsection (1) amends section 235 in order that a court may exercise its powers of imposing a SAO for offenders aged 16 years and over who have defaulted in the payment of their fine. That is, it lowers the age limit to 16 years. Subsection (2) amends section 236 in order that the court may exercise its powers under section 236 for offenders aged 16 years and over, to consider whether the offender is likely to pay within 28 days and if so impose a fine with an alternative of a SAO or if the offender is unlikely to pay within 28 days, impose a SAO. That is, it extends section 236 to offenders aged 16 and over.
259. Paragraphs 4 and 5 of Schedule 7 to the 1995 Act provide that the court may impose a sentence of three months in the sheriff court and 60 days in the district court in respect of a revocation or failure to comply with a SAO. Subsection (4) amends the maximum periods of imprisonment for revocation of or failure to comply with a SAO to 30 days in the sheriff court and 20 days in the district court.
260. Restriction of liberty orders (RLOs) were introduced in Scotland by section 5 of the Crime and Punishment (Scotland) Act 1997, which resulted in the insertion of sections 245A to 245I in the 1995 Act. RLOs require an offender to be restricted to a specified place for up to 12 hours per day or from a specified place for up to 24 hours per day, or both, for a maximum period of 12 months. Compliance with an RLO is monitored by remote monitoring equipment.
261. The amendments to section 245A of the Criminal Procedure (Scotland) Act 1995 (the 1995 Act) allow a court to impose a RLO made under that section as an alternative to imprisonment or any other form of detention.
262. Subsection (3) amends section 245A of the 1995 Act to make a RLO available to courts for offences (other than an offence for which the sentence is fixed by law) instead of imposing a sentence which includes a custodial element.