

# **ABUSIVE BEHAVIOUR AND SEXUAL HARM (SCOTLAND) ACT 2016**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON PARTS**

#### **Part 2 – Sexual Harm**

##### ***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.