

ABUSIVE BEHAVIOUR AND SEXUAL HARM (SCOTLAND) ACT 2016

EXPLANATORY NOTES

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 complainant 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 SHO 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.

These notes relate to the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 (asp 22) which received Royal Assent on 28 April 2016

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.