
EXPLANATORY NOTE

(This note is not part of the Order)

This Order revokes and re-enacts the Sexual Offences Act 2003 (Remedial) (Scotland) Order 2010 (“the original Order”) with modifications.

This Order makes amendments to the Sexual Offences Act 2003 (“the 2003 Act”) to remove the incompatibility of the indefinite notification period in section 82(1) of that Act with a Convention right. This Order extends to Scotland only.

In the case of *R (on the application of F (by his litigation friend F)) and Thompson (FC) v Secretary of State for the Home Department* [2010] UKSC 17 (21st April 2010) the Supreme Court of the United Kingdom made a declaration under section 4 of the Human Rights Act 1998 that—

“the indefinite notification requirements in section 82(1) of the Sexual Offences Act 2003 are incompatible with article 8 of the European Convention on Human Rights because they do not contain any mechanism for the review of the justification for continuing the requirements in individual cases.”

In order to remove the incompatibility, article 3 of this Order inserts sections 88A to 88I into Part 2 of the 2003 Act. Those sections provide a mechanism for the periodic review of the justification for continuing the notification requirements in individual cases.

Section 88A of the 2003 Act makes it clear that provision made for a review of the indefinite notification requirements in sections 88B to 88H will apply to any person who is notifying indefinitely on the date on which this Order comes into force (28th January 2011) or to any person who is made subject to the notification requirements for an indefinite period on or after that date (a “relevant sex offender”).

Section 88B of the 2003 Act sets out what the date of discharge and further date of discharge are for the purpose of sections 88A to 88H. For a relevant sex offender who was aged 18 or over at the time of conviction or other finding, the date of discharge will be 15 years from the date of conviction or other finding, after disregarding any time referred to in subsection (2) or, where applicable, (4). For a relevant sex offender who was aged under 18 on the date of conviction or other finding (“a young sex offender”) the date of discharge will be 8 years from the date of conviction or other finding, after disregarding any time specified in subsection (2) or, where applicable, (4). Subsections (3) and (4) ensure that time spent serving a sentence of imprisonment or term of service detention is disregarded where the relevant sex offender was released pending sentence. This does not apply to those offenders whose date of discharge would otherwise have fallen before the coming into force of this Order. This means that in the majority of cases the 15 or 8 year review period will commence after the relevant sex offender has been released from prison, detention in hospital, etc.

Section 88C of the 2003 Act sets out how the first review carried out by the relevant chief constable will operate. The relevant chief constable will have to decide, before the expiry of the applicable 15 or 8 year review period, whether a relevant sex offender should remain subject to the notification requirements. If the decision is that the relevant sex offender should cease to be subject to the notification requirements, the relevant sex offender will cease to be subject to those requirements on the date of discharge. If the relevant chief constable is satisfied that the relevant sex offender poses a risk of sexual harm, a notification continuation order will be made for a fixed period. Subsection (7) provides a definition of sexual harm. A notification continuation order will

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set out how long a relevant sex offender has to notify for before getting a further right of review. This can be imposed for a fixed period of up to 15 years.

Section 88D of the 2003 Act applies to young sex offenders who have already been subject to the notification requirements for a total period of at least 8 years at the date on which the original Order came into force. The notification requirements were originally contained in Part 1 of the Sex Offenders Act 1997 (“the 1997 Act”) before being repealed and re-enacted with amendments in Part 2 of the 2003 Act. Part 1 of the 1997 Act was commenced on 1st September 1997. Therefore, it is possible that a young sex offender may have been notifying for a total of 8 years just before or on the date on which the original Order came into force. As with section 88C, the relevant chief constable was required to make a decision as to whether a young sex offender should cease to be subject to the notification requirements and intimate that decision to the relevant sex offender within 3 months after the date the original Order came into force (25th January 2011).

Section 88E of the 2003 Act applies in circumstances in which a notification continuation order has been made in relation to a relevant sex offender. In such circumstances, the relevant chief constable will be required to carry out a further review as to whether the relevant sex offender should remain subject to the notification requirements, and notify that offender of the decision before the end of the fixed period specified in the notification continuation order.

Section 88F of the 2003 Act provides that if the relevant chief constable has not completed a review under section 88C or 88E by the required date or had not done so by 25th January 2011 under section 88D, the relevant sex offender can make an application to a sheriff to no longer be subject to the notification requirements. A sheriff will consider the application and decide whether the relevant sex offender should cease to be subject to the notification requirements. The test for reaching a decision will be exactly the same as the test which a chief constable has to apply, which is whether the relevant sex offender poses a risk of sexual harm. A sheriff can impose a notification continuation order for a fixed period of not more than 15 years.

Section 88G of the 2003 Act provides that the decision of the relevant chief constable to make a notification continuation order, and the duration of that order, can be appealed to a sheriff. It sets out how the review mechanism will operate. The decision of a sheriff to grant or refuse an appeal can be appealed to the sheriff principal whose decision is final.

An appeal of any decision must be brought within 21 days of the date of decision. The exception to this rule is where the chief constable’s decision was taken before this Order came into force. In that situation the date set out in subsection (3) of the original Order applies. An appeal can be brought against the decision to make a notification continuation order, as well as or separately, against the fixed period which that order imposes. Parties may appear or be represented at any appeal hearing. Subsections (10) and (11) make it clear that a relevant sex offender will remain subject to the existing notification requirements of this Part until the decision as to whether he or she should cease to be subject to this regime is finally determined. This includes the determination of any appeals against the decision of the relevant chief constable or, as the case may be, the sheriff.

Section 88H provides that the Scottish Ministers (by operation of section 142(6) of the 2003 Act and section 53 of the Scotland Act 1998 (c.46)) may by order, subject to affirmative procedure, amend the 15 or 8 year periods in section 88B(1) or the maximum period which a notification continuation order can be made specified in section 88C(2).

Article 4 of this Order makes consequential amendments to sections 107, 133 and 138 of the 2003 Act. The amendment to section 107 provides that where a review is successful and final and the relevant sex offender was subject to a Sexual Offences Prevention Order (or its predecessor, a Sex Offender Order) then that order also ceases to have effect. Article 5 revokes the original Order.

As compared with the original Order, this Order makes the following modifications: time spent serving a sentence of imprisonment or service detention in relation to the offence is disregarded where the relevant sex offender first notified before being sentenced (section 88B(3) and (4)); the sheriff clerk is only required to send a copy of the interlocutor and, where made, the notification

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continuation order to the relevant sex offender and may give it to him or her (section 88F(6) and (7) and 88G(8) and (9)); parties may appear or be heard in any appeal (section 88G(7)); and Sexual Offences Prevention Orders and Sex Offender Orders cease on successful review (article 4(1)).

This Order will come into force on 28th January 2011 pursuant to the procedure prescribed in section 14 of the Convention Rights (Compliance) (Scotland) Act 2001. This Order will cease to have effect if, at the end of the period of 120 days beginning with the day on which the original Order was made (25th October 2010), a resolution has not been passed by the Scottish Parliament approving this Order. In reckoning the period of 120 days no account is to be taken of any time during which the Scottish Parliament is dissolved or is in recess for more than four days.

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Changes and effects yet to be applied to :

- art. 4(1) repealed by [2016 asp 22 Sch. 2 para. 9](#)