

PROTECTION OF CHILDREN AND PREVENTION OF SEXUAL OFFENCES (SCOTLAND) ACT 2005

EXPLANATORY NOTES

THE ACT – COMMENTARY ON SECTIONS

Section 1 – Meeting a child following certain preliminary contact

4. Subsection (1) makes it an offence for a person (A) intentionally to meet, travel with the intention of meeting, or make arrangements with the intention of meeting another person (B) in any part of the world, if A has met or communicated with B on at least one earlier occasion, and intends to engage in unlawful sexual activity involving B or in the presence of B either at the time of the meeting or after the meeting. B must be aged under 16 or a police constable. An offence is not committed if A reasonably believes B to be 16 or over.
5. The offence is intended to cover situations where A establishes contact with B through, for example, meetings, telephone conversations or communications on the internet, and gains B's trust and confidence so that A can arrange to meet B for the purpose of engaging in unlawful sexual activity involving, or in the presence of, him or her. The course of conduct prior to the meeting that triggers the offence may, but need not, have an explicitly sexual content.
6. The offence would be complete when, following the earlier contact, A meets or travels to meet B, or makes arrangements for B to travel to meet A with the intent to engage in unlawful sexual activity involving or in the presence of B. The intended unlawful sexual activity does not have to take place. One or more of the necessary elements of the offence, namely the preliminary meeting or communication(s), the subsequent intentional meeting, any part of the travelling to meet with B, or the making of arrangements for B to meet with A must have a "relevant Scottish connection" (defined in subsection (2)(b)), unless the accused is a British citizen or UK resident, in which case all of these elements may take place entirely outwith Scotland.
7. The evidence of A's intention to engage in unlawful sexual activity may be drawn from the communications between A and B prior to the meeting, or may be drawn from other circumstances, for example if A travels to the meeting with condoms and lubricants.
8. The offence may be complete if A is communicating with and making arrangements with a police constable rather than with a child, as long as A believes that s/he is communicating with a child. This provides for circumstances where suspicious online communication between a potential offender and a child is identified and police officers assume the role of the child in order to continue the communication with the potential offender.

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9. Subsection (2)(a) provides that references in subsection (1) to meetings or communications with B include meetings or communications that take place in or across any part of the world.
10. Subsection (3) provides that it will not be necessary for the Crown to allege or prove that A intended to engage in specific sexual activity. The term “sexual activity” is defined in section 19.
11. Subsection (4) provides that the offence can be prosecuted summarily or on indictment. Anyone found guilty of the offence is liable to punishment of six months imprisonment and/or a fine not exceeding the statutory maximum (currently £5,000) under summary procedure or to an unlimited fine and/or 10 years imprisonment on indictment.
12. Subsection (5) applies subsections (6A) and (6B) of section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 to proceedings for an offence under section 1 of the Act. The effect of this is that where acts leading to the apprehension of an accused person have taken place outside the UK, the person may be proceeded against in the sheriff court district in which the person was apprehended or is in custody or in such other sheriff court district as the Lord Advocate may determine.

Sections 2 and 3 – Risk of sexual harm orders: applications, grounds and effects and Interpretation of section 2

13. **Section 2** introduces a new civil preventative order, the risk of sexual harm order (RSHO), for which the police can apply to a sheriff court in respect of a person who has, on at least two occasions, engaged in sexually explicit conduct or communication with a child or children, and as a result there is reasonable cause to believe that the order is necessary to protect a child or children from harm arising out of future acts by that person. The RSHO is not a substitute for a criminal offence, but applies in circumstances where the behaviour of the person gives reason to believe that a child or children are at risk from an individual’s conduct or communication and intervention at this earlier stage is necessary to protect the child or children.
14. The application may be made by a chief constable to the sheriff in whose sheriffdom the person resides, is believed to be in or is intending to come to, or where the alleged acts are said to have taken place. In normal circumstances, the application must be made within three months of the second of the two incidents of sexually explicit behaviour coming to the attention of the chief constable. However, it is open to the sheriff to consider applications made outwith this timescale, if the sheriff considers this appropriate in all the circumstances. Subsection (3) provides that the application will be made by summary application.
15. The person against whom an order is sought may or may not have a conviction for a sexual (or other) offence. The child or children to be protected must be under 16.
16. Subsection (1) explains the circumstances in which an RSHO may be sought. The acts in subsection (5) which constitute the trigger behaviour for an order all involve explicitly sexual communication or conduct with or towards a child. The types of behaviour at subsections (5)(a), (b) and (d) may already amount to a criminal offence. However the trigger behaviour need not amount to criminal conduct. Subsection (5)(c) would, for example, cover a person giving condoms or a sex toy to a child. Subsection (5)(d) would cover a person sending pornographic images to a child over the internet or describing the sexual acts they would like to carry out on the child. An order would not be made unless the court is satisfied (under subsection (6)(b)) that further such acts would cause a child or children physical or psychological harm (see definition of protecting children from harm in section 3(a)).
17. The term “image” is defined in section 3(c). For the purpose of the Act, “image” includes photographs, cartoon strips, email attachments and drawings. “Sexual activity” is defined at section 19.

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18. Under section 2(8), an order entitles the court to prohibit the person concerned from doing anything described in it. It cannot require the person concerned to comply with conditions requiring positive action.
19. The minimum duration of an order is 2 years.

Section 4 – RSHOs: variations, renewals and discharges

20. **Section 4** provides for variations, renewals and discharges of RSHOs. Variations, renewals and discharges can be made on application to the sheriff court by the person to whom the order applies, the chief constable who applied for the original order or a chief constable of the area in which the person resides, is in or intends to move to. It would be open to a person to apply for a RSHO to be varied or discharged if the child concerned reached the age of 16.

Section 5 – Interim RSHOs

21. This section allows the police to apply for an interim RSHO where an application has been made for a full order in respect of an individual, and intimated to that individual, but has not yet been determined. The sheriff may grant an interim RSHO if satisfied *prima facie* that, firstly, the person carried out sexually explicit communication or conduct referred to in section 2(5) with or toward a child on at least two occasions and, secondly, that it is just to make the order. The interim order would be for a fixed period and would cease to have effect at the end of that period or, if earlier, when a decision is made on the full order.

Section 6 – Appeals

22. This section provides that a sheriff's decision in relation to an RSHO can be appealed. The appeal will be dealt with in the first instance by the sheriff principal. An existing RSHO would continue to have effect until any appeal had been decided by a court unless it is suspended by the court.

Section 7 – Offence: breach of RSHO or interim RSHO

23. Breach of an RSHO or interim RSHO without reasonable excuse is a criminal offence that is triable either summarily (with a maximum penalty of 6 months imprisonment or a fine not exceeding £5,000 or both) or on indictment, with a maximum penalty on indictment of five years imprisonment or a fine or both.
24. **Section 7** also makes it an offence under Scots law for a person to breach an RSHO or interim RSHO that was imposed in England, Wales or Northern Ireland under sections 123 or 126 of the Sexual Offences Act 2003 (e.g. if that person was in Scotland and breaches the terms of the order that was made in England and Wales). Section 7 makes clear that it is only possible to breach in Scotland an RSHO made in England, Wales or Northern Ireland if the order prohibits its subject from doing something throughout the jurisdiction in which it was made, rather than only in a specified place.

Section 8 – Effect of conviction etc. under section 7 above or section 128 of Sexual Offences Act 2003

25. **Section 8** makes provision for different types of offender to ensure that a breach of an RSHO entails compliance with the notification requirements in the 2003 Act, which require persons convicted of specified offences to notify their details to the police on a regular basis. It applies to persons who are convicted of an offence under section 7 of the Act (breach of an RSHO or interim RSHO made in Scotland, England and Wales or Northern Ireland). It also applies to persons who have been convicted in England and Wales or Northern Ireland of a breach of an RSHO or interim RSHO that was made in England and Wales or Northern Ireland. This is to ensure that such persons are subject

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to the notification requirements of Part 2 of the 2003 Act as a matter of Scots law, which is necessary to deal with the possibility that such persons might move to Scotland.

26. Subsection (2) provides that where the offender was already subject to the notification requirements but would cease to be subject to those requirements at a time when the RSHO still has effect then that person should remain subject to the notification requirements until the expiry of the RSHO, including any renewals.
27. Given that a person subject to an RSHO need not have been convicted of any sexual offence before the order was made, the person would not necessarily be subject to the notification requirements in Part 2 of the 2003 Act. Subsection (3) therefore provides that if the person was not already subject to these notification requirements then that person becomes subject to those notification requirements from the time of the conviction until the RSHO ceases to have effect.

Section 9 – Paying for sexual services of a child

28. **Section 9** of the Act makes it an offence for a person (A) to purchase sexual services from another person (B) where B is under 18. The offence can be committed whether A makes the payment direct to B or to someone else, or knows that someone else has made such a payment.
29. Subsection (2) defines payment as any financial advantage, including the discharge of an obligation to pay or the provision of goods or services gratuitously or at a discount. The payment does not need to involve money actually changing hands, but could instead involve the discharge of an obligation to pay – such as the waiving of a debt – or provision of goods or services free of charge or at a reduced cost – for example providing food or accommodation, or supplying illegal drugs free or for less than street value.
30. Subsection (3) defines “sexual services” as the performance of sexual activity or the performance of any other activity that a reasonable person would, in all the circumstances, consider to be for the purpose of providing sexual gratification. Subsection (3) also sets out that a person’s sexual services are obtained where what is obtained is the performance of such an activity by the person. It is intended that “sexual services” should cover activities such as prostitution, lap dancing, stripping and telephone sex chat lines.
31. In cases where B is 13 or over, the Crown must prove that A did not reasonably believe that B was 18 or over. Where B is under 13, the offence is committed regardless of A’s belief as to B’s age.
32. Subsections (4) and (5) set out the penalties in relation to the offence. On summary conviction, the maximum penalty available is 6 months imprisonment or a fine not exceeding the statutory maximum or both. The penalties available for conviction on indictment are determined by the age of B. Where B was aged 16 or over, the maximum penalty on indictment is 7 years imprisonment. Where B was aged under 16, the maximum penalty on indictment is 14 years imprisonment.

Section 10 – Causing or inciting provision by child of sexual services or child pornography

33. **Section 10** makes it an offence for a person (A) intentionally to cause or incite a person under 18 (B) to become a provider of sexual services or to be involved in pornography in any part of the world. This offence is intended to cover situations where someone is, for example, recruiting children into the provision of sexual services or pornography. The expressions “pornography” and “provider of sexual services” are defined in section 13.
34. In cases where B is 13 or over, the Crown must prove that A did not reasonably believe that B was 18 or over. Where B is under 13, the offence is committed regardless of

A's belief as to B's age. Subsection (2) provides maximum penalties of 6 months imprisonment on summary conviction and 14 years imprisonment on indictment.

Section 11 – Controlling a child providing sexual services or involved in pornography

35. **Section 11** makes it an offence for a person (A) intentionally to control any of the activities of a person under 18 (B) relating to B's provision of sexual services or involvement in pornography in any part of the world. The expressions "pornography" and "provider of sexual services" are defined in section 13. This offence is intended to cover situations where someone is, for example, acting as a pimp for children involved in the provision of sexual services or controlling the movements of a child involved in pornography. That person might not recruit the children, nor actually take the photographs or obtain sexual services from the children, but he or she might control what the children do and the payments given.
36. In cases where B is 13 or over, the Crown must prove that A did not reasonably believe that B was 18 or over. Where B is under 13, the offence is committed regardless of A's belief as to B's age. Subsection (2) provides maximum penalties of 6 months imprisonment on summary conviction and 14 years imprisonment on indictment.

Section 12 – Arranging or facilitating provision by child of sexual services or child pornography

37. **Section 12** makes it an offence for a person (A) intentionally to arrange or facilitate the provision of sexual services or involvement in pornography, of a person under 18 (B), in any part of the world. This offence is intended to cover situations where A is, for example, arranging clients for B or providing premises for the provision of sexual services or pornography to take place. The expressions "pornography" and "provider of sexual services" are defined in section 13.
38. In cases where B is 13 or over, the Crown must prove that A did not reasonably believe that B was 18 or over. Where B is under 13, the offence is committed regardless of A's belief as to B's age. Subsection (2) provides maximum penalties of 6 months imprisonment on summary conviction and 14 years imprisonment on indictment.

Section 13 – Sections 10 to 12: supplementary

39. Subsection (1) provides a definition of being involved in pornography, as used in sections 10 to 12.
40. Subsection (2) provides a definition of "provider of sexual services" and "provision of sexual services", as used in sections 10 to 12. Subsection (3) provides a definition of "payment" for the purposes of the definition of "provider of sexual services" given by subsection (1). Subsection (4) provides a definition of "sexual services" for the purposes of subsections (2) and (3).
41. Subsection (5) provides that a person does not commit one of the offences in sections 10 to 12 solely by doing something within section 52(1) or 52A(1) of the Civic Government (Scotland) Act 1982. These offences relate to the taking, possession and distribution of indecent images of a child, and are amended by section 16 of this Act to cover images of children under 18. As a result, while taking an indecent photograph of a person under 18 would be an offence under section 52(1) of the 1982 Act this would not in itself constitute the offence of causing a child to be involved in pornography. Further behaviour – such as reaching an agreement that the child will receive payment in exchange for posing for the photographs - would have to occur before proceedings could be taken under sections 10, 11 or 12.

Section 14 – Liability to other criminal proceedings

42. Subsection (1) sets out that sections 9 to 12 do not exempt any person from any proceedings for any other offence which is punishable at common law or under any other enactment. This means, for example, that someone could be prosecuted for causing a child to be involved in pornography and for taking indecent photographs of that child, depending on the circumstances. Similarly, someone could be prosecuted for causing a child to provide sexual services and for unlawful intercourse with a girl under 16 (an offence under section 5 of the Criminal Law (Consolidation) (Scotland) Act 1995), depending on the circumstances. However, subsection (2) provides that this does not mean that a person can be punished twice for the same offence. While it is already the case that in Scots law a person cannot be punished twice for the same offence, this subsection is included for clarity in view of the terms of subsection (1).

Section 15 – Removal of time limit for prosecution of offence

43. Section 15 removes the time limit that currently applies to proceedings for the offence under section 5(3) of the Criminal Law (Consolidation) (Scotland) Act 1995 which relates to unlawful sexual intercourse with a girl of or over the age of 13 and under the age of 16. Section 5(4) of the 1995 Act directs that no prosecution shall commence for an offence under section 5(3) more than 1 year after the commission of the offence. The apparent purpose of this subsection was to act as a safeguard preventing prosecution for offences long after they had occurred. However, the time bar did not take into account the reality of how long it often takes victims in such cases to disclose fully the circumstances of what has happened to them. The effect of the time bar has therefore been that the Crown has often been unable to prosecute such cases. Section 15 therefore removes this time bar.

Section 16 – Indecent photographs of 16 and 17 year olds

44. Section 16 amends sections 52 and 52A of the Civic Government (Scotland) Act 1982. Sections 52 and 52A of the 1982 Act provide a series of offences in relation to the taking, possession and distribution of indecent photographs of children under 16. Section 16 amends these provisions so that they cover indecent photographs of children under 18.
45. Subsection (3) adds to the 1982 Act a series of exceptions to the indecent photographs offences insofar as they relate to photographs of 16 and 17 year olds. The exceptions relate to the offences at sections 52(1)(a) to (c) and 52A - but not to 52(1)(d) – and work as follows. If the accused raises the issues set out below, the Crown would require to disprove at least one element in order for the offences to be proved. The issues that the accused would require to raise are:
- either the photograph was of a person aged 16 or over or the accused reasonably believed that to be so;
 - at the time of the offence charged, or at the time when the accused obtained the photograph, the accused and the person aged 16 or 17 who is the subject of the photograph were either married to or civil partners of each other or were partners in an established relationship;
 - the person aged 16 or 17 who is the subject of the photograph consented to the photograph being made, taken or in the accused's possession (depending on which offence has been charged) or the accused reasonably believed that to be so; and
 - in relation to the offence at section 52(1)(b) of the 1982 Act (distributing or showing an indecent photograph), that distribution was only to the person aged 16 or 17 who is the subject of the photograph; and in relation to the offence at section 52(1)(c) of the 1982 Act (possessing an indecent photograph with a view to its being distributed or shown), the accused intended to distribute the photograph only to the person aged 16 or 17.

46. Furthermore, in each case, the exception only applies where the photograph shows the person aged 16 or 17 alone or with the accused, but not if it shows any other person.

Section 17 – Prevention of sexual offences: further provision

47. **Section 17** of the Act amends the 2003 Act in relation to sexual offences prevention orders (SOPOs). A SOPO is intended to protect the public from the risks posed by sex offenders by placing restrictions on their behaviour.
48. At present, the 2003 Act provides that in Scotland a SOPO can be made only on application to a sheriff court by a chief constable in respect of an offender who has previously been dealt with in connection with an offence listed in Schedules 3 or 5 to the 2003 Act (except paragraphs 64 to 111 of Schedule 5). The list of trigger offences covers persons with convictions under both Scots law and the law of England and Wales and Northern Ireland to cover the situation in which a person with an English conviction lives in Scotland and is exhibiting sexually risky behaviour that causes concern. The list of offences also includes any offence committed in Scotland where the court determines that there is a significant sexual element in the offender’s behaviour in committing the offence. The court must be satisfied that an order is necessary to protect the public or an individual from serious sexual harm from the defender.
49. This kind of SOPO, granted on the application of the police (a “police SOPO”) under the 2003 Act replaced the power conferred on the police to apply for sex offender orders that were introduced in the Crime and Disorder Act 1998 for Scotland, England and Wales and Northern Ireland.
50. **Section 17** of the Act amends the 2003 Act so as to bring the procedure for applying for SOPOs in Scotland more closely into line with the normal jurisdictional arrangements applicable to orders made under civil law. The effect of this change is that an order can only be applied for in a sheriffdom where the person who would be subject to the order resides, is believed to be or is intending to come to, or where the alleged acts are said to have taken place. Section 17 also amends the 2003 Act so that an application for an interim SOPO must be made in the same sheriffdom as the main application.
51. The 2003 Act also enabled the courts in England and Wales to impose a SOPO on conviction – a “court SOPO”. This court SOPO replaced the sex offender restraining order for England and Wales that had been introduced in 2000. The court there may impose a SOPO when it deals with an accused following a conviction for an offence listed in Schedule 3 or 5 or a finding that he or she is not guilty of such an offence by reason of insanity or that he or she is under a disability but has done the act charged. Under the 2003 Act, court SOPOs were not available in Scotland.
52. **Section 17** of the Act therefore amends the 2003 Act so as to enable the Scottish courts to impose a SOPO on conviction for a sexual offence or an offence with a significant sexual element, or on finding that a person is not guilty of an offence by reason of insanity or that he or she is under a disability but has done the act charged. It does this by amending section 112 of the 2003 Act which sets out the way in which the existing SOPO provisions apply to Scotland. Section 112 is amended so as to remove the current disapplication to Scotland of the sentencing court’s power to impose a SOPO on conviction (section 17(3)). The new court SOPO can be imposed by the sheriff court when exercising criminal jurisdiction or by the High Court. Section 17(2) amends section 111 of the 2003 Act to make provision for appeals against the new Scottish court SOPOs. The amendment to section 111 provides that the appeal process for the court SOPO is to be equivalent to the appeal process for other community justice disposals, such as probation and community service orders.
53. A Scottish Court SOPO can be imposed on conviction for one of the offences listed in paragraphs 30 to 60 of Schedule 3 to the 2003 Act. The offences listed in paragraphs 36 to 59C are all sexual offences or offences which are likely to have a significant sexual element. Paragraph 60 covers any others offences committed in Scotland where the

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court determines that there is a significant sexual element in the offender's behaviour in committing the offence, as recommended in the report of the Expert Panel on Sex Offending "Reducing the Risk – Improving the Response to Sex Offending". There is a power for Scottish Ministers to amend the list of relevant offences by a statutory instrument under section 130 of the 2003 Act.

54. It is not necessary to apply to the court to make a SOPO at the point of sentence although the prosecutor may ask the court to consider making an order in appropriate cases.
55. As with the existing police SOPOs and court SOPOs for England and Wales, in order to make a Scottish court SOPO, the court must form a view that the offender presents a risk of serious sexual harm to the public and that an order is necessary to provide protection from this. The evidence presented in the trial is likely to be a key factor in the formation of this judgement, together with the offender's previous convictions, of which the sheriff would have a copy. Courts may also ask social enquiry report writers to consider the suitability of a SOPO on a non-prejudicial basis.
56. In line with the provisions for existing SOPOs, a Scottish court SOPO can contain only those prohibitions on the behaviour of the offender that are necessary for the purpose of protecting the public or any particular members of the public from serious sexual harm from the offender (section 107(2) of the 2003 Act). It cannot require the offender to comply with conditions requiring positive action. Prohibitions could include, for example, preventing an offender from contacting victims, or from taking part in sporting activities that involve close contact with children, or from living in a household with girls under 16. Also, in line with the existing provisions for SOPOs in the 2003 Act, the Scottish court SOPO will also have the effect of making the offender subject to the notification requirements of Part 2 of the 2003 Act for the duration of the order. This will apply even if the offender is already subject to notification, if notification would end during the currency of the order (section 107 of the 2003 Act). The notification period runs from the date that the order is served on the offender (not from the date of conviction) – see section 107(5) of the 2003 Act. The minimum duration for an order is five years (section 107(1)(b) of the 2003 Act). There is no upper limit.
57. Breach of a court SOPO, without reasonable excuse, would be a criminal offence. An accused convicted of such an offence on summary conviction would be liable to a term of imprisonment of up to six months or to a fine or both; an offender convicted on indictment would be liable to a term of imprisonment of up to five years (section 113 of the 2003 Act).

Section 18 and the schedule – Minor and consequential amendments

58. **Section 18** introduces the schedule to the Act, which contains a number of minor and consequential amendments.
59. The offences at section 52A of the 1982 Act and sections 9 to 12 of the Act are added to section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 (commission of certain sexual acts outside the United Kingdom). The effect of this is that any act done by a British citizen or UK resident in a country or territory outside the UK which constituted an offence in that country and would also have been one of these offences if it had been done in Scotland shall constitute that offence, and proceedings can be taken in Scotland.
60. The offences at sections 52 and 52A of the 1982 Act and sections 1 and 9 to 12 of the Act are added to Schedule 1 to the Criminal Procedure (Scotland) Act 1995, in cases where the offences relate to children under 17 years of age. This provides the additional powers of arrest without warrant specified in section 21 of the 1995 Act and also allows child protection procedures to be undertaken.
61. Under section 48 of the Criminal Procedure (Scotland) Act 1995 a convicting court has the power to refer a child who was the victim of a Schedule 1 offence to the reporter to

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the children's panel. This additional protection would extend to any child living in the same household as the victim of one of these offences and any child living in the same household as a person convicted of one of the offences. The reporter could then refer to a children's hearing without the need to establish grounds of referral. Any specific measures needed to protect the child could be arranged by the children's hearing.

62. In addition to a referral by a convicting court at the time of the crime, inclusion of these offences in Schedule 1 would mean that children who are or become or are likely to become members of the same household as either the victim or the perpetrator, later on after the conviction, can be referred by a reporter to a hearing under section 52(2) (d), (e) or (f) of the Children (Scotland) Act 1995, even where there was no subsequent conviction with regard to those children.
63. It is important to note, however, that it is for the court to decide whether referral to the children's panel is appropriate in any particular case.
64. The schedule also makes a number of amendments to Schedule 3 to the Sexual Offences Act 2003 (offences which trigger certain provisions in Part 2 of that Act, notably the sex offender notification requirements). Paragraphs 45 and 46 of Schedule 3, which refer to offences under sections 52 and 52A of the 1982 Act, are amended by sub-paragraphs 3(a) and (b) of the schedule to the Act so that the offences will apply for the purposes of Schedule 3 only if the child was under 16 and the offender was either 18 or over or was sentenced in respect of the offence to at least 12 months imprisonment.
65. The offence at section 1 of the Act is included at paragraph 59A of Schedule 3 to the 2003 Act in cases where the offender was 18 or over or has been sentenced in respect of the offence to at least 12 months imprisonment.
66. The offences at sections 9 to 12 of the Act are added at paragraphs 59B and 59C of Schedule 3 to the 2003 Act in cases where the victim was under 16 and the offender was 18 or over or has been sentenced in respect of the offence to at least 12 months imprisonment.
67. In respect of each of these offences, however, the schedule gives a discretion to the court so that it may determine that Part 2 of the 2003 Act should apply in cases where the specified conditions do not apply.