

ABUSIVE BEHAVIOUR AND SEXUAL HARM (SCOTLAND) ACT 2016

EXPLANATORY NOTES

COMMENTARY ON PARTS

Part 2 – Sexual Harm

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 shrievalty 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.