

Abusive Behaviour and Sexual Harm (Scotland) Act 2016

2016 asp 22

PART 2

SEXUAL HARM

PROSPECTIVE

CHAPTER 3

SEXUAL HARM PREVENTION ORDERS

Meaning of sexual harm

10 Meaning of sexual harm

In this Chapter, “sexual harm”, from a person, means physical or psychological harm caused—

- (a) by the person committing one or more of the offences listed in schedule 3 of the 2003 Act, or
- (b) (in the context of harm outside the United Kingdom) by the person doing, outside the United Kingdom, anything which would constitute an offence listed in schedule 3 of the 2003 Act if done in the United Kingdom.

Circumstances where sexual harm prevention order may be made

11 Making of order on dealing with person for offence

(1) This section applies where a person is—

- (a) convicted of an offence listed in schedule 3 of the 2003 Act,

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- (b) acquitted of an offence listed in schedule 3 of the 2003 Act by reason of the special defence set out in section 51A of the 1995 Act, or
 - (c) found by a court, in respect of an offence listed in schedule 3 of the 2003 Act, to be unfit for trial under section 53F of the 1995 Act and the court determines that the person has done the act or made the omission constituting the offence.
- (2) The court dealing with the person may (in addition to dealing with the person in any other way) make a sexual harm prevention order (see section 16(1)) against the person.
- (3) A court may make a sexual harm prevention order under this section—
- (a) at its own instance, or
 - (b) on the motion of the prosecutor.
- (4) A court may make a sexual harm prevention order only if it is satisfied that it is necessary to do so, for the purpose of—
- (a) protecting the public, or any particular members of the public, from sexual harm from the person, or
 - (b) protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the person outside the United Kingdom.
- (5) Before deciding whether to make a sexual harm prevention order under this section, a court must—
- (a) if subsection (6) applies, hold a hearing at which the person against whom the order would be made and the prosecutor may appear or be represented,
 - (b) if subsection (6) does not apply, either—
 - (i) hold a hearing at which the person against whom the order would be made and the prosecutor may appear or be represented, or
 - (ii) give an opportunity to make written representations to the person against whom the order would be made and the prosecutor.
- (6) This subsection applies if, not later than rules of court may provide, the person against whom the order would be made gives notice to the court of a wish for a hearing to be held.

12 Making of order against qualifying offender on application to sheriff

- (1) On the application of the chief constable, an appropriate sheriff may make a sexual harm prevention order (see section 16(1)) against a person.
- (2) An appropriate sheriff may make a sexual harm prevention order against a person only if satisfied that—
- (a) the person is a qualifying offender, and
 - (b) the person's behaviour since the appropriate date makes it necessary to make such an order, for the purpose of—
 - (i) protecting the public, or any particular members of the public, from sexual harm from the person, or
 - (ii) protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the person outside the United Kingdom.
- (3) Before determining an application under this section, a sheriff must—

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- (a) if subsection (4) applies, hold a hearing at which the person against whom the order is sought and the chief constable may appear or be represented,
 - (b) if subsection (4) does not apply, either—
 - (i) hold a hearing at which the person against whom the order is sought and the chief constable may appear or be represented, or
 - (ii) give an opportunity to make written representations to the person against whom the order is sought and the chief constable.
- (4) This subsection applies if, not later than rules of court may provide, the person against whom the order is sought gives notice to the sheriff of a wish for a hearing to be held.
- (5) In this section—
- “appropriate date”, in relation to a qualifying offender, means the date or, as the case may be, the first date on which the person was convicted, cautioned or the subject of a finding as mentioned in sections 13, 14 and 15,
- “appropriate sheriff” means—
- (a) a sheriff in whose sheriffdom the person resides,
 - (b) a sheriff in whose sheriffdom the person is believed by the chief constable to be,
 - (c) a sheriff to whose sheriffdom the person is believed by the chief constable to be intending to come, or
 - (d) a sheriff whose sheriffdom includes any place where it is alleged that the person acted in a way giving reasonable cause to believe that it is necessary for a sexual harm prevention order to be made,
- “qualifying offender” means a person to whom section 13, 14 or 15 applies.

13 Qualifying offender: conviction etc. in Scotland

- (1) This section applies to a person if the person has, whether before or after this Chapter comes into force—
- (a) been convicted of an offence listed in paragraphs 36 to 60 of schedule 3 of the 2003 Act, or
 - (b) been the subject, in respect of such an offence, of any of the following—
 - (i) acquittal by reason of the special defence set out in section 51A of the 1995 Act,
 - (ii) acquittal by reason of insanity,
 - (iii) a finding by a court of being unfit for trial under section 53F of the 1995 Act and the court determining that the person has done the act or made the omission constituting the offence,
 - (iv) a finding by a court that the person is under a disability and did the act or made the omission charged.
- (2) This section also applies to a person if—
- (a) before 1 May 2004, the person was in Scotland—
 - (i) convicted of an offence other than an offence listed in paragraphs 36 to 59 of schedule 3 of the 2003 Act,
 - (ii) found not guilty of such an offence by reason of insanity, or
 - (iii) found by a court, in respect of such an offence, to be under a disability and to have done the act or made the omission charged, and

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- (b) the sheriff who is considering the application for the sexual harm prevention order is satisfied that there was a significant sexual aspect to the person's behaviour in committing the offence.

14 Qualifying offender: conviction etc. elsewhere in United Kingdom

This section applies to a person if the person has, whether before or after this Chapter comes into force, in England and Wales or Northern Ireland—

- (a) been convicted of an offence listed in schedule 3 or schedule 5 of the 2003 Act,
- (b) been found not guilty of such an offence by reason of insanity,
- (c) been found by a court, in respect of such an offence, to be under a disability and to have done the act or made the omission charged, or
- (d) been cautioned in respect of such an offence following an admission of it.

15 Qualifying offender: conviction etc. outside United Kingdom

- (1) This section applies to a person if, whether before or after this Chapter comes into force, under the law in force in a country outside the United Kingdom—

- (a) the person has been convicted of an equivalent offence (whether or not the person has been punished for it),
- (b) a court exercising jurisdiction under that law has made in respect of an equivalent offence a finding equivalent to a finding that the person is not guilty by reason of insanity,
- (c) such a court has made in respect of an equivalent offence a finding equivalent to a finding that, in respect of the offence, the person is under a disability and has done the act or made the omission charged, or
- (d) the person has been cautioned, or received another type of warning equivalent to a caution in England and Wales or Northern Ireland, in respect of an equivalent offence following an admission of it.

- (2) In subsection (1), “equivalent offence” means an act or omission which, at the time it was done or made—

- (a) constituted an offence under the law in force in the country concerned, and
- (b) would have constituted an offence listed in schedule 3 (other than at paragraph 60) or schedule 5 of the 2003 Act if it had been done or made in any part of the United Kingdom.

- (3) For the purposes of subsection (2), an act or omission punishable under the law in force in a country outside the United Kingdom constitutes an offence under that law however it is described in that law.

- (4) In relation to an application under section 12 where subsection (1) is alleged to apply, subsection (2)(b) is to be taken to be satisfied unless—

- (a) not later than rules of court may provide, the person against whom the order is sought (“the respondent”) serves on the chief constable a notice—
 - (i) stating that, on the facts as alleged with respect to the act or omission concerned, it is not in the respondent's opinion satisfied,
 - (ii) setting out the respondent's grounds for that opinion, and
 - (iii) requiring the chief constable to prove that it is satisfied, or
- (b) the court permits the respondent to require the chief constable to prove that subsection (2)(b) is satisfied without service of such a notice.

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What order does

16 Content and duration of order

- (1) A sexual harm prevention order is an order prohibiting the person against whom it is made from doing, or requiring the person to do, a thing or things described in the order.
- (2) A prohibition or requirement contained in a sexual harm prevention order applies throughout the United Kingdom (unless expressly confined to particular localities).
- (3) A prohibition or requirement contained in a sexual harm prevention order has effect for a fixed period, specified in the order, of not less than 5 years.
- (4) Different periods may be provided for different prohibitions or requirements.
- (5) Subsection (3) is subject, in the case of a prohibition on foreign travel, to subsection (1) of section 17.
- (6) The prohibitions and requirements which may be imposed in a sexual harm prevention order are those necessary for the purpose of—
 - (a) protecting the public, or any particular members of the public, from sexual harm from the person against whom the order is made, or
 - (b) protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the person against whom the order is made outside the United Kingdom.
- (7) Where a court makes a sexual harm prevention order in relation to a person already subject to such an order (whether made by that court or another), the earlier order ceases to have effect.
- (8) A sexual harm prevention order ceases to have effect, if it has not already done so, when all of the prohibitions or requirements contained in it have ceased to have effect.

17 Prohibitions on foreign travel

- (1) A prohibition on foreign travel contained in a sexual harm prevention order must be for a fixed period of not more than 5 years.
- (2) A “prohibition on foreign travel” means—
 - (a) a prohibition on travelling to any country outside the United Kingdom named or described in the order,
 - (b) a prohibition on travelling to any country outside the United Kingdom other than a country named or described in the order, or
 - (c) a prohibition on travelling to any country outside the United Kingdom.
- (3) Subsection (1) does not prevent a prohibition on foreign travel from being extended for a further period (of no more than 5 years each time) under section 20.
- (4) A sexual harm prevention order that contains a prohibition within subsection (2)(c) must require the person who is subject to the order to surrender all of the person's passports at a police station specified in the order—
 - (a) on or before the date when the prohibition takes effect, or
 - (b) within a period specified in the order.
- (5) In this section, “passport” means—

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- (a) a United Kingdom passport within the meaning of the Immigration Act 1971,
 - (b) a passport issued by or on behalf of the authorities of another country,
 - (c) a passport issued by or on behalf of an international organisation,
 - (d) a document that can be used (in some or all circumstances) instead of a passport.
- (6) Any passports surrendered in accordance with the requirement must be returned as soon as reasonably practicable after the person ceases to be subject to a sexual harm prevention order containing such a prohibition (unless the person is subject to an equivalent prohibition under another order).
- (7) Subsection (6) does not apply in relation to—
- (a) a passport issued by or on behalf of the authorities of another country if the passport has been returned to those authorities,
 - (b) a passport issued by or on behalf of an international organisation if the passport has been returned to that organisation.

Interaction with notification requirements

18 Application of notification requirements where order made

- (1) This section applies to a person against whom a sexual harm prevention order is made.
- (2) Where the person—
- (a) was a relevant offender immediately before this section applied to the person, and
 - (b) would (apart from this subsection and sections 88F and 88G of the 2003 Act) cease to be subject to the notification requirements of Part 2 of the 2003 Act while the order has effect,
- the person remains subject to the notification requirements while the order has effect.
- (3) Where the person was not a relevant offender immediately before this section applied to the person—
- (a) the person, by virtue of this section, becomes subject to the notification requirements of Part 2 of the 2003 Act from the time this section first applies to the person and remains so subject until the order ceases to have effect, and
 - (b) that Part of that Act applies to the person subject to the modification set out in subsection (4).
- (4) The “relevant date” is the date of service of the order.
- (5) In this section, “relevant offender” has the meaning given by section 80(2) of the 2003 Act.

19 Cessation of order: relevant sexual offenders

- (1) This section applies where—
- (a) a sexual harm prevention order is in effect in relation to a relevant sexual offender, and
 - (b) by virtue of section 88F or 88G of the 2003 Act, the relevant sexual offender ceases to be subject to the notification requirements of Part 2 of the 2003 Act.

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- (2) The sexual harm prevention order ceases to have effect.
- (3) For the purposes of this section, a person is a “relevant sexual offender” if the person falls within section 88A(1)(a) or (b) of the 2003 Act.

Variation, renewal and discharge

20 Variation, renewal and discharge

- (1) On the application of a person mentioned in subsection (2), the appropriate court may make an order varying, renewing or discharging a sexual harm prevention order.
- (2) The persons are—
 - (a) the person against whom the order has effect (“the subject”),
 - (b) the chief constable,
 - (c) in the case only of an order made under section 11, the prosecutor.
- (3) In subsection (1), the “appropriate court” means—
 - (a) where the order was made under section 11 by the High Court of Justiciary, that court,
 - (b) where the order was made under section 11 in the sheriff court—
 - (i) a sheriff exercising criminal jurisdiction in the sheriffdom in which the subject resides, or
 - (ii) if the subject does not reside in a sheriffdom, any sheriff exercising criminal jurisdiction in the sheriffdom of the sheriff who made the order,
 - (c) where the order was made under section 12, an appropriate sheriff.
- (4) In subsection (3)(c), an “appropriate sheriff” means—
 - (a) the sheriff who made the order,
 - (b) another sheriff of the same sheriffdom,
 - (c) a sheriff in whose sheriffdom the subject resides, or
 - (d) where the application is made by the chief constable—
 - (i) a sheriff in whose sheriffdom the subject is believed by the chief constable to be, or
 - (ii) a sheriff to whose sheriffdom the subject is believed by the chief constable to be intending to come.
- (5) A sexual harm prevention order may be renewed, or varied so as to impose an additional prohibition or requirement on the subject, only if it is necessary to do so for the purpose of—
 - (a) protecting the public, or any particular members of the public, from sexual harm from the subject, or
 - (b) protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the subject outside the United Kingdom,
 and any renewed or varied order may contain only such prohibitions and requirements as are necessary for one or other of these purposes.

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- (6) A sexual harm prevention order may be discharged, or varied so as to remove a prohibition or requirement, only if the order or, as the case may be, prohibition or requirement, is no longer necessary for the purpose of—
- (a) protecting the public, or any particular members of the public, from sexual harm from the subject, or
 - (b) protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the subject outside the United Kingdom.
- (7) Before determining an application under this section, a court must—
- (a) if subsection (8) applies, hold a hearing at which the subject and the chief constable, and in the case of an order made under section 11, the prosecutor, may appear or be represented,
 - (b) if subsection (8) does not apply, either—
 - (i) hold a hearing at which the subject and the chief constable, and in the case of an order made under section 11, the prosecutor, may appear or be represented, or
 - (ii) give an opportunity to make written representations to the subject and the chief constable and, in the case of an order made under section 11, the prosecutor.
- (8) This subsection applies if, not later than rules of court may provide, the subject or the chief constable, or, in the case of an order made under section 11, the prosecutor, gives notice to the court of a wish for a hearing to be held.
- (9) In subsections (7) and (8), “court” includes “sheriff” (except in “rules of court”).

Interim orders

21 Interim orders

- (1) On the application of the chief constable, an appropriate sheriff may make an interim sexual harm prevention order against a person in respect of whom the chief constable is applying for an order under section 12.
- (2) An interim sexual harm prevention order may be made if the sheriff considers it just to do so.
- (3) An interim sexual harm prevention order is an order prohibiting the person against whom it is made from doing, or requiring that person to do, a thing or things described in the order.
- (4) A prohibition or requirement contained in an interim sexual harm prevention order applies throughout the United Kingdom (unless expressly confined to particular localities).
- (5) A prohibition or requirement contained in an interim sexual harm prevention order has effect for a fixed period, specified in the order.
- (6) Different periods may be provided for different prohibitions or requirements.
- (7) An application for an interim sexual harm prevention order—

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- (a) may be made in the application for an order under section 12 to which it relates, or
 - (b) if the application for that order has been made, may be made in such way as rules of court may provide.
- (8) Section 18 applies to a person against whom an interim sexual harm prevention order is made as it applies to a person against whom a sexual harm prevention order is made.
- (9) An interim sexual harm prevention order ceases to have effect, if it has not already done so, when either of the following events occurs—
- (a) the related application for an order under section 12 is determined, or
 - (b) all of the prohibitions or requirements contained in it have ceased to have effect.
- (10) On the application of a person mentioned in subsection (11), an appropriate sheriff may vary, renew or discharge an interim sexual harm prevention order.
- (11) Those persons are—
- (a) the person against whom the interim sexual harm prevention order has effect,
 - (b) the chief constable.
- (12) In this section, an “appropriate sheriff” means—
- (a) the sheriff to whom the related application for an order under section 12 is made, or
 - (b) another sheriff of the same sheriffdom.

Appeals

22 Appeals

- (1) An order made under section 11, and any order granting or refusing a variation, renewal or discharge of such an order may be appealed against as if the order were a sentence.
- (2) On such an appeal, the court hearing the appeal may suspend the order appealed against pending the disposal of the appeal.
- (3) An order under section 11 made on appeal is to be regarded for the purposes of section 20(3) as having been made by the court which dealt with the question of whether an order under that section should be made at first instance.
- (4) A decision of a sheriff mentioned in subsection (5) may be appealed against as if it were a decision constituting final judgment in civil proceedings within the meaning of the 2014 Act.
- (5) A decision to—
 - (a) make, or refuse to make, an order under section 12 or 21,
 - (b) vary, renew or discharge, or refuse to vary, renew or discharge, an order made under either of those sections.
- (6) An order under section 12 made on appeal is to be regarded for the purposes of section 20(3) as having been made by the sheriff who determined the application for the order at first instance.

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Requirement to serve order

23 Requirement for clerk of court to serve order

- (1) Where a court makes, varies or renews a sexual harm prevention order or an interim sexual harm prevention order, the clerk of the court must serve a copy of the order as made, varied or renewed (as the case may be) on the person against whom the order has effect.
- (2) Where a court discharges a sexual harm prevention order or an interim sexual harm prevention order, the clerk of the court must serve a copy of the order effecting the discharge on the person against whom the order had effect.
- (3) In this section, “court” includes “sheriff”.

Enforcement

24 Offence of breaching order

- (1) A person commits an offence if, without reasonable excuse, the person—
 - (a) does something which the person is prohibited from doing, or
 - (b) fails to do something which the person is required to do,
 by a sexual harm prevention order or an interim sexual harm prevention order.
- (2) A person who commits an offence under subsection (1) is liable—
 - (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both),
 - (b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or a fine (or both).
- (3) Where a person is convicted of an offence under subsection (1), it is not open to the court by or before which the person is convicted—
 - (a) to make a community payback order in respect of the offence, or
 - (b) to dispose of the matter by—
 - (i) dismissing the person with an admonition, or
 - (ii) discharging the person absolutely.
- (4) A person may be prosecuted, tried and punished for an offence under subsection (1) of failing to comply with a prohibition on foreign travel—
 - (a) in any sheriff court district in which the person is apprehended or in custody, or
 - (b) in such sheriff court district as the Lord Advocate may determine,
 as if the offence had been committed in that district (and the offence is, for all purposes incidental to or consequential on the trial or punishment, to be deemed to have been committed in that district).

Interpretation

25 Interpretation of Chapter

- (1) In this Chapter—

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“vulnerable adult” means a person who is 18 or over whose ability to protect himself or herself from physical or psychological harm is significantly impaired through physical or mental disability or illness, through old age, or otherwise,

“the chief constable” means the chief constable of the Police Service of Scotland,

“child” means a person under 18,

“interim sexual harm prevention order” means (except in section 21(1) to (3)) an order made under section 21,

“prohibition on foreign travel” has the meaning given by section 17(2),

“the public” means the public in the United Kingdom,

“sexual harm prevention order” means (except in sections 11, 12 and 16(1)) an order made under section 11 or 12.

(2) Subsection (3) applies for the purposes of sections 11 to 15.

(3) In construing any reference to an offence listed in schedule 3 of the 2003 Act, any condition subject to which an offence is so listed that relates—

(a) to the way in which a person is dealt with in respect of the offence or a relevant finding (within the meaning of section 132(9) of the 2003 Act) in relation to the offence, or

(b) to the age of any person,

is to be disregarded.

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