



# Abusive Behaviour and Sexual Harm (Scotland) Act 2016

2016 asp 22

**The Bill for this Act of the Scottish Parliament was passed by the Parliament on 22nd March 2016 and received Royal Assent on 28th April 2016**

An Act of the Scottish Parliament to make provision about abusive behaviour; and to make provision about sexual harm including provision about directions to be given to juries in sexual offence cases and provision about orders to prevent future sexual harm.

VALID FROM 24/04/2017

## PART 1

### ABUSIVE BEHAVIOUR

#### *Abusive behaviour towards partner or ex-partner*

#### **1 Aggravation of offence where abuse of partner or ex-partner**

- (1) This subsection applies where it is—
  - (a) libelled in an indictment or specified in a complaint that an offence is aggravated by involving abuse of the partner or ex-partner of the person committing it, and
  - (b) proved that the offence is so aggravated.
- (2) An offence is aggravated as described in subsection (1)(a) if in committing the offence—
  - (a) the person intends to cause the partner or ex-partner to suffer physical or psychological harm, or
  - (b) in the case only of an offence committed against the partner or ex-partner, the person is reckless as to causing the partner or ex-partner to suffer physical or psychological harm.
- (3) It is immaterial for the purposes of subsection (2) that the offence does not in fact cause the partner or ex-partner physical or psychological harm.

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- (4) Evidence from a single source is sufficient to prove that an offence is aggravated as described in subsection (1)(a).
- (5) Where subsection (1) applies, the court must—
- (a) state on conviction that the offence is aggravated as described in subsection (1)(a),
  - (b) record the conviction in a way that shows that the offence is so aggravated,
  - (c) take the aggravation into account in determining the appropriate sentence, and
  - (d) state—
    - (i) where the sentence imposed in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or
    - (ii) otherwise, the reasons for there being no such difference.
- (6) For the purposes of this section, a person is a partner of another person if they are—
- (a) spouses or civil partners of each other,
  - (b) living together as if spouses or civil partners of each other, or
  - (c) in an intimate personal relationship with each other,
- and the references to a person's ex-partner are to be construed accordingly.
- (7) In this section—
- “cause” includes contribute to causing (and “causing” is to be construed accordingly),
- “psychological harm” includes fear, alarm or distress.

VALID FROM 03/07/2017

*Disclosure of an intimate photograph or film*

**2 Disclosing, or threatening to disclose, an intimate photograph or film**

- (1) A person (“A”) commits an offence if—
- (a) A discloses, or threatens to disclose, a photograph or film which shows, or appears to show, another person (“B”) in an intimate situation,
  - (b) by doing so, A intends to cause B fear, alarm or distress or A is reckless as to whether B will be caused fear, alarm or distress, and
  - (c) the photograph or film has not previously been disclosed to the public at large, or any section of the public, by B or with B's consent.
- (2) For the purposes of this section, a photograph or film is disclosed if it, or any data or other thing which is capable of being converted into it, is given, shown or made available to a person other than B.
- (3) In proceedings for an offence under subsection (1), A has a defence if any of the following facts is established—
- (a) B consented to the photograph or film being disclosed,
  - (b) A reasonably believed that B consented to the photograph or film being disclosed,

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- (c) A reasonably believed that disclosure of the photograph or film was necessary for the purposes of the prevention, detection, investigation or prosecution of crime, or
  - (d) A reasonably believed that disclosure of the photograph or film was in the public interest.
- (4) For the purposes of subsection (3), consent to the photograph or film being disclosed may be—
- (a) consent which is specific to the particular disclosure or (as the case may be) the particular threatened disclosure, or
  - (b) consent to disclosure generally where that consent covers the particular disclosure or (as the case may be) the particular threatened disclosure.
- (5) In proceedings for an offence under subsection (1), A has a defence if the following matter is established—
- (a) B was in the intimate situation shown in the photograph or film,
  - (b) B was not in the intimate situation as a result of a deliberate act of another person to which B did not agree, and
  - (c) when B was in the intimate situation—
    - (i) B was in a place to which members of the public had access (whether or not on payment of a fee), and
    - (ii) members of the public were present.
- (6) For the purposes of subsection (3), a fact is established, and for the purposes of subsection (5), the matter is established, if—
- (a) sufficient evidence is adduced to raise an issue as to whether that is the case, and
  - (b) the prosecution does not prove beyond reasonable doubt that it is not the case.
- (7) 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 Interpretation of section 2**

- (1) For the purposes of section 2, a person is in an “intimate situation” if—
- (a) the person is engaging or participating in, or present during, an act which—
    - (i) a reasonable person would consider to be a sexual act, and
    - (ii) is not of a kind ordinarily done in public, or
  - (b) the person's genitals, buttocks or breasts are exposed or covered only with underwear.
- (2) In section 2—
- “film” means a moving image in any form, whether or not the image has been altered in any way, that was originally captured by making a recording, on any medium, from which a moving image may be produced, and includes a copy of the image,

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“photograph” means a still image in any form, whether or not the image has been altered in any way, that was originally captured by photography, and includes a copy of the image.

**4 Section 2: special provision in relation to providers of information society services**

Schedule 1 makes special provision in connection with the operation of section 2 in relation to persons providing information society services (as defined in paragraph 4(1) of that schedule).

*Non-harassment orders*

**5 Making of non-harassment orders in criminal cases**

(1) Section 234A of the 1995 Act is amended as follows.

(2) For subsection (1), substitute—

“(1) This section applies where a person is—

- (a) convicted of an offence involving misconduct towards another person (“the victim”),
- (b) acquitted of such an offence by reason of the special defence set out in section 51A, or
- (c) found by a court to be unfit for trial under section 53F in respect of such an offence and the court determines that the person has done the act or made the omission constituting the offence.

(1A) The prosecutor may apply to the court to make (instead of or in addition to dealing with the person in any other way) a non-harassment order against the person.

(1B) A non-harassment order is an order requiring the person to refrain, for such period (including an indeterminate period) as may be specified in the order, from such conduct in relation to the victim as may be specified in the order.”.

(3) In subsection (2), for “(1)” substitute “(1A)”.

(4) In subsection (2A)(a)—

- (a) in sub-paragraph (i), for “offender” substitute “ person against whom the order is sought ”,
- (b) in sub-paragraph (ii), for “offender” substitute “ person against whom the order is sought ”.

(5) After subsection (2B), insert—

“(2BA) The court may, for the purpose of subsection (2) above, have regard to any information given to it for that purpose by the prosecutor about any other offence involving misconduct towards the victim—

- (a) in respect of which the person against whom the order is sought was acquitted by reason of the special defence set out in section 51A, or
- (b) in respect of which the person against whom the order is sought was found by a court to be unfit for trial under section 53F and the court

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determined that the person had done the act or made the omission constituting the offence.”.

(6) In subsection (2C), for “offender” substitute “ person against whom the order is sought ”.

(7) For subsection (3), substitute—

“(3) A non-harassment order made by a criminal court may be appealed against—

- (a) if the order was made in a case falling within subsection (1)(a) above, as if the order were a sentence,
- (b) if the order was made in a case falling within subsection (1)(b) or (c) above, as if the person had been convicted of the offence concerned and the order were a sentence passed on the person for the offence.

(3A) A variation or revocation of a non-harassment order made under subsection (6) below may be appealed against—

- (a) if the order was made in a case falling within subsection (1)(a) above, as if the variation or revocation were a sentence,
- (b) if the order was made in a case falling within subsection (1)(b) or (c) above, as if the person had been convicted of the offence concerned and the variation or revocation were a sentence passed on the person for the offence.”.

VALID FROM 24/04/2017

## PART 2

### SEXUAL HARM

#### CHAPTER 1

##### JURY DIRECTIONS RELATING TO SEXUAL OFFENCES

#### 6 Jury directions relating to sexual offences

In the 1995 Act, after section 288D insert—

*“Jury directions relating to sexual offences*

#### **288DA Jury direction relating to lack of communication about offence**

- (1) Subsection (2) applies where, in a trial on indictment for a sexual offence—
  - (a) evidence is given which suggests that the person against whom the offence is alleged to have been committed—
    - (i) did not tell, or delayed in telling, anyone, or a particular person, about the offence, or

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- (ii) did not report, or delayed in reporting, the offence to any investigating agency, or a particular investigating agency, or
  - (b) a question is asked, or a statement is made, with a view to eliciting, or drawing attention to, evidence of that nature.
- (2) In charging the jury, the judge must advise that—
- (a) there can be good reasons why a person against whom a sexual offence is committed may not tell others about it or report it to an investigating agency, or may delay in doing either of those things, and
  - (b) this does not, therefore, necessarily indicate that an allegation is false.
- (3) Subsection (2) does not apply if the judge considers that, in the circumstances of the case, no reasonable jury could consider the evidence, question or statement by reason of which subsection (2) would otherwise apply to be material to the question of whether the alleged offence is proved.
- (4) For the purposes of this section—
- “investigating agency” means—
- (a) a police force maintained for the area where the offence is alleged to have been committed,
  - (b) any other person who has functions (to any extent) of investigating crime in the area where the offence is alleged to have been committed,
- “sexual offence” has the same meaning as in section 210A, except that it does not include—
- (a) an offence under section 170 of the Customs and Excise Management Act 1979, or
  - (b) an offence under section 52A of the Civic Government (Scotland) Act 1982.

#### **288DB Jury direction relating to absence of physical resistance or physical force**

- (1) Subsection (2) applies where, in a trial on indictment for a sexual offence—
- (a) evidence is given which suggests that the sexual activity took place without physical resistance on the part of the person against whom the offence is alleged to have been committed, or
  - (b) a question is asked, or a statement is made, with a view to eliciting, or drawing attention to, evidence of that nature.
- (2) In charging the jury, the judge must advise that—
- (a) there can be good reasons why a person against whom a sexual offence is committed might not physically resist the sexual activity, and
  - (b) an absence of physical resistance does not, therefore, necessarily indicate that an allegation is false.
- (3) Subsection (2) does not apply if the judge considers that, in the circumstances of the case, no reasonable jury could consider the evidence,

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question or statement by reason of which subsection (2) would otherwise apply to be material to the question of whether the alleged offence is proved.

- (4) Subsection (5) applies where, in a trial on indictment for a sexual offence—
- (a) evidence is given which suggests that the sexual activity took place without the accused using physical force to overcome the will of the person against whom the offence is alleged to have been committed, or
  - (b) a question is asked, or a statement is made, with a view to eliciting, or drawing attention to, evidence of that nature.
- (5) In charging the jury, the judge must advise that—
- (a) there can be good reasons why a person may, in committing a sexual offence, not need to use physical force to overcome the will of the person against whom the offence is committed, and
  - (b) an absence of physical force does not, therefore, necessarily indicate that an allegation is false.
- (6) Subsection (5) does not apply if the judge considers that, in the circumstances of the case, no reasonable jury could consider the evidence, question or statement by reason of which subsection (5) would otherwise apply to be material to the question of whether the alleged offence is proved.
- (7) For the purposes of this section—
- “sexual activity” means the sexual activity which is the subject of the alleged sexual offence,
- “sexual offence” means—
- (a) rape (whether at common law or under section 1(1) of the Sexual Offences (Scotland) Act 2009),
  - (b) indecent assault,
  - (c) sodomy,
  - (d) clandestine injury to women,
  - (e) an offence under section 2 of the Sexual Offences (Scotland) Act 2009 (sexual assault by penetration),
  - (f) an offence under section 3 of that Act (sexual assault),
  - (g) an offence under section 4 of that Act (sexual coercion).”.

## CHAPTER 2

### SEXUAL ACTS OUTSIDE SCOTLAND

#### 7 Incitement to commit certain sexual acts elsewhere in the United Kingdom

- (1) Section 54 of the 2009 Act is amended as follows.
- (2) In subsection (1), for “the United Kingdom” substitute “ Scotland ”.
- (3) For subsection (2), substitute—

“(2) However—

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- (a) a person who is not a habitual resident of Scotland commits an offence by virtue of subsection (1) in respect of relevant conduct intended to occur elsewhere in the United Kingdom only if, and
  - (b) a person who is not a UK national commits an offence by virtue of subsection (1) in respect of relevant conduct intended to occur outside the United Kingdom only if,
- the condition in subsection (2A) is met.
- (2A) That condition is that the relevant conduct would also involve the commission of an offence under the law in force in the country where the whole or any part of it was intended to take place.”.
- (4) In subsection (3), for “(2)” substitute “ (2A) ”.
- (5) In subsection (4), for “(2)” substitute “ (2A) ”.
- (6) In subsection (8)—
- (a) after the definition of “listed offence” insert—
    - ““habitual resident of Scotland” means an individual who was at the time the act mentioned in subsection (1) took place habitually resident in Scotland,”,
  - (b) in the definition of “UK national” omit “, or who has subsequently become”.
- (7) The title becomes “ **Incitement to commit certain sexual acts outside Scotland** ”.

## 8 **Commission of certain sexual offences elsewhere in the United Kingdom**

After section 54 of the 2009 Act, insert—

### “54A Offences committed outside Scotland

- (1) If a person does an act elsewhere in the United Kingdom which would, if it had been done in Scotland, constitute a listed offence then the person commits that offence.
- (2) However, a person who is not a habitual resident of Scotland commits an offence by virtue of subsection (1) only if the act would also constitute an offence under the law in force in the country where it took place.
- (3) For the purposes of subsection (2), an act punishable under the law in force in the country is an offence under that law however it is described in that law.
- (4) The condition specified in subsection (2) is to be taken to be satisfied unless, not later than such time as may be prescribed by Act of Adjournal, the accused serves on the prosecutor a notice—
  - (a) stating that, on the facts as alleged with respect to the act in question, the condition is not in the accused's opinion satisfied,
  - (b) setting out the grounds for the accused's opinion, and
  - (c) requiring the prosecutor to prove that the condition is satisfied.
- (5) But the court, if it thinks fit, may permit the accused to require the prosecutor to prove that the condition is satisfied without the prior service of a notice under that subsection.



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- (6) In proceedings on indictment, the question whether the condition is satisfied is to be determined by the judge alone.
- (7) A person may be prosecuted, tried and punished for any offence to which this section applies—
- (a) in any sheriff court district in Scotland 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 trial or punishment, to be deemed to have been committed in that district.
- (8) In this section—
- “habitual resident of Scotland” means an individual who was at the time the act mentioned in subsection (1) took place habitually resident in Scotland,
  - “listed offence” means an offence listed in Part 2 of schedule 4,
  - “sheriff court district” is to be construed in accordance with section 307(1) of the Criminal Procedure (Scotland) Act 1995.

#### **54B Offence committed by virtue of section 54A(1): limitations on prosecution**

- (1) Subject to section 54C, this section applies in relation to a listed offence committed by a person by virtue of section 54A(1).
- (2) Prosecution in respect of the listed offence—
- (a) is not competent if the person has been, or is being, prosecuted in respect of the act constituting the listed offence, in the country where the act took place, and
  - (b) is competent only if—
    - (i) before the prosecution is initiated, the prosecutor has consulted the relevant director of public prosecutions about the prosecution, and
    - (ii) the person is prosecuted, on the same indictment or complaint, in respect of an act in Scotland constituting a listed offence.
- (3) For the purposes of subsection (2)(a), a person is not to be regarded as having been prosecuted in respect of the act constituting the listed offence, in the country where the act took place, if a prosecution in that country was withdrawn in order to enable the prosecution of the person in Scotland.
- (4) For the purposes of subsection (2)(b)(i)—
- (a) the prosecution is initiated when the indictment or complaint is served,
  - (b) the relevant director of public prosecutions is—
    - (i) in the case of an act which took place in England and Wales, the Director of Public Prosecutions (that is, the head of the Crown Prosecution Service),

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(ii) in the case of an act which took place in Northern Ireland, the Director of Public Prosecutions for Northern Ireland.

(5) In this section, “listed offence” means an offence listed in Part 2 of schedule 4.

#### **54C Listed offence: limitations on prosecution if country not specified**

(1) The indictment or complaint in which a listed offence is charged need not contain information from which the country in the United Kingdom in which the act constituting the listed offence took place can be determined.

(2) If the indictment or complaint does not contain that information, prosecution in respect of the listed offence—

- (a) is not competent if the person charged with the offence has been, or is being, prosecuted, in respect of the act constituting the listed offence elsewhere in the United Kingdom, and
- (b) is competent only if the conditions in subsection (3) which are applicable in the case are met.

(3) Those conditions are—

- (a) if it can be determined from the indictment or complaint that the act constituting the offence took place—
  - (i) either in Scotland or in England and Wales, or
  - (ii) either in Scotland or in Northern Ireland,
 that before the indictment or complaint was served, the prosecutor consulted the relevant director of public prosecutions about the prosecution,
- (b) if it can be determined from the indictment or complaint that the act constituting the offence took place either in England and Wales or in Northern Ireland but not in Scotland, that—
  - (i) before the indictment or complaint was served, the prosecutor consulted both directors of public prosecutions about the prosecution, and
  - (ii) the person is prosecuted, on the same indictment or complaint, in respect of an act in Scotland constituting a listed offence,
- (c) if neither paragraph (a) nor (b) applies, that before the indictment or complaint was served, the prosecutor consulted both directors of public prosecutions about the prosecution.

(4) For the purposes of subsection (3)—

- (a) the relevant director of public prosecutions is—
  - (i) in relation to subsection (3)(a)(i), the Director of Public Prosecutions (that is, the head of the Crown Prosecution Service),
  - (ii) in relation to subsection (3)(a)(ii), the Director of Public Prosecutions for Northern Ireland,
- (b) the references to both directors of public prosecutions are to the Director of Public Prosecutions and the Director of Public Prosecutions for Northern Ireland.

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(5) For the purposes of subsection (2)(a), a person is not to be regarded as having been prosecuted in respect of the act constituting the listed offence, elsewhere in the United Kingdom, if a prosecution elsewhere in the United Kingdom was withdrawn in order to enable the prosecution of the person in Scotland.

(6) In this section, “listed offence” means an offence listed in Part 2 of schedule 4.”.

## 9 Commission of certain sexual offences outside the United Kingdom

(1) Section 55 of the 2009 Act is amended as follows.

(2) After subsection (2), insert—

“(2A) If—

- (a) a person who is not a UK national or a UK resident does an act in a country outside the United Kingdom which would, if it had been done in Scotland, constitute a listed offence,
- (b) the act constitutes an offence under the law in force in that country, and
- (c) the person meets the nationality or residence condition at the relevant time,

proceedings may be brought against the person in Scotland for that listed offence as if the person had done the act there.

(2B) The person meets the nationality or residence condition at the relevant time if the person is a UK national or a UK resident at the time when the indictment or complaint is served on the person.”.

(3) In subsection (3), for “subsection (2)(b)” substitute “ subsections (2)(b) and (2A)(b) ”.

(4) In subsection (4), after “(2)(b)” insert “ or (2A)(b) ”.

(5) In subsection (8), for the definition of “UK national” substitute—

““UK national” means an individual who was at the time the act mentioned in subsection (1) or (2A) took place—

- (a) a British citizen, a British overseas territories citizen, a British National (Overseas) or a British Overseas citizen,
- (b) a person who under the British Nationality Act 1981 is a British subject, or
- (c) a British protected person within the meaning of that Act.”.

(6) In subsection (8), in the definition of “UK resident”—

- (a) after “(2)” insert “ or (2A) ”,
- (b) omit “, or who has subsequently become”.

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## 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,
  - (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—

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- (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—
  - (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

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(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
- (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),

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- (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.

*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—

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- (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—
- (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.



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### *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.
- (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—

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- (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.
- (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—

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- (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—
  - (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.

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- (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.

### *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”.

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### *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—
  - “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.

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- (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.

VALID FROM 31/03/2023

## CHAPTER 4

### SEXUAL RISK ORDERS

#### *Meaning of harm*

#### **26 Meaning of harm**

In this Chapter, “harm”, from a person, means physical or psychological harm caused by the person doing an act of a sexual nature.

#### *Making of order*

#### **27 Making of order**

- (1) On the application of the chief constable, an appropriate sheriff may make a sexual risk order (see section 28(1)) against a person (“the respondent”).
- (2) An appropriate sheriff may make a sexual risk order only if satisfied that the respondent has (whether before or after this Chapter comes into force) done an act of a sexual nature as a result of which it is necessary to make such an order for the purpose of—
  - (a) protecting the public, or any particular members of the public, from harm from the respondent, or
  - (b) protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from harm from the respondent outside the United Kingdom.
- (3) In this section, an “appropriate sheriff” means—
  - (a) a sheriff in whose sheriffdom the respondent resides,
  - (b) a sheriff in whose sheriffdom the respondent is believed by the chief constable to be,
  - (c) a sheriff to whose sheriffdom the respondent is believed by the chief constable to be intending to come, or

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- (d) a sheriff whose sheriffdom includes any place where it is alleged that the respondent did an act of a sexual nature giving rise to reasonable cause to believe that it is necessary for a sexual risk order to be made.
- (4) Before determining an application under this section, a sheriff must—
- (a) if subsection (5) applies, hold a hearing at which the respondent and the chief constable may appear or be represented,
- (b) if subsection (5) does not apply, either—
- (i) hold a hearing at which the respondent and the chief constable may appear or be represented, or
- (ii) give an opportunity to make written representations to the respondent and the chief constable.
- (5) This subsection applies if, not later than rules of court may provide, the respondent gives notice to the sheriff of a wish for a hearing to be held.

*What order does*

## **28 Content and duration of order**

- (1) A sexual risk 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 risk order applies throughout the United Kingdom (unless expressly confined to particular localities).
- (3) A prohibition or requirement in a sexual risk order has effect for a fixed period, specified in the order, of not less than 2 years.
- (4) Different periods may be provided for different prohibitions or requirements.
- (5) The prohibitions and requirements which may be imposed in a sexual risk order are those necessary for the purpose of—
- (a) protecting the public, or any particular members of the public, from harm from the respondent, or
- (b) protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from harm from the respondent outside the United Kingdom.
- (6) Where a sheriff makes a sexual risk order in relation to a person already subject to such an order (whether made by that sheriff or another), the earlier order ceases to have effect.
- (7) A sexual risk order ceases to have effect, if it has not already done so, when all of the prohibitions or requirements in it have ceased to have effect.

## **29 Prohibitions on foreign travel**

- (1) A prohibition on foreign travel contained in a sexual risk order must not be for a period of 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,

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- (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 30.
- (4) A sexual risk 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—
- (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 risk 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.

#### *Variation, renewal and discharge*

### **30 Variation, renewal and discharge**

- (1) On the application of a person mentioned in subsection (2), an appropriate sheriff may make an order varying, renewing or discharging a sexual risk order.
- (2) The persons are—
- (a) the person against whom the order has effect (“the subject”),
  - (b) the chief constable.
- (3) In subsection (1), an “appropriate sheriff” means—
- (a) the sheriff who made the sexual risk 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



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- (ii) a sheriff to whose sheriffdom the subject is believed by the chief constable to be intending to come.
- (4) A sexual risk 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 harm from the subject, or
  - (b) protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from 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.
- (5) A sexual risk 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 harm from the subject, or
  - (b) protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from harm from the subject outside the United Kingdom.
- (6) Before determining an application under this section, a sheriff must—
- (a) if subsection (7) applies, hold a hearing at which the subject and the chief constable may appear or be represented,
  - (b) if subsection (7) does not apply, either—
    - (i) hold a hearing at which the subject and the chief constable may appear or be represented, or
    - (ii) give an opportunity to make written representations to the subject and the chief constable.
- (7) This subsection applies if, not later than rules of court may provide, the subject or the chief constable gives notice to the sheriff of a wish for a hearing to be held.

### *Interim orders*

## **31 Interim orders**

- (1) On the application of the chief constable, an appropriate sheriff may make an interim sexual risk order against a person in respect of whom the chief constable is applying for an order under section 27.
- (2) An interim sexual risk order may be made if the sheriff—
  - (a) considers that there is a prima facie case that the person has done an (or, as the case may be, the) act of a sexual nature which is being relied on for the purposes of subsection (2) of section 27 in relation to the application for an order under that section, and
  - (b) considers it just to make an interim sexual risk order.

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- (3) An interim sexual risk 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 risk order applies throughout the United Kingdom (unless expressly confined to particular localities).
- (5) A prohibition or requirement contained in an interim sexual risk 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 risk order—
  - (a) may be made in the application for an order under section 27 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) An interim sexual risk 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 27 is determined, or
  - (b) all of the prohibitions or requirements contained in it have ceased to have effect.
- (9) On the application of a person mentioned in subsection (10), an appropriate sheriff may vary, renew or discharge an interim sexual risk order.
- (10) Those persons are—
  - (a) the person against whom the interim sexual risk order has effect,
  - (b) the chief constable.
- (11) In this section, an “appropriate sheriff” means—
  - (a) the sheriff to whom the related application for an order under section 27 is made, or
  - (b) another sheriff of the same sheriffdom.

### *Appeals*

## **32 Appeals**

- (1) A decision of a sheriff mentioned in subsection (2) may be appealed against as if it were a decision constituting final judgment in civil proceedings within the meaning of the 2014 Act.
- (2) A decision to—
  - (a) make, or refuse to make, an order under section 27 or 31,
  - (b) vary, renew or discharge, or refuse to vary, renew or discharge, an order made under either of those sections.
- (3) An order under section 27 made on appeal is to be regarded for the purposes of section 30(1) as having been made by the sheriff who determined the application for the order at first instance.

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**Changes to legislation:** There are currently no known outstanding effects for the Abusive Behaviour and Sexual Harm (Scotland) Act 2016. (See end of Document for details)

### *Requirement to serve order*

#### **33 Requirement for clerk of court to serve order**

- (1) Where a court makes, varies or renews a sexual risk order or an interim sexual risk 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 risk order or an interim sexual risk 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*

#### **34 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 risk order or an interim sexual risk 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).

#### **35 Application of notification requirements on breach of order**

- (1) This section applies to a person who—
  - (a) is convicted of an offence under section 34,
  - (b) is acquitted of such an offence by reason of the special defence set out in section 51A of the 1995 Act, or

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- (c) is found, in respect of such an offence, 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) Where the person—
- (a) was a relevant offender immediately before this section applied to the person, and
  - (b) would (apart from this subsection) cease to be subject to the notification requirements of Part 2 of the 2003 Act while the relevant order has effect, the person remains subject to those notification requirements while the relevant 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 relevant 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 on which this section first applies to the person.
- (5) In this section—
- “relevant offender” has the meaning given by section 80(2) of the 2003 Act, “relevant order” means—
- (a) where the conviction, finding or acquittal by virtue of which this section applies to the person is in respect of a breach of a sexual risk order, that order,
  - (b) where the conviction, finding or acquittal by virtue of which this section applies to the person is in respect of an interim sexual risk order—
    - (i) any sexual risk order made on the hearing of the application to which the interim order relates, or
    - (ii) if no such order is made, the interim order.

### *Interpretation*

## **36 Interpretation of Chapter**

In this Chapter—

“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 mental or physical 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 risk order” means (except in section 31(1) to (3)) an order made under section 31,

“prohibition on foreign travel” has the meaning given by section 29(2),

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“the public” means the public in the United Kingdom,  
 “sexual risk order” means (except in sections 27 and 28(1)) an order made under section 27.

VALID FROM 31/03/2023

## CHAPTER 5

### EQUIVALENT ORDERS ELSEWHERE IN UNITED KINGDOM

#### 37 Breach of orders equivalent to orders in Chapters 3 and 4: offence

- (1) A person commits an offence if, without reasonable excuse, the person does something which the person is prohibited from doing by an equivalent order from elsewhere in the United Kingdom.
- (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) For the purposes of this section, prohibitions imposed by an equivalent order from elsewhere in the United Kingdom apply, unless expressly confined to particular localities, to every part of the United Kingdom.
- (5) In this section, “equivalent order from elsewhere in the United Kingdom” means—
  - (a) a sexual harm prevention order made under section 103A of the 2003 Act [F1 or Chapter 2 of Part 11 of the Sentencing Code],
  - (b) an interim sexual harm prevention order made under section 103F of the 2003 Act,
  - (c) a sexual risk order made under section 122A of the 2003 Act,
  - (d) an interim sexual risk order made under section 122E of the 2003 Act,
  - (e) a sexual offences prevention order made under section 104 of the 2003 Act (but excluding such an order made in Scotland),
  - (f) an interim sexual offences prevention order made under section 109 of the 2003 Act (but excluding such an order made in Scotland),
  - (g) a foreign travel order made under section 114 of the 2003 Act (but excluding such an order made in Scotland),
  - (h) a risk of sexual harm order made under section 123 of the 2003 Act,

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- (i) an interim risk of sexual harm order made under section 126 of the 2003 Act,
- (j) a restraining order made under section 5A of the Sex Offenders Act 1997,
- (k) a sex offender order made under section 2 of the Crime and Disorder Act 1998.

#### Textual Amendments

**F1** Words in s. 37(5)(a) inserted (1.12.2020) by [Sentencing Act 2020 \(c. 17\)](#), s. 416(1), [Sch. 24 para. 311](#) (with [Sch. 27](#)); [S.I. 2020/1236](#), reg. 2

### 38 Breach of certain equivalent orders: application of notification requirements

- (1) This section applies to a person who—
- (a) is convicted of an offence under section 37 in respect of a breach of an order under section 122A, 122E, 123 or 126 of the 2003 Act,
  - (b) is acquitted of such an offence by reason of the special defence set out in section 51A of the 1995 Act, or
  - (c) is found, in respect of such an offence, to be unfit for trial under section 53F of the 1995 Act and the court determines that the person has done the act constituting the offence.
- (2) This section also applies to a person who—
- (a) is convicted of an offence under section 122H or 128 of the 2003 Act,
  - (b) is found not guilty of such an offence by reason of insanity,
  - (c) is found, in respect of such an offence, to be under a disability and to have done the act charged in respect of the offence, or
  - (d) is cautioned in respect of such an offence following an admission of it.
- (3) Where the person—
- (a) was a relevant offender immediately before this section applied to the person, and
  - (b) would (apart from this subsection) cease to be subject to the notification requirements of Part 2 of the 2003 Act while the relevant order has effect,
- the person remains subject to those notification requirements while the relevant order has effect.
- (4) 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 relevant order ceases to have effect, and
  - (b) that Part of that Act applies to the person subject to the modification set out in subsection (5).
- (5) The “relevant date” is the date on which this section first applies to the person.
- (6) In this section, “relevant order” means—

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- (a) where the conviction, finding, acquittal or caution by virtue of which this section applies to the person is in respect of a breach of an order under section 122A or 123 of the 2003 Act, that order,
- (b) where the conviction, finding, acquittal or caution by virtue of which this section applies to the person is in respect of an order under section 122E or 126 of the 2003 Act—
  - (i) any order under section 122A or 123 of the 2003 Act made on the hearing of the application to which the order under section 122E or 126 of the 2003 Act relates, or
  - (ii) if no such order is made, the order under section 122E or 126 of the 2003 Act.

VALID FROM 31/03/2023

## CHAPTER 6

### PREVIOUS ORDERS

#### 39 Repeals of provisions as to previous orders

- (1) The following provisions of the 2003 Act (which make provision as to sexual offences prevention orders and foreign travel orders) are repealed—
  - (a) sections 104 to 109,
  - (b) sections 110 to 117,
  - (c) section 117B,
  - (d) section 118,
  - (e) sections 120 to 122.
- (2) Sections 2 to 8 of the 2005 Act (which make provision as to risk of sexual harm orders) are repealed.

#### 40 Saving and transitional provision

- (1) In this section—
 

“existing order” means—

  - (a) a sexual offences prevention order under section 104 or 105 of the 2003 Act,
  - (b) a foreign travel order under section 114 of the 2003 Act,
  - (c) a risk of sexual harm order under section 2 of the 2005 Act,
  - (d) an interim sexual offences prevention order under section 109 of the 2003 Act,
  - (e) an interim risk of sexual harm order under section 5 of the 2005 Act,

“old order” means an order made under section 20 of the Crime and Disorder Act 1998.
- (2) The repeals made by section 39 do not apply in relation to—
  - (a) an application for an existing order made before this section comes into force,

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**Changes to legislation:** There are currently no known outstanding effects for the Abusive Behaviour and Sexual Harm (Scotland) Act 2016. (See end of Document for details)

- (b) an existing order applied for before then (and whether made before or after then),
  - (c) anything done in connection with such an application or order.
- (3) But—
- (a) as from when this section comes into force, there may be no variation of an existing order that extends the period of the order or any of its provisions,
  - (b) as from the end of the period of 5 years beginning with when this section comes into force, the relevant sections of this Act apply, with any necessary modifications, in relation to any existing order that is still in force as if the provisions of the order were provisions of a corresponding new order.
- (4) In subsection (3)(b)—
- a “corresponding new order” means—
    - (a) in the case of a sexual offences prevention order, a sexual harm prevention order,
    - (b) in the case of a foreign travel order, a sexual harm prevention order containing a prohibition on foreign travel (as defined in section 17(2)),
    - (c) in the case of a risk of sexual harm order, a sexual risk order made under section 27,
    - (d) in the case of an interim sexual offences prevention order, an interim sexual harm prevention order made under section 21,
    - (e) in the case of an interim risk of sexual harm order, an interim sexual risk order made under section 31,
  - the “relevant sections of this Act” means—
    - (a) in the case of a sexual offences prevention order, sections 19, 20 and 24,
    - (b) in the case of a foreign travel order, sections 20 and 24,
    - (c) in the case of a risk of sexual harm order, sections 30 and 34,
    - (d) in the case of an interim sexual offences prevention order, sections 21(10) to (12) and 24,
    - (e) in the case of an interim risk of sexual harm order, sections 31(9) to (11) and 34.
- (5) Sections 20 and 24 apply to an old order as they apply to a sexual harm prevention order.
- (6) In this section, “sexual harm prevention order” means an order made under section 11 or 12.



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## PART 3

### GENERAL

VALID FROM 24/04/2017

#### 41 Interpretation

In this Act—

“the 1995 Act” means the Criminal Procedure (Scotland) Act 1995,

“the 2003 Act” means the Sexual Offences Act 2003,

“the 2005 Act” means the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005,

“the 2009 Act” means the Sexual Offences (Scotland) Act 2009,

“the 2014 Act” means the Courts Reform (Scotland) Act 2014.

#### 42 Ancillary provision

- (1) The Scottish Ministers may by regulations make any incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, in connection with, or for giving full effect to, this Act.
- (2) Regulations under subsection (1) may—
  - (a) modify any enactment (including this Act),
  - (b) make different provision for different purposes.
- (3) Regulations under subsection (1)—
  - (a) are subject to the affirmative procedure if they add to, replace or omit any part of the text of this or any other Act,
  - (b) otherwise, are subject to the negative procedure.

VALID FROM 24/04/2017

#### 43 Minor and consequential modifications

Schedule 2 makes minor and consequential modifications of other enactments.

#### 44 Crown application

- (1) No contravention by the Crown of any provision of, or made under, this Act makes the Crown criminally liable.
- (2) But the Court of Session may, on the application of the Scottish Ministers or any public body or office-holder having responsibility for enforcing the provision, declare unlawful any act or omission which constitutes such a contravention.
- (3) Despite subsection (1), any provision of, or made under, this Act applies to persons in the public service of the Crown as it applies to other persons.

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#### **45 Commencement**

- (1) Sections 42, 44 and 46, and this section, come into force on the day after Royal Assent.
- (2) The other provisions of this Act come into force on such day as the Scottish Ministers may by regulations appoint.
- (3) Regulations under subsection (2) may—
  - (a) appoint different days for different purposes,
  - (b) include transitional, transitory or saving provision.

#### **46 Short title**

The short title of this Act is the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.

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VALID FROM 24/04/2017

VALID FROM 03/07/2017

## SCHEDULE 1

(introduced by section 4)

### SECTION 2: SPECIAL PROVISION IN RELATION TO PROVIDERS OF INFORMATION SOCIETY SERVICES

#### *Exceptions for mere conduits*

- 1
- (1) A service provider is not capable of being guilty of an offence under section 2 in respect of anything done in the course of providing so much of an information society service as consists in—
    - (a) the provision of access to a communication network, or
    - (b) the transmission in a communication network of information provided by a recipient of the service,if the transmission condition is satisfied.
  - (2) The transmission condition is satisfied if the service provider does not—
    - (a) initiate the transmission,
    - (b) select the recipient of the transmission, or
    - (c) select or modify the information contained in the transmission.
  - (3) For the purposes of sub-paragraph (1)—
    - (a) the provision of access to a communication network, and
    - (b) the transmission of information in a communication network,includes the automatic, intermediate and transient storage of the information transmitted as far as the storage is solely for the purpose of carrying out the transmission in the network.
  - (4) Sub-paragraph (3) does not apply if the information is stored for longer than is reasonably necessary for the transmission.

#### *Exception for caching*

- 2
- (1) This paragraph applies where an information society service consists in the transmission in a communication network of information provided by a recipient of the service.
  - (2) The service provider is not capable of being guilty of an offence under section 2 in respect of the automatic, intermediate and temporary storage of information so provided, if—
    - (a) the storage of the information is solely for the purpose of making more efficient the onward transmission of the information to other recipients of the service at their request, and
    - (b) the condition in sub-paragraph (3) is satisfied.

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- (3) The condition is that the service provider—
- (a) does not modify the information,
  - (b) complies with any conditions attached to having access to the information, and
  - (c) where sub-paragraph (4) applies, expeditiously removes the information or disables access to it.
- (4) This sub-paragraph applies if the service provider obtains actual knowledge that—
- (a) the information at the initial source of transmission has been removed from the network,
  - (b) access to it has been disabled, or
  - (c) a court or administrative authority has ordered the removal from the network of, or the disablement of access to, the information.

*Exception for hosting*

- 3 (1) A service provider is not capable of being guilty of an offence under section 2 in respect of anything done in the course of providing so much of an information society service as consists of the storage of information provided by a recipient of the service, if sub-paragraph (2) or (3) is satisfied.
- (2) This sub-paragraph is satisfied if the service provider had no actual knowledge when the information was provided that the provision of the information amounted to an offence under section 2.
- (3) This sub-paragraph is satisfied if, on obtaining such knowledge, the service provider expeditiously removed the information or disabled access to it.
- (4) Sub-paragraph (1) does not apply if the recipient of the service is acting under the authority or control of the service provider.

*Interpretation*

- 4 (1) In this schedule—
- “information society services”—
- (a) has the meaning given in Article 2(a) of the E-Commerce Directive (which refers to Article 1(2) of Directive [98/34/EC](#) of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations), and
  - (b) is summarised in recital 17 of the E-Commerce Directive as covering “any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service”,
- “recipient”, in relation to a service, means a person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible,
- “service provider” means a person providing an information society service.
- (2) In sub-paragraph (1), “the E-Commerce Directive” means Directive [2000/31/EC](#) of the European Parliament and of the Council of 8 June 2000 on certain legal

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aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

SCHEDULE 2

(introduced by section 43)

MINOR AND CONSEQUENTIAL MODIFICATIONS

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**Status:**

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**Changes to legislation:**

There are currently no known outstanding effects for the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.