

Draft Order laid before Parliament under paragraph 2(a) of Schedule 2 to the Human Rights Act 1998 for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2012 No.

CRIMINAL LAW, ENGLAND AND WALES

The Sexual Offences Act 2003 (Remedial) Order 2012

Made - - - -

Coming into force - -

The indefinite notification requirements in section 82(1) of the Sexual Offences Act 2003(1) have been declared(2) under section 4 of the Human Rights Act 1998(3) to be incompatible with a Convention right(4).

The Secretary of State considers that there are compelling reasons for proceeding by way of remedial order(5) to make such amendments to the Sexual Offences Act 2003 as she considers necessary to remove the incompatibility.

In accordance with paragraph 2(a) of Schedule 2 to the Human Rights Act 1998, a draft of this instrument was laid before Parliament and was approved by resolution of each House of Parliament, a document containing a draft of this instrument having previously been laid before Parliament in accordance with paragraph 3(1) of that Schedule.

Accordingly, the Secretary of State makes the following Order in the exercise of the powers conferred by section 10(2) of, and paragraph 1(1)(a), (c) and (d), (2) and (3) of Schedule 2 to, the Human Rights Act 1998:

Citation, commencement, extent and interpretation

1.—(1) This Order may be cited as the Sexual Offences Act 2003 (Remedial) Order 2012 and shall come into force 14 days after the day on which it is made.

(2) This Order extends to England and Wales only.

(3) In this Order, “the 2003 Act” means the Sexual Offences Act 2003.

(1) 2003 c. 42.

(2) By the Supreme Court in the case of *The Queen on the application of F and another v Secretary of State for the Home Department* [2010] UKSC 17.

(3) 1998 c. 42.

(4) See section 1(1) of the Human Rights Act 1998 for the definition of “the Convention rights” and section 21(1) of that Act for the definition of “the Convention”.

(5) See section 21(1) of the Human Rights Act 1998 for the definition of “remedial order”.

Amendment of the Sexual Offences Act 2003

2. The 2003 Act is amended in accordance with article 3.
3. After section 91 insert—

“91A Review of indefinite notification requirements: qualifying relevant offender

(1) A qualifying relevant offender may apply to the relevant chief officer of police for a determination that the qualifying relevant offender is no longer subject to the indefinite notification requirements (“an application for review”).

(2) A qualifying relevant offender means a relevant offender who, on the date on which he makes an application for review, is—

- (a) subject to the indefinite notification requirements; and
- (b) not subject to a sexual offences prevention order under section 104(1) or an interim sexual offences prevention order under section 109(3).

(3) The “indefinite notification requirements” mean the notification requirements of this Part for an indefinite period by virtue of—

- (a) section 80(1);
- (b) section 81(1); or
- (c) a notification order made under section 97(5).

(4) In this Part, the “relevant chief officer of police” means, subject to subsection (5), the chief officer of police for the police area in which a qualifying relevant offender is recorded as residing or staying in the most recent notification given by him under section 84(1) or 85(1).

(5) Subsection (6) applies if a qualifying relevant offender is recorded as residing or staying at more than one address in the most recent notification given by him under section 84(1) or 85(1).

(6) If this subsection applies, the “relevant chief officer of police” means the chief officer of police for the police area in which, during the relevant period, the qualifying relevant offender has resided or stayed on a number of days which equals or exceeds the number of days on which he has resided or stayed in any other police area.

(7) In subsection (6), “the relevant period” means the period of 12 months ending on the day on which the qualifying relevant offender makes an application for review.

91B Review of indefinite notification requirements: application for review and qualifying dates

(1) An application for review must be in writing and may be made on or after the qualifying date or, as the case may be, the further qualifying date.

(2) Subject to subsection (7), the qualifying date is—

- (a) where the qualifying relevant offender was 18 or over on the relevant date, the day after the end of the 15 year period beginning with the day on which the qualifying relevant offender gives the relevant notification; or
- (b) where the qualifying relevant offender was under 18 on the relevant date, the day after the end of the 8 year period beginning with the day on which the qualifying relevant offender gives the relevant notification.

(3) Subject to subsections (4) to (6), the further qualifying date is the day after the end of the 8 year period beginning with the day on which the relevant chief officer of police

makes a determination under section 91C to require a qualifying relevant offender to remain subject to the indefinite notification requirements.

(4) Subsection (5) applies if the relevant chief officer of police, when making a determination under section 91C to require a qualifying relevant offender to remain subject to the indefinite notification requirements, considers that the risk of sexual harm posed by a qualifying relevant offender is sufficient to justify a continuation of those requirements after the end of the 8 year period beginning with the day on which the determination is made.

(5) If this subsection applies, the relevant chief officer of police may make a determination to require a qualifying relevant offender to remain subject to the indefinite notification requirements for a period which may be no longer than the 15 year period beginning with the day on which the determination is made.

(6) If subsection (5) applies, the further qualifying date is the day after the end of the period determined under that subsection.

(7) The qualifying date must not be earlier than the expiry of the fixed period specified in a notification continuation order made in relation to a qualifying relevant offender in accordance with sections 88A to 88I(6).

(8) The relevant chief officer of police within 14 days of receipt of an application for review—

- (a) must give an acknowledgment of receipt of the application to the qualifying relevant offender, and
- (b) may notify a responsible body that the application has been made.

(9) Where a responsible body is notified of the application for review under subsection (8)(b) and holds information which it considers to be relevant to the application, the responsible body must give such information to the relevant chief officer of police within 28 days of receipt of the notification.

(10) In this section “the relevant notification” means the first notification which the relevant offender gives under section 83, 84 or 85 when he is first released after—

- (a) being remanded in or committed to custody by an order of a court in relation to the conviction for the offence giving rise to the indefinite notification requirements;
- (b) serving a sentence of imprisonment or a term of service detention in relation to that conviction;
- (c) being detained in hospital in relation to that conviction.

(11) For the purposes of this Part—

- (a) “responsible body” means—
 - (i) the probation trust for any area that includes any part of the police area concerned,
 - (ii) in relation to any part of the police area concerned for which there is no probation trust, each provider of probation services which has been identified as a relevant provider of probation services for the purposes of section 325 of the Criminal Justice Act 2003(7) by arrangements under section 3 of the Offender Management Act 2007(8),

(6) These sections were inserted into the 2003 Act by the Sexual Offences Act 2003 (Remedial) (Scotland) Order [S.S.I. 2011/45](#). These provisions have the effect of remedying the incompatibility in Scotland, and amend the 2003 Act insofar as it extends to Scotland only.

(7) [2003 c. 44](#).

(8) [2007 c. 21](#).

- (iii) the Minister of the Crown exercising functions in relation to prisons (and for this purpose “prison” has the same meaning as in the Prison Act 1952(9)), and
 - (iv) each body mentioned in section 325(6) of the Criminal Justice Act 2003, but as if the references in that subsection to the relevant area were references to the police area concerned;
- (b) “risk of sexual harm” means a risk of physical or psychological harm to the public in the United Kingdom or any particular members of the public caused by the qualifying relevant offender committing one or more of the offences listed in Schedule 3.

91C Review of indefinite notification requirements: determination of application for review

(1) The relevant chief officer of police must, within 6 weeks of the latest date on which any body to which a notification has been given under section 91B(8)(b) may give information under section 91B(9)—

- (a) determine the application for review, and
- (b) give notice of the determination to the qualifying relevant offender.

(2) For the purposes of the determination of an application for review under this section, a qualifying relevant offender must satisfy the relevant chief officer of police that it is not necessary for the purpose of protecting the public or any particular members of the public from sexual harm for the qualifying relevant offender to remain subject to the indefinite notification requirements.

(3) If the relevant chief officer of police determines under this section that the qualifying relevant offender should remain subject to the indefinite notification requirements, the notice of the determination must—

- (a) contain a statement of reasons for the determination, and
- (b) inform the qualifying relevant offender that he may appeal the determination in accordance with section 91E.

(4) If the relevant chief officer of police determines under this section that a qualifying relevant offender should not remain subject to the indefinite notification requirements, the qualifying relevant offender ceases to be subject to the indefinite notification requirements on the date of receipt of the notice of determination.

(5) The Secretary of State may by order amend the period in subsection (1).

91D Review of indefinite notification requirements: factors applying to determination under section 91C

(1) In determining an application for review under section 91C, the relevant chief officer of police must—

- (a) have regard to information (if any) received from a responsible body;
- (b) consider the risk of sexual harm posed by the qualifying relevant offender and the effect of a continuation of the indefinite notification requirements on the offender; and
- (c) take into account the matters listed in subsection (2).

- (2) The matters are—
- (a) the seriousness of the offence in relation to which the qualifying relevant offender became subject to the indefinite notification requirements;
 - (b) the period of time which has elapsed since the qualifying relevant offender committed the offence (or other offences);
 - (c) where the qualifying relevant offender falls within section 81(1), whether the qualifying relevant offender committed any offence under section 3 of the Sex Offenders Act 1997(10);
 - (d) whether the qualifying relevant offender has committed any offence under section 91;
 - (e) the age of the qualifying relevant offender at the qualifying date or further qualifying date;
 - (f) the age of the qualifying relevant offender at the time the offence referred to in paragraph (a) was committed;
 - (g) the age of any person who was a victim of any such offence (where applicable) and the difference in age between the victim and the qualifying relevant offender at the time the offence was committed;
 - (h) any assessment of the risk posed by the qualifying relevant offender which has been made by a responsible body under the arrangements for managing and assessing risk established under section 325 of the Criminal Justice Act 2003;
 - (i) any submission or evidence from a victim of the offence giving rise to the indefinite notification requirements;
 - (j) any convictions or findings made by a court (including by a court in Scotland, Northern Ireland or countries outside the United Kingdom) in respect of the qualifying relevant offender for any offence listed in Schedule 3 other than the one referred to in paragraph (a);
 - (k) any caution which the qualifying relevant offender has received for an offence (including for an offence in Northern Ireland or countries outside the United Kingdom) which is listed in Schedule 3;
 - (l) any convictions or findings made by a court in Scotland, Northern Ireland or countries outside the United Kingdom in respect of the qualifying relevant offender for any offence listed in Schedule 5 where the behaviour of the qualifying relevant offender since the date of such conviction or finding indicates a risk of sexual harm;
 - (m) any other submission or evidence of the risk of sexual harm posed by the qualifying relevant offender;
 - (n) any evidence presented by or on behalf of the qualifying relevant offender which demonstrates that the qualifying relevant offender does not pose a risk of sexual harm; and
 - (o) any other matter which the relevant chief officer of police considers to be appropriate.

(3) In this section, a reference to a conviction, finding or caution for an offence committed in a country outside the United Kingdom means a conviction, finding or caution for an act which—

- (a) constituted an offence under the law in force in the country concerned, and

- (b) would have constituted an offence listed in Schedule 3 or Schedule 5 if it had been done in any part of the United Kingdom.

91E Review of indefinite notification requirements: appeals

(1) A qualifying relevant offender may appeal against a determination of the relevant chief officer of police under section 91C.

(2) An appeal under this section may be made by complaint to a magistrates' court within the period of 21 days beginning with the day of receipt of the notice of determination.

(3) A qualifying relevant offender may appeal under this section to any magistrates' court in a local justice area⁽¹¹⁾ which includes any part of the police area for which the chief officer is the relevant chief officer of police.

(4) If the court makes an order that a qualifying relevant offender should not remain subject to the indefinite notification requirements, the qualifying relevant offender ceases to be subject to the indefinite notification requirements on the date of the order.

91F Review of indefinite notification requirements: guidance

(1) The Secretary of State must issue guidance to relevant chief officers of police in relation to the determination by them of applications made under section 91B.

(2) The Secretary of State may, from time to time, revise the guidance issued under subsection (1).

(3) The Secretary of State must arrange for any guidance issued or revised under this section to be published in such manner as the Secretary of State considers appropriate."

Home Office
Date

Name
Parliamentary Under-Secretary of State

(11) Section 8 of the Courts Act 2003 (c. 39) introduced new provision in relation to local justice areas.

EXPLANATORY NOTE

(This note is not part of the Order)

This Order amends the Sexual Offences Act 2003 (“the 2003 Act”) to remedy an incompatibility with a Convention right in relation to the indefinite notification requirements contained in section 82(1) of the 2003 Act. This Order extends to England and Wales only.

In the case of *R (on the application of F (by his litigation friend F)) and Thompson (FC) v Secretary of State for the Home Department* [2010] UKSC 17 the Supreme Court of the United Kingdom on 21st April 2010 made a declaration under section 4 of the Human Rights Act 1998 that the “indefinite notification requirements in section 82(1) of the Sexual Offences Act 2003 are incompatible with article 8 of the European Convention on Human Rights in so far as they do not contain any provision for the review of the justification for continuing the requirements in individual cases.”

Article 3 of this Order inserts sections 91A to 91G into Part 2 of the 2003 Act. These provisions provide a mechanism for a relevant offender to apply to the police for a review of the requirement that the relevant offender remain subject to the indefinite notification requirements which apply by virtue of section 82(1) of the 2003 Act.

Section 91A makes provision for a qualifying relevant offender to apply to the relevant chief officer of police for a determination that the qualifying relevant offender ceases to remain subject to the indefinite notification requirements. This section defines a “qualifying relevant offender” and the “relevant chief officer of police”. A qualifying relevant offender (“the offender”) is a relevant offender (defined in section 80(1) of the 2003 Act as a person who is subject to the notification requirements under Part 2 of the 2003 Act) who is subject to the indefinite notification requirements, and who is not subject to a sexual offences prevention order (under section 104(1) of the 2003 Act) or an interim sexual offences prevention order (under section 109(3) of the 2003 Act). The relevant chief officer of police is the chief officer for the police area in which the qualifying relevant offender is recorded as residing or staying in the most recent notification given by him (under sections 84(1) or 85(1) of the 2003 Act). If the offender resides or stays at more than one address, the relevant chief officer of police is the chief officer for the area in which the offender has, during the preceding 12 months, resided or stayed for longer than in any other area.

Section 91B enables an offender to apply for a review on or after the qualifying date or further qualifying date, and prescribes the initial steps which the police must take on receipt of the application for review. This section defines the “qualifying date” as a date after the end of the 15 year period beginning with the day on which the offender gives the relevant notification, where the offender is aged 18 or over on the relevant date. The period is 8 years if the offender was under 18 on the relevant date.

“Relevant notification” is defined in subsection (10) and means the first notification given by the offender (whether under section 83, 84 or 85 of the 2003 Act) following the first occasion on which the offender is released from detention (the forms of detention are set out in subsection (10)(a) to (c)) to which the offender is subject as a result of the conviction for the offence giving rise to the indefinite notification requirements.

“Relevant date” is defined in section 82(6) of the 2003 Act. If the offender has been made the subject of a notification continuation order under sections 88A to 88I of the 2003 Act (these sections contain provision for the review of indefinite notification requirements in relation to an offender in Scotland), the qualifying date cannot be earlier than the date of expiry of a notification continuation order made in Scotland.

The relevant chief officer of police (“the police”), on receipt of an application for review, must within 14 days give the offender an acknowledgment of receipt and may notify a responsible body that the application has been made. A “responsible body” is defined, in relation to the police area concerned, as the local probation board (or relevant provider of probation services), the Minister of the Crown exercising prison functions and the bodies mentioned in section 325(6) of the Criminal Justice Act 2003. A responsible body, if it holds relevant information, must give such information to the police within 28 days of being notified of the application.

Section 91B also defines the “further qualifying date” as the day after the end of the 8 year period beginning with the day on which the police determine an application for review under section 91C, but reserves to the police a power to require the offender to remain subject to the indefinite notifications for a period which may be no longer than the 15 year period beginning with the day on which the police determine an application for review under section 91C. The police can only exercise this power if the police consider that the risk of sexual harm posed by the offender is sufficient to justify a continuation of the indefinite notification requirements after the end of the 8 year period described above. “Risk of sexual harm” is defined in subsection (10) as meaning a risk of physical or psychological harm to the public or a part of the public in the United Kingdom caused by the offender committing an offence under Schedule 3 to the 2003 Act.

Section 91C prescribes the steps which the police must take following receipt of an application and the basis on which the application is determined. The police must determine the application within 6 weeks of the latest date on which any responsible authority may provide information under section 91B(9), and give notice of the determination to the offender. Unless the offender satisfies the police that it is not necessary for the purpose of protecting the public for him to remain subject to the indefinite notification requirements, the police will determine that those requirements will continue to apply. If so, the police must include with the notice of determination a statement of reasons and inform the offender of his right of appeal.

An offender ceases to be subject to the indefinite notification requirements on the date of receipt of a notice of determination under this section.

Section 91C(5) enables the Secretary of State to make an order amending the period specified in section 91C(1), which governs the time by which the police must determine an application for review.

Section 91D prescribes the facts and matters which the police must consider in determining an application for review under section 91C. The police must have regard to any information received from a responsible body, consider the risk of sexual harm posed by the offender and the effect on him of a continuation of the notification requirements, and take into account the factors prescribed in subsection (2). These factors relate (amongst other things) to the circumstances of the offence which gave rise to the indefinite notification requirement to which the offender is subject, any assessment of the risk posed by the offender prepared by any responsible authority, evidence from a victim of the offence which gave rise to the indefinite notification requirements, a conviction or other finding made by a court in England and Wales in relation to the subsequent commission of an offence under Schedule 3 to the 2003 Act by the offender or a conviction or finding by a court in another country in relation to an equivalent offence.

Section 91E sets out a right of appeal in respect of the determination by the police that an offender must remain subject to the indefinite notification requirements or that the offender may not make a further application for review for a period specified in section 91B(5). The appeal may be made to the magistrates’ court by complaint within 21 days of the receipt of the notice of determination.

Section 91F requires the Secretary of State to issue guidance to the police in relation to their determination of applications for review. The Secretary of State may issue revised guidance from time to time, and any guidance must be published in a manner which the Secretary of State considers to be appropriate.

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Draft Legislation: *This is a draft item of legislation. This draft has since been made as a UK Statutory Instrument: The Sexual Offences Act 2003 (Remedial) Order 2012 No. 1883*