

*Order made by the Scottish Ministers, laid before the Scottish Parliament under section 14(2)(b) of the Convention Rights (Compliance) (Scotland) Act 2001 for approval by resolution of the Scottish Parliament within 120 days beginning with the date on which the Order was made, not taking into account periods of dissolution or recess for more than 4 days.*

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## SCOTTISH STATUTORY INSTRUMENTS

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**2010 No. 370**

### **CRIMINAL LAW**

#### **The Sexual Offences Act 2003 (Remedial) (Scotland) Order 2010**

*Made* - - - - *at 2.00 p.m. on 25th*  
*Laid before the Scottish* *October 2010*  
*Parliament* - - - - *25th October 2010*  
*Coming into force in accordance with article 1(1)*

The Scottish Ministers make the following remedial Order in exercise of the powers conferred by section 12(1) and (3) of the Convention Rights (Compliance) (Scotland) Act 2001<sup>(1)</sup> (“the 2001 Act”) and all other powers enabling them to do so.

The Scottish Ministers consider the provision made by this remedial Order to be necessary or expedient in consequence of Part 2 of the Sexual Offences Act 2003<sup>(2)</sup>, so far as making a person subject to the notification requirements of that Part for an indefinite period has been declared to be incompatible with a Convention right<sup>(3)</sup>.

In accordance with section 12(2) of the 2001 Act they are of the opinion that there are compelling reasons for making a remedial order as distinct from taking any other action.

In accordance with section 14(1) of the 2001 Act it appears to them that, for reasons of urgency, it is necessary to make a remedial order without following the procedure under section 13(2) to (4) of the 2001 Act.

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(1) 2001 asp 7.

(2) 2003 c.42. The functions of the Secretary of State were transferred to the Scottish Ministers by virtue of section 142(6) of the Sexual Offences Act 2003 and section 53 of the Scotland Act 1998 (c.46).

(3) The “Convention rights” has the meaning given by section 1 of the Human Rights Act 1998 (c.42). 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, judgment 21st April 2010, the Supreme Court made a declaration of incompatibility under section 4 of the Human Rights Act 1998 that the indefinite notification requirements in section 82(1) of the Sexual Offences Act 2003 were incompatible with Article 8 of the Convention because they did not contain any mechanism for the review of the justification for the continuing of the requirements in individual cases.

### **Citation, commencement, extent and interpretation**

1.—(1) This Order may be cited as the Sexual Offences Act 2003 (Remedial) (Scotland) Order 2010 and comes into force at 1700 hours on 25th October 2010.

(2) This Order extends to Scotland only.

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

### **Amendment of the 2003 Act**

2. The 2003 Act is amended in accordance with articles 3 and 4.

3. After section 88 insert—

#### ***“88A Review of indefinite notification requirements: applicable persons***

3.—(1) Sections 88B to 88H apply to—

- (a) a person who, on or after the date on which this section comes into force, becomes subject to the notification requirements of this Part for an indefinite period by virtue of section 80(1) or a notification order made under section 97(5); and
- (b) a person who immediately before that date was subject to the notification requirements of this Part for an indefinite period by virtue of—
  - (i) section 80(1);
  - (ii) section 81(1); or
  - (iii) a notification order made under section 97(5).

(2) A person who falls within subsection (1)(a) or (b) is referred to in sections 88B to 88G as a “relevant sex offender”.

#### ***88B Review of indefinite notification requirements: date of discharge and further date of discharge***

(1) For the purposes of this Part, the date of discharge is—

- (a) where the relevant sex offender was aged 18 or over on the relevant date, the date falling 15 years after that date;
- (b) where the relevant sex offender was aged under 18 on the relevant date, the date falling 8 years after that date.

(2) In determining the date of discharge under subsection (1), there is to be disregarded any time when the relevant sex offender was—

- (a) remanded in or committed to custody by order of a court;
- (b) serving a sentence of imprisonment or a term of service detention;
- (c) detained in hospital; or
- (d) outside the United Kingdom,

before the relevant sex offender first notified information to the police under section 2(1) of the Sex Offenders Act 1997 or section 83(1) of this Part.

(3) Where a notification continuation order made under this Part has effect in respect of the relevant sex offender, for the purposes of this Part the further date of discharge is the date of expiry of the fixed period specified in that order.

(4) In this section and section 88D “relevant date”—

- (a) in relation to a relevant sex offender who is subject to the notification requirements of this Part for an indefinite period by virtue of section 80(1) or 81(1), has the meaning applicable to that offender specified in section 82(6)(a) to (c);
- (b) in relation to a relevant sex offender who is subject to the notification requirements of this Part for an indefinite period by virtue of a notification order made under section 97(5), has the meaning applicable to that offender specified in section 98(2).

**88C Review of the indefinite notification requirements: procedure and grounds**

- (1) The relevant chief constable must no later than the date of discharge—
  - (a) make a notification continuation order in respect of the relevant sex offender; or
  - (b) notify the relevant sex offender that the offender ceases to be subject to the notification requirements of this Part on the date of discharge.
- (2) A notification continuation order is an order making the relevant sex offender subject to the notification requirements of this Part for a fixed period of not more than 15 years from the date which would, but for the order, have been the date of discharge.
- (3) The relevant chief constable may make a notification continuation order only if satisfied, on the balance of probabilities, that the relevant sex offender poses a risk of sexual harm to the public, or any particular members of the public, in the United Kingdom.
- (4) In deciding whether to make a notification continuation order, the relevant chief constable must take into account—
  - (a) the seriousness of the offence (or offences)—
    - (i) of which the relevant sex offender was convicted;
    - (ii) of which the relevant sex offender was found not guilty by reason of insanity;
    - (iii) in respect of which the relevant sex offender was found to be under a disability and to have done the act charged; or
    - (iv) in respect of which the relevant sex offender was cautioned in England and Wales or Northern Ireland,which made the relevant sex offender subject to the notification requirements of this Part for an indefinite period;
  - (b) the period of time which has elapsed since the relevant sex offender committed the offence (or offences);
  - (c) where the relevant sex offender falls within section 88A(1)(b)(ii), whether the relevant sex offender committed any offence under section 3 of the Sex Offenders Act 1997;
  - (d) whether the relevant sex offender has committed any offence under section 91 of this Act;
  - (e) the age of the relevant sex offender at the time of the decision;
  - (f) the age of the relevant sex offender at the time the offence (or offences) referred to in paragraph (a) was (or were) 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 relevant sex offender at the time the offence was committed;
  - (h) any convictions or findings made by a court in respect of the relevant sex offender for any other offence listed in Schedule 3;
  - (i) any caution which the relevant sex offender has received for an offence in England and Wales or Northern Ireland which is listed in Schedule 3;

- (j) whether any criminal proceedings for any offences listed in Schedule 3 have been instituted against the relevant sex offender but have not concluded;
  - (k) any assessment of the risk posed by the relevant sex offender which has been made by the responsible authorities under the joint arrangements for managing and assessing risk established under section 10 of the Management of Offenders etc. (Scotland) Act 2005;
  - (l) any other submission or evidence of the risk of sexual harm posed by the relevant sex offender to the public, or any particular members of the public, in the United Kingdom;
  - (m) any submission or evidence presented by or on behalf of the relevant sex offender which demonstrates that the relevant sex offender does not pose a risk of sexual harm to the public, or any particular members of the public, in the United Kingdom; and
  - (n) any other matter which the relevant chief constable considers to be appropriate.
- (5) A notification continuation order must state—
- (a) the reasons why the order was made; and
  - (b) the reasons for the determination of the fixed period in the order.
- (6) A notification continuation order must be notified to the relevant sex offender by—
- (a) the relevant chief constable sending a copy of the order to the relevant sex offender by registered post or by the recorded delivery service (an acknowledgement or certificate of delivery of a copy so sent, issued by the Post Office, being sufficient evidence of the delivery of the copy on the day specified in the acknowledgement or certificate); or
  - (b) a constable serving a copy of the order on the relevant sex offender.
- (7) In this section—
- “sexual harm” means physical or psychological harm caused by the relevant sex offender doing anything which would constitute an offence listed in Schedule 3 if done in any part of the United Kingdom; and
- “responsible authorities” has the meaning given by section 10(7) of the Management of Offenders etc. (Scotland) Act 2005.
- (8) In this section and sections 88D to 88G, “relevant chief constable” means the chief constable of the police force for the police area in which the relevant sex offender resides.

**88D Review of indefinite notification requirement: transitional arrangements**

- (1) This section applies to a relevant sex offender falling within section 88A(1)(b)(ii) if the person—
- (a) was aged under 18 on the relevant date; and
  - (b) after disregarding any time referred to in subsection (2), has been subject to the notification requirements of Part 1 of the Sex Offenders Act 1997 and this Part for a total period of at least 8 years on the date on which this section comes into force.
- (2) That time is any time during which the relevant sex offender was—
- (a) remanded in or committed to custody by order of the court;
  - (b) serving a sentence of imprisonment or a term of service detention;
  - (c) detained in hospital; or
  - (d) outside the United Kingdom,
- before the relevant sex offender first notified information to the police under section 2(1) of the Sex Offenders Act 1997.
- (3) The relevant chief constable must no later than the applicable date—

- (a) make a notification continuation order in respect of the relevant sex offender; or
  - (b) notify the relevant sex offender that the offender ceases to be subject to the notification requirements of this Part on the applicable date.
- (4) Section 88C(2) to (8) applies in relation to this section, but a reference to the date of discharge is to be read as a reference to the applicable date.
- (5) In this section, the “applicable date” is the date falling 3 months after the date on which this section comes into force.

***88E Review of indefinite notification requirements: further review***

- (1) Where a notification continuation order has been made, the relevant chief constable must no later than the further date of discharge—
- (a) make another notification continuation order in respect of the relevant sex offender; or
  - (b) notify the relevant sex offender that the offender ceases to be subject to the notification requirements of this Part on the further date of discharge.
- (2) Section 88C(2) to (8) applies in relation to this section, but a reference to the date of discharge is to be read as a reference to the further date of discharge.

***88F Review of the indefinite notification requirements: application to a sheriff***

- (1) Where a relevant chief constable fails to comply with section 88C(1), 88D(3) or 88E(1), the relevant sex offender may make an application to a sheriff for an order that the offender is no longer subject to the notification requirements of this Part.
- (2) An application under subsection (1) is to be made by summary application to the sheriff in whose sheriffdom the relevant sex offender resides.
- (3) On an application under subsection (1), the sheriff may—
- (a) make the order sought in the application; or
  - (b) make a notification continuation order in respect of the relevant sex offender.
- (4) Section 88C(2) to (5) and (7) applies in relation to the making of a notification continuation order under this section, but—
- (a) a reference to the relevant chief constable is to be read as a reference to the sheriff;
  - (b) if an application under subsection (1) is made in relation to the failure of the relevant chief constable to comply with section 88D(3), the reference to the date of discharge in section 88C(2) is to be read as a reference to the applicable date; and
  - (c) if an application under subsection (1) is made in relation to the failure of the relevant chief constable to comply with section 88E(1), the reference to the date of discharge in section 88C(2) is to be read as a reference to the further date of discharge.
- (5) The relevant chief constable and the relevant sex offender may appear or be represented at any hearing in respect of the application.
- (6) Where an application under subsection (1) is determined, the sheriff clerk must send a copy of the interlocutor, and where made a copy of the notification continuation order, to the relevant sex offender and the relevant chief constable.
- (7) The copy of the interlocutor, and where made the copy of the notification continuation order, is sent in accordance with subsection (6) if—
- (a) sent by registered post or by the recorded delivery service (an acknowledgement or certificate of delivery of a copy so sent, issued by the Post Office, being sufficient evidence of the delivery of the copy on the day specified in the acknowledgement or certificate); or

(b) personally served on the relevant sex offender and the relevant chief constable.

(8) The relevant sex offender remains subject to the notification requirements of this Part until the matter is finally determined as mentioned in section 88G(10).

**88G Review of indefinite notification requirements: appeals**

(1) The decision of the relevant chief constable—

- (a) to make a notification continuation order; and
- (b) setting the fixed period of the notification continuation order,

may be appealed by the relevant sex offender within 21 days after the date specified in subsection (3).

(2) An appeal under subsection (1) is to be made by summary application to the sheriff in whose sheriffdom the relevant sex offender resides.

(3) The date is—

- (a) where the appeal is brought against the decision of the relevant chief constable made under section 88C(1), the date of discharge;
- (b) where the appeal is brought against the decision of the relevant chief constable made under section 88D(1), the applicable date; or
- (c) where the appeal is brought against the decision of the relevant chief constable made under section 88E(1), the further date of discharge.

(4) The decision of a sheriff—

- (a) on an application made under section 88F(1);
- (b) on appeal made under subsection (1); and
- (c) in relation to the fixed period of the notification continuation order,

may be appealed by the relevant sex offender or the relevant chief constable to the sheriff principal within 21 days of the date of that decision.

(5) On an appeal under this section, the sheriff or the sheriff principal may—

- (a) uphold or quash the decision of the relevant chief constable or, as the case may be, the sheriff;
- (b) make a notification continuation order; or
- (c) vary the fixed period in that order.

(6) Section 88C(3) to (5) apply in relation to the making of a notification continuation order under this section but a reference to the relevant chief constable is to be read as a reference to the sheriff or, as the case may be, sheriff principal.

(7) Where an appeal under this section is finally determined, the sheriff clerk must send a copy of the interlocutor, and where made a copy of the notification continuation order, to the relevant sex offender and the relevant chief constable.

(8) The copy of the interlocutor, and where made the copy of the notification continuation order, shall be sent in accordance with subsection (7) if—

- (a) sent by registered post or by the recorded delivery service (an acknowledgement or certificate of delivery of a copy so sent, issued by the Post Office, being sufficient evidence of the delivery of the copy on the day specified in the acknowledgement or certificate); or
- (b) personally served on the relevant sex offender and relevant chief constable.

(9) The relevant sex offender remains subject to the existing notification requirements of this Part until the matter is finally determined as mentioned in subsection (10).

(10) The matter is finally determined—

- (a) where it is decided that a relevant sex offender should cease to be subject to the notification requirements of this Part, or the decision to make a notification continuation order is quashed, on the expiry of the period of 21 days referred to in subsection (4) without an appeal being taken;
- (b) where a notification continuation order is made, or a decision to make such an order is upheld on appeal, on the expiry of the period of 21 days referred to in subsection (1) or (4) without an appeal being taken; or
- (c) where an appeal is taken—
  - (i) on the disposal of the appeal; or
  - (ii) on its being abandoned.

#### **88H Review of indefinite notification requirements: power to amend periods**

The Secretary of State may by order amend—

- (a) the periods specified in sections 88B(1)(a) and (b); and
- (b) the fixed period specified in section 88C(2).

#### **88I Discharge from indefinite notification requirements: England, Wales and Northern Ireland**

(1) A relevant offender who is, under the relevant legislation, discharged from the notification requirements of this Part by a court, person or body in England and Wales or Northern Ireland is, by virtue of the discharge, also discharged from the notification requirements of this Part as it applies to Scotland.

(2) In subsection (1) “relevant legislation” means legislation which makes provision equivalent to that made by sections 88A to 88H and this section for a relevant offender who is subject to the notification requirements of this Part as it applies to England and Wales or, as the case may be, Northern Ireland for an indefinite period to be discharged from those notification requirements.”.

#### **Consequential amendments to the 2003 Act**

4.—(1) In section 133 (Part 2: general interpretation), in subsection (1)—

(a) in the appropriate place alphabetically insert the following:—

““applicable date” has the meaning given by section 88D(5)”;

““date of discharge” has the meaning given by section 88B(1)”;

““further date of discharge” has the meaning given by section 88B(3)”;

““notification continuation order” has the meaning given by section 88C(2)”;

(b) in the definition of “relevant date”, after “sections” insert “88B”.

(2) In section 138 (orders and regulations), in subsection (2), after “86” insert “, 88H”.

(3) Until the coming into force of section 102(6) of the Criminal Justice and Licensing (Scotland) Act 2010, section 138 has effect as if, after subsection (3), there were inserted—

“(4) An order under section 88H may—

- (a) make different provision for different purposes,

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- (b) include supplementary, incidental, consequential, transitional, transitory or saving provisions.”.

St Andrew’s House,  
Edinburgh  
At 2.00 p.m. on 25th October 2010

*KENNY MACASKILL*  
A member of the Scottish Executive

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## EXPLANATORY NOTE

*(This note is not part of the Order)*

This Order makes amendments to the Sexual Offences Act 2003 (“the 2003 Act”) to remove the incompatibility of the indefinite notification period in section 82(1) of that Act with a Convention right. This Order extends to Scotland 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 (21st April 2010) the Supreme Court of the United Kingdom made a declaration under section 4 of the Human Rights Act 1998 that—

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“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 because they do not contain any mechanism for the review of the justification for continuing the requirements in individual cases.”

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In order to remove the incompatibility, article 3 of this Order inserts sections 88A to 88I into Part 2 of the 2003 Act. Those sections provide a mechanism for the periodic review of the justification for continuing the notification requirements in individual cases.

Section 88A of the 2003 Act makes it clear that provision made for a review of the indefinite notification requirements in sections 88B to 88H will apply to any person who is notifying indefinitely on the date on which this Order comes into force (25th October 2010 at 17:00 hours) or to any person who is made subject to the notification requirements for an indefinite period on or after that date (a “relevant sex offender”).

Section 88B of the 2003 Act sets out what the date of discharge and further date of discharge are for the purpose of sections 88A to 88H. For a relevant sex offender who was aged 18 or over at the time of conviction or other finding, the date of discharge will be 15 years from the date of conviction or other finding, after disregarding any time referred to in subsection (2). For a relevant sex offender who was aged under 18 on the date of conviction or other finding (“young sex offenders”) the date of discharge will be 8 years from the date of conviction or other finding, after disregarding any time specified in subsection (2). This means that in the majority of cases the 15 or 8 year review period will commence after the relevant offender has been released from prison, detention in hospital, etc.

Section 88C of the 2003 Act sets out how the first review carried out by the relevant chief constable will operate. The relevant chief constable will have to decide, before the expiry of the applicable 15 or 8 year review period, whether a relevant sex offender should remain subject to the notification requirements. If the decision is that the relevant sex offender should cease to be subject to the notification requirements, the relevant sex offender will cease to be subject to those requirements on the date of discharge. If the relevant chief constable is satisfied that the relevant sex offender poses a risk of sexual harm, a notification continuation order will be made for a fixed period. Subsection (7) provides a definition of sexual harm. A notification continuation order will set out how long a relevant sex offender has to notify for before getting a further right of review. This can be imposed for a fixed period of up to 15 years.

Section 88D of the 2003 Act applies to young sex offenders who have already been subject to the notification requirements for a total period of at least 8 years at the date on which the remedial order comes into force. The notification requirements were originally contained in Part 1 of the Sex Offenders Act 1997 (“the 1997 Act”) before being repealed and re-enacted with amendments in Part

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2 of the 2003 Act. Part 1 of the 1997 Act was commenced on 1st September 1997. Therefore, it is possible that a young sex offender may have been notifying for a total of 8 years just before or on the date on which this Order comes into force. As with section 88C, the relevant chief constable will be required to make a decision as to whether a young sex offender should cease to be subject to the notification requirements and intimate that decision to the relevant sex offender within 3 months from the date on which this Order comes into force.

Section 88E of the 2003 Act applies in circumstances in which a notification continuation order has been made in relation to a relevant sex offender. In such circumstances, the relevant chief constable will be required to carry out a further review as to whether the relevant sex offender should remain subject to the notification requirements, and notify that offender of the decision before the end of the fixed period specified in the notification continuation order.

Section 88F of the 2003 Act provides that if the relevant chief constable has not completed a review under section 88C, 88D or 88E by the required date, the relevant sex offender can make an application to a sheriff to no longer be subject to the notification requirements. A sheriff will consider the application and decide whether the relevant sex offender should cease to be subject to the notification requirements. The test for reaching a decision will be exactly the same as the test which a chief constable has to apply, which is whether the relevant sex offender poses a risk of sexual harm. A sheriff can impose a notification continuation order for a fixed period of not more than 15 years.

Section 88G of the 2003 Act provides that the decision of the relevant chief constable to make a notification continuation order, and the duration of that order, can be appealed to a sheriff. It sets out how the review mechanism will operate. The decision of a sheriff to grant or refuse an appeal can be appealed to the sheriff principal whose decision is final.

An appeal of any decision must be brought within 21 days. An appeal can be brought against the decision to make a notification continuation order, as well as or separately, against the fixed period which that order imposes. Subsections (9) and (10) make it clear that a relevant sex offender will remain subject to the existing notification requirements of this Part until the decision as to whether he or she should cease to be subject to this regime is finally determined. This includes the determination of any appeals against the decision of the relevant chief constable or, as the case may be, the sheriff.

Section 88H provides that the Scottish Ministers may by order, subject to affirmative procedure, amend the 15 or 8 year periods in section 88B(1) or the maximum period which a notification continuation order can be made specified in section 88C(2).

Article 4 of this Order makes consequential amendments to sections 133 and 138 of the 2003 Act.

This Order will come into force at 17:00 hours on 25th October 2010 pursuant to the procedure prescribed in section 14 of the Convention Rights (Compliance) (Scotland) Act 2001. This Order will cease to have effect if, at the end of the period of 120 days beginning with the day on which this Order was made, a resolution has not been passed by the Scottish Parliament approving this Order.