

POLICY NOTE

THE ABUSIVE BEHAVIOUR AND SEXUAL HARM (SCOTLAND) ACT 2016 (COMMENCEMENT NO. 3, TRANSITIONAL AND SAVING PROVISIONS) REGULATIONS 2023

SSI 2023/51 (C. 5)

The above instrument was made in exercise of the powers conferred by section 45(2) and (3) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016¹ (“the Act”). The instrument is subject to the “Laid – no Procedure” process under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010².

These Regulations are necessary to commence the provisions in the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, which are not yet in force, pertaining to Sexual Harm Prevention Orders (SHPOs) and Sexual Risk Orders (SROs).

Policy Objectives

Background

These specific provisions will simplify and rationalise the existing system of criminal and civil orders available to protect communities from those who may commit sexual offences or pose a risk to others arising from sexual conduct. These provisions form an essential part of the Scottish Government’s approach to protecting the public from sexual harm. This policy note supplements the policy memorandum for the Act previously produced.

At the same time the UK Government are now intending to commence provisions in the Police, Crime, Sentencing and Courts Act 2022³, which affect the cross-border operation of these orders. Commencing this SSI will ensure the alignment of procedures for the effective cross-border policing of these orders.

Under regulation 2 of the Regulations, these provisions will come into force on 31 March 2023.

Transitional arrangements

Section 40 of the 2016 Act provides provisions to facilitate the transition between the existing regime of orders - Sexual Offences Prevention Orders (SOPOs), Foreign Travel Orders (FTOs) and Risk of Sexual Harm Orders (RSHOs) - and the new regime (SHPOs and SROs).

¹ 2016 asp 22.

² 2010 asp 10.

³ 2022 c. 32.

Amongst other things, this provides that the repeal of the previous orders made by section 39 of the 2016 Act does not apply to an existing order made or applied for before the commencement of the provisions in the 2016 Act, or anything done in connection with such orders or applications. Therefore, for existing orders (SOPOs, interim SOPOs, FTOs, RSHOs or interim RSHOs) and for those same orders applied for prior to the commencement date, even if made after, the main provisions of the current legislation are preserved, including in relation to the power to vary (although with constraints on varying *duration* as set out below).

Section 40(3) prevents any variation of existing SOPOs, interim SOPOs, FTOs, RSHOs or interim RSHOs that would extend their duration and provides that 5 years after the new regime of orders comes into force, the provisions in any SOPO, interim SOPO, FTO, RSHO or interim RSHO which continue to have effect will be treated as if they were provisions in the new corresponding order. Accordingly, these existing orders can remain extant for another 5 years (when they are effectively converted to the new orders) and they cannot be varied so as to extend the period of the order or any provision contained in it, but can be varied in all other respects.

Additionally, these Regulations contain a transitional provision which provides that where a court makes a SHPO or a SRO in relation to a person already subject to one of the earlier corresponding orders (SOPO, RSHO, or a FTO), the earlier order ceases to have effect. This will prevent any final order of one of the existing types continuing to linger on in effect potentially for several years when there has been the opportunity to replace it completely in a corresponding new order, and will facilitate quicker expiry of these orders.

These Regulations also contain a number of saving provisions in respect of amendments and repeals made by schedule 2 of the Act, to preserve the previous law in relation to applications for previous types of order made before 31 March 2023 and individual orders of previous types which continue to have effect under the main saving provision in section 40 of the Act. The saving provisions are necessary because section 40 only disapplies the repeals made by section 39, not those made in schedule 2- they ensure that the whole of the relevant previous law continues to apply to existing orders which remain in effect under section 40.

Consultation

Prior to the introduction of the Abusive Behaviour and Sexual Harm (Scotland) Bill, this policy was developed in discussion with Police Scotland. From a child protection perspective, aspects of these measures are also included in the Scottish Government's National Action Plan to Tackle Child Sexual Exploitation (November 2014). The Ministerial Working Group overseeing implementation of the plan also highlighted the need to see progress in this area.

Specifically in terms of these commencement Regulations, justice partners have been kept abreast of developments, including timescales for commencement. In addition, Police Scotland, Scottish Courts and Tribunal Service (SCTS), and Crown Office and Procurator Fiscal Service (COPFS), have all been given an opportunity to contribute to the accompanying non-statutory practice guidance to the Regulations developed by the Scottish Government.

Impact Assessments

At the time of the Bill's introduction, a number of impact assessments were carried out. It was considered that the Bill (now an Act) would have no impact on island and rural communities and no negative impact on sustainable development. An Equality Impact Assessment (EQIA) was carried out and the results were published on the Scottish Government's website.

In relation to the provisions contained within the Act, the Scottish Government considers that these do not discriminate on the basis of the protected characteristics namely age, maternity and pregnancy, marriage and civil partnership, gender reassignment, race, disability, religion and belief, sex or sexual orientation.

The impact of the new sexual orders on human rights was considered at the time of introduction. It was recognised that both orders could potentially interfere with a person's Article 8 right to respect for private life.

However, in making the order, the court must act compatibly with Convention Rights. The court may make an order only if it is satisfied that it is necessary to do so for the purpose of protecting the public from sexual harm.

Financial Effects

At the Bill's introduction the Scottish Government was satisfied that the Bill has no significant impact on businesses and other non-public bodies.

Scottish Government
Directorate for Justice
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