

**EXPLANATORY MEMORANDUM TO
THE SEXUAL OFFENCES ACT 2003 (REMEDIAL) ORDER 2012**

2012 No.

1. This explanatory memorandum has been prepared by the Home Office (“the Department”) and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1. This order amends the Sexual Offences Act 2003 (“the 2003 Act”) to remedy an incompatibility with a Convention right in the provision for the indefinite notification requirements in section 82(1) of the 2003. In *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 made a declaration under section 4 of the Human Rights Act 1998 (“the 1998 Act”) on 21 April 2010 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.”

2.2 This order introduces a mechanism by which a person subject to indefinite notification requirements under the 2003 Act can apply for a review and determination that those requirements shall cease.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 Section 82(1) of the 2003 Act prescribes the periods during which a person convicted of an offence listed in Schedule 3 to that Act must comply with the notification requirements set out in Part 2 of that Act (in particular, sections 83 to 85). A person who, in respect of the offence, is sentenced to imprisonment for (amongst other things) a term of 30 months or more is subject to notification requirements for an indefinite period.

4.2 In the absence of any mechanism for reviewing the indefinite notification requirement, the Supreme Court declared that this requirement was incompatible with a Convention right. This order is

being made under section 10 of the 1998 Act so as to introduce a mechanism for enabling a person to apply for a review of the indefinite notification requirements to which that person is subject.

- 4.3 This order will be the sixth remedial order to be made under section 10 of the 1998 Act, and the Secretary of State considers that the conditions in that section are satisfied.

5. Territorial Extent and Application

- 5.1 This order applies to England and Wales.
- 5.2 Criminal law (including the law governing aspects of the notification regime to which persons convicted of sex offences are subject) is a devolved matter in Scotland and Northern Ireland. In response to the decision of the Supreme Court, Scotland has taken legislative steps to remedy the incompatibility; Northern Ireland is taking steps to do so.

6. European Convention on Human Rights

- 6.1 Lynne Featherstone MP, the Parliamentary Under-Secretary of State for Equalities and Criminal Information, has made the following statement:

In my view the provisions of the draft *Sexual Offences Act 2003 (Remedial) Order 2012* are compatible with the Convention rights.

7. Policy background

- *What is being done and why*

- 7.1 The 2003 Act was substantially brought into force in May 2004 and provides a comprehensive new legislative framework for sexual offences, covering offences against adults and children, and familial sexual offences. It amended the law governing the notification requirements to which those convicted of sex offences are subject (commonly referred to as the ‘sex offenders’ register’) and modified the civil orders available in relation to those considered to pose a risk of committing sexual offences; these measures were originally introduced in the Sex Offenders Act 1997. An offender who is subject to the notification requirements is required to notify the police of their personal details, including (but not limited to) their: name, address, date of birth and national insurance number. Following the initial notification, this is done annually and whenever the prescribed information changes.

- 7.2 The circumstances in which a person becomes subject to indefinite notification requirements are summarised in paragraph 4.1 above. Following the decision of the Supreme Court on 21 April 2010 in *R (on the application of F and Angus Aubrey Thompson) v Secretary of State for the Home Department* [2010] UKSC 17, the Department has worked with key partners, including the Association of Chief Police Officers (“ACPO”) and the National Offender Management Service (“NOMS”) to consider how best to give effect to the decision of the Supreme Court.
- 7.3 This order seeks to remedy the incompatibility by introducing a review mechanism for persons subject to the indefinite notification requirements under Part 2 of the 2003 Act. They will be entitled to apply for a review after a prescribed period (usually 15 years from the date of their first release from custody, or 8 years in the case of those who were under 18 on the date of the conviction or other finding giving rise to the indefinite notification requirements). The application for review is made to the police for the area in which the applicant lives, and the police determine the application after considering a range of prescribed factors. The overarching purpose of this process is to assess the continued risk, if any, posed by the applicant, and balance this against any other relevant factors.
- 7.4. The Department has considered options for making the necessary legislative amendment through primary legislation. However, in the absence of any suitable First Session bills to rectify the incompatibility and mindful of the need to avoid undue delay in remedying the incompatibility, the Department has taken the view that it is appropriate to seek to remedy the position by means of a remedial order under section 10 of the 1998 Act.

- **Consolidation**

- 7.5 The Government does not intend to consolidate the legislation.

8. Consultation outcome

- 8.1 The Department has consulted closely with key partners, including ACPO and NOMS, before finalising the proposal contained in this order, and has ensured that colleagues across Government and the devolved administrations with a key interest were consulted on the proposed legislative changes and in particular whether the changes proposed would have any unintended consequences.
- 8.2 In accordance with the non-urgent remedial order process under paragraph 3 of Schedule 2 to the 1998 Act, the Department laid a proposal before Parliament on 16 June 2011. Following careful consideration of the representations made in relation to the proposal, the Government has now laid the draft *Sexual Offences Act 2003*

(Remedial) Order 2012 before Parliament. This order is laid in draft before Parliament for a further 60 day period, before resolutions from each House can be sought.

9. Guidance

9.1 The Department will issue statutory guidance when the order comes into force. Information about this will be made available through updates to the Department's website. Any changes will also be communicated to police forces in England and Wales via ACPO.

10. Impact

10.1 There is no foreseeable impact on business, charities or voluntary bodies.

10.2 The impact on the public sector is less than £5 million per annum.

10.3 An Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on www.legislation.gov.uk.

11. Regulating small business

11.1 This order does not apply to small business.

12. Monitoring & review

12.1 The effectiveness of the new scheme will be monitored on an ongoing basis by the Department, and information relevant to the review process will be stored on ViSOR (the database used to capture information on a range of offender types who are considered to pose a risk of harm to the public, including Registered Sex Offenders). There will be no formal evaluation of this policy.

13. Contact

13.1 Faye Ricketts at the Home Office on 020 7035 8430 or email: faye.ricketts4@homeoffice.gsi.gov.uk can answer any queries regarding the instrument.

The Sexual Offences Act 2003 (Remedial) Order 2012

Statement made pursuant to paragraph 3(2) of Schedule 2 to the Human Rights Act 1998

The draft of the proposed Sexual Offences Act 2003 (Remedial) Order 2011¹ was laid with the required information on 14 June 2011 for an initial 60 day period.

The Joint Committee on Human Rights (“the JCHR”) issued a ‘call for evidence’ on the Government’s proposal on 21 June 2011 to which various parties responded. The respondents included the following organisations: Howard League; Liberty; NSPCC; Prison Reform Trust; South Essex Rape and Incest Crisis Centre; and the Law Society of Scotland. The Association of Chief Police Officers lead for the Management of Sexual Offenders and Violent Offenders and the National Offender Management Service (Ministry of Justice) also responded to the JCHR’s request for further information about the proposal. The JCHR also addressed a number of questions about the proposed order to the Home Secretary on 28 June 2011 and she responded on 19 July 2011.

The JCHR published its report on 13 October 2011² and made a number of recommendations. These related to:

- Review by an appropriate tribunal. The JCHR considered that only a review carried out by an independent and impartial tribunal or a full statutory right of appeal from the decision of the police to an independent and impartial tribunal (i.e. the courts) would introduce a sufficiently independent element to the review process.
- Consideration of the proportionality of continuing notification requirements. The JCHR recommend amendment of the proposal to (a) include a test to be applied on review, incorporating a proportionality exercise, and (b) to introduce the impact on the individual offender as a relevant factor to be considered on review.
- Provision for review of the proportionality and necessity of any requirement to notify for a fixed period.
- Statutory guidance. The JCHR welcomed the Government’s intention to issue guidance to accompany the new review mechanism but recommended that the proposal include a requirement to issue statutory guidance.
- Child offenders. The JCHR recommended a discretionary opportunity for review of the proportionality of notification requirements or a shorter period for rolling reviews.

The Government has considered the JCHR’s report, which has assisted the consideration of this issue, and accepts a number of its recommendations. These include:

- The express inclusion of the test which the police must apply when determining an application for review, building in a proportionality exercise which takes into account the effect on the offender of a continuation of the notification requirements.
- The introduction of a right of appeal to the courts from the police determination.
- The inclusion of a duty on the Secretary of State to issue statutory guidance to the police in relation to the process for the determination of reviews.

¹ The Order will be made in 2012, and the title of the draft Order has been amended accordingly.

² It can be found at: <http://www.parliament.uk/jchr>

A detailed response to the report of the JCHR is available on the Department's website: *The Government reply to the Nineteenth Report of Session 2010 – 12 HC 1549 Proposal for the Sexual Offences Act 2003 (Remedial) Order 2011*³.

The Department has received no other substantive representations relating to the proposals.

³ It can be found at: <http://www.homeoffice.gov.uk/>