



# Scottish Police Federation

5 Woodside Place Glasgow G3 7QF

## JCC Circular 47 of 2015

Ref: CS/SF

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Dear Colleague

### **Abusive Behaviour and Sexual Harm (Scotland) Bill - Consultation**

The Scottish Parliament's Justice Committee is seeking views on the general principles of the Abusive Behaviour and Sexual Harm Bill, a Scottish Government Bill which was introduced in the Scottish Parliament on 8 October 2015.

Please submit any comments/observations you may have to [Lesley.stevenson@spf.org.uk](mailto:Lesley.stevenson@spf.org.uk) by **Monday 9 November 2015**.

Yours sincerely

**Calum Steele**  
**General Secretary**

## Call for written evidence - on the Abusive Behaviour and Sexual Harm (Scotland) Bill

Introduced in the Scottish Parliament on 8 October 2015. The Bill and accompanying documents (including the Policy Memorandum, which explains the aims of the Bill) can be found [here](#):

The Justice Committee expects to be appointed lead Committee for Stage 1 of the Bill later in October and to take evidence on the Bill at meetings in November and December, before reporting on the general principles around the New Year. In advance of those sessions, the Committee is interested in hearing written views on:

- **Section 1**, which enables offences involving the abuse of a partner, or ex-partner to be treated as aggravated offences, meaning that the convicted person may be liable to a tougher sentence;
- **Section 2**, which creates a new offence of disclosing, or threatening to disclose, an intimate photograph or film. The Committee would be particularly interested in hearing views on whether there is a gap in the law that justifies the creation of a new offence and, if so, whether the definition of the offence in section 2 is sufficiently robust;
- **Section 5**, which amends current law to allow non-harassment orders, in some circumstances, be granted against individuals who have not been convicted of misconduct towards another person;
- **Section 6**, which would require a judge to give particular directions to the jury in sexual offence cases about whether to draw inferences from particular evidence being led or not led. The Committee would be particularly interested in hearing views on whether this provision amounts to a legitimate constraint on judicial discretion and whether it would make it more likely that justice would be delivered in individual cases;
- **Sections 7 and 8**, which would enable the Scottish courts to prosecute sexual offences against children or young people committed by a Scots-domiciled person elsewhere in the UK;
- **Chapters 3 and 4 of Part 2**, which reform the system of civil orders available to protect individuals and communities from individuals considered to be at risk of causing sexual harm. The Committee would be particularly interested on views as to whether these reforms appear to be an improvement on current law;
- **Other matters:** any other matter considered relevant to the subject matter of the Bill, including whether there are provisions related to abuse or domestic violence that are not in the Bill but ought to be.

# Abusive Behaviour and Sexual Harm (Scotland) Bill

[AS INTRODUCED]

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ACCOMPANYING DOCUMENTS

Explanatory Notes, together with other accompanying documents, are printed separately as SP Bill 81-EN. A Policy Memorandum is printed separately as SP Bill 81-PM.

# Abusive Behaviour and Sexual Harm (Scotland) Bill [AS INTRODUCED]

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.

## 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.
- (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.

### *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,

(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, and
  - (b) 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), a 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,
  - “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 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.”.

## 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

(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, 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 ELSEWHERE IN THE UNITED KINGDOM

#### **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—

(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), 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, or who has subsequently become, habitually resident in Scotland.”.

(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.
- (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, or who has subsequently become, 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) This section applies in relation to a listed offence committed by a person by virtue of section 54A(1) where the act constituting the listed offence also constitutes an offence under the law in force in the country where it took place (a “local offence”).
- (2) For the purposes of subsection (1), an act punishable under the law in force in the country is an offence under that law however it is described in that law.
- (3) Prosecution in respect of the listed offence—
  - (a) is not competent if the person has been, or is being, prosecuted in respect of the local 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, and
    - (ii) the person is prosecuted, on the same indictment or complaint, in respect of an act in Scotland constituting a listed offence.
- (4) For the purposes of subsection (3)(b)(i), the relevant director of public prosecutions is—
  - (a) 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),
  - (b) 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.”.

**CHAPTER 3**

## SEXUAL HARM PREVENTION ORDERS

*Meaning of sexual harm***9 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***10 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 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 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.

## **11 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 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) 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 12, 13 and 14,
- “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



- (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 12, 13 or 14 applies.

## **12 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 constituting the offence,

- (iv) a finding by a court that the person is under a disability and did the act 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 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.

## **13 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 charged in respect of the offence, or

- (d) been cautioned in respect of such an offence following an admission of it.

**14 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),
- (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 constituting the offence, 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 which, at the time it was done—

- (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 in any part of the United Kingdom.

(3) For the purposes of subsection (2), an act 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 11 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 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***15 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 16.
- 5 (6) The prohibitions and requirements which may be imposed in a sexual harm prevention order are those necessary for the purpose of—
- (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.
- 10 (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.
- 15 (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.

## **16 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—
- 20 (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.
- 25 (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 19.
- (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—
- 30 (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,
- 35 (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).
- 40

(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.

*Interaction with notification requirements*

**17 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.

(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.

**18 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*

**19 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—
- (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 10, the prosecutor.
- 5 (3) In subsection (1), the “appropriate court” means—
- (a) where the order was made under section 10 by the High Court of Justiciary, that court,
  - (b) where the order was made under section 10 in the sheriff court—
    - 10 (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 11, an appropriate sheriff.
- 15 (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—
    - 20 (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.
- 25 (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,
- 30 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—
- 35 (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 sheriff must give an opportunity to make representations to the subject and the chief constable and, in the case of an order made under section 10, the prosecutor.

*Interim orders***20 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 11.
- (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 11 to which it relates, or
  - (b) if the application for that order has been made, by separate application.
- (8) Section 17 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 11 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.
- (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 11 is made, or
  - (b) another sheriff of the same sheriffdom.

*Appeals*

**21 Appeals**

- (1) An order made under section 10, 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) A decision of a sheriff mentioned in subsection (4) may be appealed against as if it were a decision constituting final judgment in civil proceedings within the meaning of the 2014 Act.
- (4) A decision to—
- (a) make, or refuse to make, an order under section 11 or 20,
  - (b) vary, renew or discharge, or refuse to vary, renew or discharge, an order made under either of those sections.

*Requirement to serve order*

**22 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”.

*Enforcement*

**23 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 tried, prosecuted 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*

## **24 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 an order made under section 20,

“prohibition on foreign travel” has the meaning given by section 16(2),

“the public” means the public in the United Kingdom,

“sexual harm prevention order” means an order made under section 10 or 11.

- (2) Subsection (3) applies for the purposes of sections 10 to 14.
- (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.

## **CHAPTER 4**

### SEXUAL RISK ORDERS

#### *Meaning of harm*

## **25 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*

**26 Making of order**

- (1) On the application of the chief constable, an appropriate sheriff may make a sexual risk order 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
  - (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.

*What order does*

**27 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.

**28 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,
  - (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 29.
- (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***29 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
  - 5 (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.
- 10 (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
  - 15 (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—
  - 20 (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.
- 25 (6) Before determining an application under this section, a sheriff must give an opportunity to make representations to the subject and the chief constable.

### *Interim orders*

#### **30 Interim orders**

- 30 (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 26.
- (2) An interim sexual risk order may be made if the sheriff considers it just to do so.
- (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.
- 35 (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 26 to which it relates, or
  - (b) if the application for that order has been made, by separate application.
- (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 26 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 26 is made, or
  - (b) another sheriff of the same sheriffdom.

*Appeals***31 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 26 or 30,
  - (b) vary, renew or discharge, or refuse to vary, renew or discharge, an order made under either of those sections.

*Enforcement***32 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 tried, prosecuted 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).

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

- (1) This section applies to a person who—

- (a) is convicted of an offence under section 32,
- (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) 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.

- (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 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***34 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 an order made under section 30,

“prohibition on foreign travel” has the meaning given by section 28(2),

“the public” means the public in the United Kingdom,

“sexual risk order” means an order made under section 26.

**CHAPTER 5****EQUIVALENT ORDERS ELSEWHERE IN UK****35 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—
  - (a) an equivalent England and Wales order, or
  - (b) an equivalent Northern Ireland 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) For the purposes of this section, prohibitions imposed by an equivalent England and Wales order or an equivalent Northern Ireland order apply, unless expressly confined to particular localities, to every part of the United Kingdom.

(5) In this section—

“equivalent England and Wales order” means—

- (a) a sexual harm prevention order made under section 103A of the 2003 Act,
- (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,

“equivalent Northern Ireland order” means—

- (a) a sexual offences prevention order made under section 104 of the 2003 Act,
- (b) an interim sexual offences prevention order made under section 109 of the 2003 Act,
- (c) a foreign travel order made under section 114 of the 2003 Act,
- (d) a risk of sexual harm order made under section 123 of the 2003 Act,
- (e) an interim risk of sexual harm order made under section 126 of the 2003 Act.

### **36 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 35 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.

- (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—

(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.

## CHAPTER 6

### PREVIOUS ORDERS

#### **37 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.

#### **38 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,

“new order” means—

(a) a sexual harm prevention order,

(b) a sexual risk order,

“old order” means an order made under section 20 of the Crime and Disorder Act 1998.

(2) The repeals made by section 37 do not apply in relation to—

(a) an application for an existing order made before this section comes into force,

(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 new order.

(4) The “relevant sections of this Act” means—

(a) in the case of a sexual offences prevention order, sections 18, 19 and 23,

(b) in the case of a foreign travel order, sections 19 and 23,

(c) in the case of a risk of sexual harm order, sections 29 and 32.

(5) Sections 19 and 23 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 10 or 11,

“sexual risk order” means an order made under section 26.

### **PART 3**

#### **GENERAL**

### **39 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.

#### **40 Ancillary provision**

- 5 (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.
- 10 (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.

#### **41 Minor and consequential modifications**

15 Schedule 2 makes minor and consequential modifications of other enactments.

#### **42 Crown application**

- (1) No contravention by the Crown of any provision of, or made under, this Act makes the Crown criminally liable.
- 20 (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.

#### **43 Commencement**

- 25 (1) Sections 40, 42 and 44, 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,
  - 30 (b) include transitional, transitory or saving provision.

#### **44 Short title**

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

SCHEDULE 1  
(introduced by section 4)

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

*Exceptions for mere conduits*

- 5 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—
- 10 (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,
- 15 (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,
- 20 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*

- 25 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 guilty of an offence under section 2 in respect of the automatic, intermediate and temporary storage of information so provided, if—
- 30 (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.
- (3) The condition is that the service provider—
- (a) does not modify the information,
- 35 (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 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.
- 10 (2) This sub-paragraph is satisfied if the service provider had no actual knowledge when the information was provided that—
- (a) it consisted of or included a photograph or film showing, or appearing to show, a person in an intimate situation,
  - 15 (b) it was provided without the consent of a person who is shown, or appears to be shown, in such a situation in the photograph or film, or
  - (c) the photograph or film was provided with the intention to cause fear, alarm or distress to that person or in providing it, the recipient of the service was reckless as to whether the person would be caused fear, alarm or distress.
- 20 (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*

- 25 4 (1) In this schedule—
- “person in an intimate situation”, “photograph” and “film” have the same meanings as in section 2,
- “information society services”—
- 30 (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”,
- 35 “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,
- 40 “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 aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

SCHEDULE 2  
(introduced by section 41)

MINOR AND CONSEQUENTIAL MODIFICATIONS

*Criminal Procedure (Scotland) Act 1995*

- 1 (1) The 1995 Act is amended as follows.

- 10 (2) In section 19AA(1)—

(a) in paragraph (b), for “section 2 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) (a risk of sexual harm order)” substitute “section 26 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016”,

15 (b) in paragraph (c), for “section 2 of that Act of 2005” substitute “section 26 of that Act of 2016”.

- (3) In section 19AB—

(a) in subsection (4), for “risk of sexual harm orders” substitute “sexual risk orders”,

(b) in subsection (5)—

20 (i) for “risk of sexual harm order” substitute “sexual risk order”,

(ii) for the words from “under” to the end substitute “of a court considering an appeal against the making of a sexual risk order suspending the effect of the order pending the determination of the appeal”,

(c) in subsection (7)—

25 (i) omit the definitions of “risk of sexual harm order” and “the 2005 Act”,

(ii) insert, immediately before the definition of “the 2003 Act”, the following definition—

30 ““sexual risk order” means an order under section 26 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, and also includes an order under section 122A or 123 of the 2003 Act;”,

(d) the title becomes “**Section 19AA: supplementary provision in sexual risk order cases**”.

*Sexual Offences Act 2003*

- 2 (1) The 2003 Act is amended as follows.

- 35 (2) In section 88—

(a) in subsection (1), for “Subsections (2) to (4)” substitute “Subsections (2) and (2A)”,

(b) subsections (4) and (5) are repealed.

(3) In section 89, after subsection (1) insert—

“(1A) In the Table—

- (a) the reference to a sexual harm prevention order includes an order made under section 10 or 11 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016,
- (b) the reference to an interim sexual harm prevention order includes an order made under section 20 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.”.

*Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005*

3 Subsections (1) to (5) of section 17 of the 2005 Act are repealed.

*Protection of Vulnerable Groups (Scotland) Act 2007*

4 Paragraph 1 of schedule 1 of the Protection of Vulnerable Groups (Scotland) Act 2007 is amended as follows—

(a) paragraph (r) is repealed,

(b) after paragraph (zr), insert—

“(zra)an offence under section 32 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016,

(zrb)an offence under section 35 of that Act in respect of a breach of—

- (i) a sexual risk order made under section 122A of the Sexual Offences Act 2003,
- (ii) an interim sexual risk order made under section 122E of the Sexual Offences Act 2003,
- (iii) a risk of sexual harm order made under section 123 of the Sexual Offences Act 2003, or
- (iv) an interim risk of sexual harm order made under section 126 of the Sexual Offences Act 2003,”.

*Sexual Offences (Scotland) Act 2009*

5 In section 54(8) of the 2009 Act, in the definition of “UK national”, for “relevant conduct” substitute “act mentioned in subsection (1)”.

*Criminal Justice and Licensing (Scotland) Act 2010*

6 The following provisions of the Criminal Justice and Licensing (Scotland) Act 2010 are repealed—

- (a) section 103,
- (b) section 104,
- (c) paragraph 75 of schedule 7.

*Police and Fire Reform (Scotland) Act 2012*

- 7 Paragraph 26 of schedule 7 of the Police and Fire Reform (Scotland) Act 2012 is repealed.

*Sexual Offences Act 2003 (Remedial) (Scotland) Order 2011 (S.S.I. 2011/45)*

- 5 8 Article 4(1) of the Sexual Offences Act 2003 (Remedial) (Scotland) Order 2011 (S.S.I. 2011/45) is repealed.

*Anti-social Behaviour, Crime and Policing Act 2014*

- 9 Paragraphs 78 and 79 of schedule 11 of the Anti-social Behaviour, Crime and Policing Act 2014 are repealed.

# **Abusive Behaviour and Sexual Harm (Scotland) Bill**

[AS INTRODUCED]

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.

Introduced by: Michael Matheson  
Supported by: Paul Wheelhouse  
On: 8 October 2015  
Bill type: Government Bill

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# **ABUSIVE BEHAVIOUR AND SEXUAL HARM (SCOTLAND) BILL**

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## **POLICY MEMORANDUM**

### **INTRODUCTION**

1. This document relates to the Abusive Behaviour and Sexual Harm (Scotland) Bill introduced in the Scottish Parliament on 8 October 2015. It has been prepared by the Scottish Government to satisfy Rule 9.3.3 of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 81–EN.

### **POLICY OBJECTIVES OF THE BILL**

2. The provisions in the Bill will help improve how the justice system responds to abusive behaviour including domestic abuse and sexual harm. This should help improve public safety through ensuring perpetrators are appropriately held to account for their conduct.

3. The Bill:

- provides a new specific “domestic abuse” aggravator that an offence was aggravated by involving abuse of a person’s partner or ex-partner,
- provides a new specific offence for the non-consensual sharing of private, intimate images (often called “revenge porn”),
- allows courts to directly protect victims where the court is satisfied a person did harass another person, but a conviction does not take place due to the mental or physical condition of the person,
- requires juries in sexual offence cases to be given specific directions about how to consider the evidence,
- ensures child sexual offences committed in England and Wales by Scottish residents are capable of being prosecuted in Scotland,
- reforms the system of civil orders available to protect communities from those who may commit sex offences.

4. The Bill will help contribute to the Scottish Government’s national outcome of helping people live their lives safe from crime, disorder and danger by improving how the justice system is able to deal with domestic abuse and sexual offending. This should give confidence to victims that action under the criminal law can be taken when they are subject to coercive control by their partner.

5. In line with the Scottish Government's Justice Strategy<sup>1</sup>, the Bill will help ensure people experience low levels of crime as well as experience low levels of fear, alarm and distress. The Bill will also help people to have high levels of confidence in justice institutions and processes.

6. It is important to understand the wider context within which these reforms are being progressed.

7. In June 2014 the Scottish Government launched the Equally Safe Strategy<sup>2</sup>. This is an ambitious, high level strategy which was developed in partnership with COSLA and in association with a wide range of partners including Scottish Women's Aid and Rape Crisis Scotland alongside Police Scotland and NHS Health Scotland. The aim is to create a strong and flourishing Scotland where all individuals are equally safe and respected, where women and girls live free from abuse and the attitudes which perpetuate it.

8. There is a clear and unequivocal message which runs through the Strategy that violence against women and girls will not be tolerated, and a bold and unapologetic approach which links systematic gender inequality with the root causes of violence against women. The Strategy seeks to involve everyone in a shared understanding of the problem and the causes, risk factors and the scale of the problem within Scotland. Equally Safe seeks to instigate a step change in emphasis on preventing violence from occurring in the first place, and where it does occur intervening at the earliest possible stage to minimise the harm caused. Equally Safe acknowledges that both women and girls and men and boys can be victims of abuse and sexual harm.

9. Progress under the Strategy can already be seen within the justice sector with, for example, Police Scotland's decision for a national roll out of its Disclosure Scheme for Domestic Abuse. There were 60,080 incidents of domestic abuse recorded by the police in Scotland in 2012-13. Of these incidents 80% had a female victim and a male perpetrator. The disclosure scheme provides a formal mechanism through which people can request information from Police Scotland about their partner's background if they suspect their partner has a history of violence. This scheme will not eradicate domestic abuse on its own, but is a good example of the type of practical scheme that can be seen within a context of measures and interventions to increase the support provided to potential victims of domestic abuse.

10. The Scottish Government has invested long-standing equalities funding in measures to tackle violence against women and girls. In March this year, new funding of £20m was committed from the justice budget to be used in the period 2014-15 to 2016-17 to better support victims of violence and sexual assault and help prevent abuse and harm. This funding will go towards measures within the justice system to reduce delays, inconvenience and stress for victims and their families; widening access to specialist advocacy and support services for the victims of crime, including domestic abuse and sexual offences; exploring an expansion to innovative initiatives such as the Caledonian System, which work with men convicted of domestic abuse related offences to address the underlying causes of their behaviour and further protect women; and improving education and information resources within schools and work

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<sup>1</sup> <http://www.scotland.gov.uk/Topics/Justice/justicestrategy>

<sup>2</sup> <http://www.gov.scot/Publications/2014/06/7483>

places to help increase public understanding of these crimes and reinforce a zero-tolerance approach to domestic abuse and sexual crimes.

11. Further details of the specific policy contained within the Bill are given in the following paragraphs.

## **SPECIFIC PROVISIONS**

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

#### *Policy objectives*

12. To provide for a new statutory aggravation that an offence involved abuse of a person's partner or ex-partner, and require courts to take account of that fact in sentencing the offender.

#### *Key information*

13. Statutory aggravations exist to assist in the identification and prosecution of a number of different types of crime. For example, the Offences (Aggravation by Prejudice) (Scotland) Act 2009 provides for statutory aggravations for any crimes where the perpetrator is motivated by malice or ill-will towards an individual based on their sexual orientation, transgender identity or disability. This could, for example, be an assault motivated by ill-will towards a person because of their sexual orientation. Where offences are proven to have been motivated by such malice or ill-will, the court must take that into account when determining sentence. Evidence from a single source is sufficient to establish the aggravation.

14. Section 74 of the Criminal Justice (Scotland) Act 2003 makes similar provision for offences aggravated by religious prejudice, and section 96 of the Crime and Disorder Act 1998 provides for a statutory aggravation that an offence was motivated by malice or ill-will towards the victim based on their membership (or presumed membership) of a racial group.

15. The Human Trafficking and Exploitation (Scotland) Bill recently passed by the Parliament, establishes a statutory aggravation that an offence was committed against a background of human trafficking. This recognises that many cases involving other offences, for example, producing false documents, immigration offences, brothel-keeping and drugs offences, are committed in the context of human trafficking, even though there may be insufficient evidence to raise proceedings for a specific human trafficking offence.

16. A statutory aggravation that an offence or offences involved abuse of a person's partner or ex-partner provides a means of ensuring that the courts formally recognise a victim's experience. By placing a statutory duty on the courts to take this fact into account when sentencing the offender, as they are required to do by existing legislation concerning e.g. offences aggravated by prejudice, victims can have greater confidence that the sentencing decisions of the courts reflect the fact that the offence occurred in the context of an abusive relationship.

17. The Bill provides that an offence is aggravated by involving abuse of a person's partner or ex-partner where it is established that the convicted person intended to cause their partner or

ex-partner to suffer physical or psychological harm by committing the offence or else, where the offence was committed against the person's partner or ex-partner, the offender was reckless as to whether the offence would cause such harm. As such, the aggravation will apply where a person is convicted of an offence against a third party (e.g. their ex-partner's child) and it is proven that their intent in committing the offence was to cause their ex-partner to suffer psychological harm. Where the offence is committed against a partner or ex-partner, it is sufficient to prove that the accused was reckless as to whether their actions would cause physical or psychological harm, so where, for example, a person assaults their ex-partner, it would not be necessary to show that it was their *intent* to cause harm, providing it can be shown that they were reckless as to whether their actions would cause such harm.

#### *Alternative approaches*

18. The consultation, *Equally Safe – Reforming the criminal law to address domestic abuse and sexual offences*<sup>3</sup>, sought views on the creation of a specific offence to deal with domestic abuse. Initial analysis of the consultation responses confirmed strong support for such an offence but a wide range of different views about how the specific offence should be framed. The Scottish Government's Programme for Government in September 2015<sup>4</sup>, announced that the Government will publish and seek views on the exact wording of a specific offence to deal with those who commit psychological abuse and coercive and controlling behaviour during 2015, separate from the current Bill. This will allow time for engagement between stakeholders to seek to establish broad support for the terms of the offence.

19. While the creation of a specific offence could be seen as an alternative to the creation of a "domestic abuse" aggravation, the great majority of consultation respondents were of the view that a statutory domestic abuse aggravation should be introduced in addition to any specific offence as, even once a specific offence has been introduced, there may be individual cases where it is more appropriate to prosecute the offender for another substantive offence and libel the aggravation to reflect the fact that the offence amounted to the abuse of the offender's partner or former partner.

#### *Consultation*

20. The Scottish Government's consultation, *Equally Safe – Reforming the criminal law to address domestic abuse and sexual offences*, sought views on a proposal to introduce a statutory aggravation that an offence was committed as part of a course of conduct amounting to domestic abuse.

21. A clear majority of those who responded to this question (97%) thought that there should be a statutory aggravation that an offence was committed against a background of domestic abuse being perpetrated. Consultees noted that the statutory aggravation model is well understood and that it would ensure that the fact that an offence was connected to domestic abuse to be formally recognised and recorded through the court process.

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<sup>3</sup> <http://www.gov.scot/Publications/2015/03/4845>

<sup>4</sup> <http://www.gov.scot/Publications/2015/09/7685/5>

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

### *Policy objectives*

22. To make it a criminal offence for a person to share, publish or distribute private, intimate images relating to another person without that person's consent, or to threaten to do so.

### *Key information*

23. Recent technological developments mean that it is easier than ever before to take and share pictures, messages and videos with friends and family and the wider world. Unfortunately, a small number of people have used this technology to threaten, harass and abuse other people. This can take many forms, but one which has attracted much attention in recent years has been the non-consensual sharing of private and intimate images, typically of partners or former partners.

24. This often involves images being shared on the internet, sometimes on websites set up specifically for this purpose. There have been cases in which the names and contact details of victims have been posted together with such private images. In other cases, threats to publish such material on the internet have been used by abusive partners or ex-partners to control victims as part of a campaign of intimidation or blackmail.

25. Depending on the facts and circumstances of the particular case, there are a number of criminal offences which can be used to prosecute people who publish or share private intimate images, for example, of a partner or former partner, without their consent. These include blackmail, breach of the peace, threatening or abusive behaviour, stalking and improper use of a public electronic communications network.

26. However, in the absence of an offence specifically concerned with the sharing of intimate images the exact scope of the law in this area can be seen by many as being unclear. Victims of this kind of behaviour may not be aware that a criminal offence has been committed against them, and potential perpetrators may not be aware that what they are doing is criminal. Even where a successful prosecution has taken place, a victim may consider that the prosecution of the perpetrator for an offence such as threatening and abusive behaviour does not fully reflect their particular experience.

27. By proving for a new offence concerning the sharing of private, intimate images, we intend to make clear that it is unlawful to share private, intimate images of another person without their consent.

28. This new offence will criminalise a person who publishes, shares or otherwise distributes private, intimate images of another person without their consent where they either intend to cause that person to feel fear, alarm or distress or otherwise are reckless as to the possibility that sharing such material will cause them to feel fear, alarm or distress.

29. The intimate images covered by the offence include still or moving images of a person:

- engaging in a sexual act of a kind not ordinarily done in public, or

- in which their genitals, buttocks or breasts are exposed or covered only with underwear.

30. However, an image is not considered to be an intimate image if it was taken in a public place and other members of the public were present. This ensures that the offence does not extend to, for example, photographs taken by members of the public of a naked protestor, or of a “streaker” at a sporting event.

31. The maximum penalty for the new offence on conviction on indictment will be 5 years imprisonment. The offence is broadly comparable with the existing threatening and abusive behaviour offence which carries 5 year imprisonment as a maximum penalty.

#### *Alternative approaches*

32. Three broad options for addressing the non-consensual sharing of private, intimate images were considered.

33. The first was to rely on the existing law to prosecute those who share or distribute private, intimate images of a person without their consent. Depending on the facts and circumstances of the particular case, it may be possible to prosecute people who engage in this conduct using offences of blackmail, breach of the peace, threatening or abusive behaviour, stalking and improper use of a public electronic communications network. However, a very clear majority of respondents to the Scottish Government’s consultation supported the creation of a specific offence, and it is considered that the creation of a specific offence would make the exact scope of the law in this area clear and send a clear message to both victims and potential perpetrators that such conduct is criminal.

34. Another option which was considered was replicating the provisions at sections 33 to 35 of the Criminal Justice and Courts Act 2015, which provide for an offence of “disclosing private sexual photographs and films with intent to cause distress”. However, it is considered that the approach taken in this offence was insufficiently broad. It requires that the accused acted with the intent of causing fear, alarm or distress to the victim, and not merely that they were reckless as to the possibility that their actions would have this effect. Stakeholders have advised that this could represent a significant barrier to prosecution.

35. Consideration was given as to whether the offence should extend to the sharing of private and intimate written and audio communications, such as letters, text messages, e-mails and voice-mail recordings. However, while the sharing of such material could, in some circumstances, be used to cause alarm or distress to the person to whom it relates, in practice, almost all the cases which the Scottish Government is aware of have involved the sharing of intimate images. Furthermore, providing a clear definition of an intimate written or recorded communication that is easy to interpret, and does not risk unintended consequences in terms of interference with freedom of speech, would be very difficult. It should be noted that it will remain possible for the Crown Office and Procurator Fiscal Service (COPFS) to prosecute the sharing of such materials using, for example, the Communications Act 2003 offence or the offence of threatening or abusive behaviour, in appropriate cases.

36. Another approach suggested by some respondents to the consultation was a broad “breach of privacy” type offence which would make it a criminal offence to share, distribute or publish any images of another person or other communications sent by that person such as text messages, voice-mails, e-mails or letters, without their consent. However, it is considered that such an offence would be considerably wider in scope than is required to deal with the core harm of the sharing of private, intimate images, and that there was a risk of creating unintended consequences, for example, potentially inadvertently criminalising much ordinary use of internet social media and photo-sharing sites.

37. The consultation also sought views on whether the offence should adopt a test for an “intimate image” where an image is considered to be private and intimate if the person featured in the image and the person sharing the image considered it to be so. This would have the advantage that it would include images that may not be “sexual” images, but which would be considered to be private because of the particular circumstances or cultural beliefs of the person featured in it (e.g. an image of a person who would always choose to wear a headscarf in public who is not wearing a headscarf, or an image of a transgender person prior to that change). While there was considerable support for this from consultees, the Scottish Government considers that such an approach risked perpetuating the very ambiguity in the law which a specific offence is seeking to address, and that it may be very difficult for police and prosecutors to establish that such a shared understanding, that a particular image was “intimate”, actually existed between the person featured in the image and the person sharing the image.

#### *Consultation*

38. The Scottish Government’s consultation, *Equally Safe – Reforming the criminal law to address domestic abuse and sexual offences*, sought views on proposals to introduce a specific offence concerning the non-consensual sharing of private, intimate images. The very clear majority of respondents (99%) agreed that a specific offence should be created.

39. Respondents also identified a range of issues that should be considered or addressed if legislation is taken forward. These included consideration of how the offence could impact on particular groups (e.g. children, or those with a learning disability) who may not understand the consequence of their behaviour, and extension of any offence to cover other materials that can be used to humiliate or control, including sound or audio files (such as voicemail), other moving image recordings, photo-shopped or composite images and texts and e-mails.

40. The majority of respondents to the consultation (73%) did not agree that the offence should be restricted to images as other materials, such as audio files, texts and e-mails, could be used by a perpetrator to humiliate or control a victim. However, those who agreed that the offence should be restricted to images expressed the view that keeping the offence specific would help to ensure that it remains clear that creating a broad offence of criminal infringement of privacy (which they argued that extending the offence to cover written and voice materials would do) without proper consideration of the possible consequences could create problems.

41. There was support from the majority of respondents (79%) for the proposal to define an image as an “intimate image” if the person featured in the image and the person sharing the image both considered it to be so, as such a definition would allow for intimate but non-sexual images to be covered, taking account of images which might be considered intimate because of

the cultural or religious beliefs of those involved. Those who favoured an objective test of what constitutes an “intimate image” tended to have concerns that too wide a definition could lack clarity and certainty as to when an offence had been committed, and would be too open to interpretation and subjective judgment, including at the trial stage.

42. There was support from a clear majority of respondents (94%) that it should be an offence to threaten to share intimate images of another person without their consent. Comments most frequently focused on the powerful and harmful effect that such threats can have on the person affected. Those who disagreed that it should be an offence tended to voice concerns about how enforceable such an offence would be.

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

#### *Policy objectives*

43. To provide the court with a power to make a non-harassment order (NHO) where a person is unfit to plead, but the court decides they did commit the offence with which they are charged or where a person is acquitted as they were not criminally responsible at the time of the offence due to a mental condition.

#### *Key information*

44. Where a person is prosecuted for a criminal offence, there is a mechanism in the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) for the court to hold that the person is mentally or physically unfit to stand trial. The test for unfitness to stand trial is that the person is incapable of participating effectively in the trial because of a mental or physical condition. In assessing this, the court will take into account whether the person has the ability to understand key elements of the trial process and instruct a lawyer.

45. Where the court is satisfied that an accused person is unfit to stand trial, the court can hold an examination of facts to decide whether the person did in fact carry out the acts constituting the offence with which they are charged. In such circumstances, where the court decides that a person did carry out the acts constituting the offence with which they have been charged, this is not recorded as a conviction and the person is not “sentenced” to a criminal penalty.

46. Section 51A of the 1995 Act provides that an accused may be acquitted on the grounds that they were not criminally responsible for their acts at the time of the offence, whilst accepting that the accused did commit the act(s) constituting the offence. This again is not recorded as a conviction.

47. This has implications for the disposals available to the court. Recently, a court case highlighted an issue in relation to the operation of NHOs imposed by the criminal courts. NHOs are intended to provide a means of ensuring that on-going harassment by one individual of another can be prevented. In Scotland, NHOs can be granted in a civil court on application by the person suffering harassment, or by a criminal court following conviction for a criminal offence involving harassment of the person to whom the order relates. In either case, an NHO



can require a person to desist all contact with another person for a period of time as laid down by the court within the terms of the order. Breach of the terms of an NHO is a criminal offence.

48. However, while the criminal court can impose an NHO on an offender following conviction, they have no power to do so following an examination of facts where a person has been found by the court to have carried out acts constituting a criminal offence, but where the court has accepted either that they are unfit to stand trial, or that they were not criminally responsible for their acts at the time of the offence.

49. It would be open to the victim to apply to the civil court to impose an NHO or interdict, but this requires the victim to initiate a separate legal process notwithstanding that the criminal court has already come to the view that the relevant person has committed acts constituting an offence against the person applying for an NHO.

50. The Bill amends the 1995 Act to enable the prosecutor to apply to the court to make an NHO against a person who, following an examination of facts, has been found to have carried out the acts constituting the offence with which they were charged or who has been acquitted under section 51A of the 1995 Act because they were not criminally responsible for their actions at the time they committed the offence.

51. Breach of an NHO is a criminal offence. There is of course a risk that, in some cases, a person who is found unfit to stand trial in respect of the offence for which the NHO was imposed might similarly be found unfit to stand trial if they are at a later date charged with a criminal offence for breaching the terms of that NHO. However, it is not considered that this negates the usefulness of an NHO. Having an NHO in place may make it easier for the police to intervene to protect the victim of harassment at an early stage in the event of on-going harassment by the subject of the order, as behaviour which is contrary to the terms of the NHO (e.g. approaching the person named in the order) would not necessarily otherwise constitute a criminal offence. It will continue to be the responsibility of the trial judge to satisfy themselves that it is appropriate to grant the NHO in any individual case.

52. It is worth noting that the courts can impose a sexual offences prevention order (SOPO) (one of the civil orders reformed by this Bill) where a person has been found to have committed an offence following a finding of facts, or where they have been acquitted because they lacked criminal responsibility at the time the offence was committed. A SOPO imposes conditions on the offender either prohibiting them from doing something described in the order or requiring them to do something described in the order. They are intended to protect the public from serious sexual harm from the offender. As with NHOs, their purpose is to protect members of the public, rather than to punish an offender and, as such, it may be appropriate to impose a SOPO whether or not a person was criminally responsible for their actions at the time of the offence, or fit to stand trial.

### *Consultation*

53. The Scottish Government's consultation, *Equally Safe – Reforming the criminal law to address domestic abuse and sexual offences*, sought views on a proposal to enable non-harassment orders to be imposed following a finding of facts, in circumstances where the

accused is unfit to stand trial, or where the person who committed the act constituting the offence was not criminally responsible for their actions at the time of the offence.

54. The clear majority of respondents (97%) thought that non-harassment orders should be available to the court in such circumstances. Many of those responding to the consultation stressed the importance of providing protections to those harassed or stalked in circumstances where the perpetrator is found not fit to stand trial. They also noted the burden that can be placed on victims if they have to apply for a civil order (especially where they do not qualify for legal aid).

#### *Alternative approaches*

55. There is no alternative approach that can achieve the policy objective. Retaining the status quo would mean that, in the small number of cases where this issue arises, the victim would require to seek a non-harassment order or interdict through the civil courts where the perpetrator was unfit for trial, or acquitted because they lacked the mental capacity to be criminally responsible for their actions.

### **Jury directions relating to sexual offences**

#### *Policy objectives*

56. To require judges in sexual offence trials to provide juries with directions in cases where evidence is led or elicited at trial that: an alleged sexual offence may not have been reported until some time after it was alleged to have been committed, of the fact that it is not alleged that the accused used physical force to overcome the victim, or that the alleged victim did not physically resist their assailant. The judge's directions must set out that there may be good reasons why that happened and that may not necessarily indicate that an allegation is false.

#### *Key information*

57. Concern has been expressed that certain ill-founded preconceptions held by members of the public, who make up juries, about the nature of sexual violence make understanding victims' responses to such crimes more difficult.

58. It is thought that some members of the public imagine that a sexual assault is almost always violent and that, if assaulted, a victim would be very likely to respond by trying to physically resist their attacker.

59. Equally, it has been suggested that jurors may regard the fact that a significant period of time passed between the time an alleged crime takes place and a report being made to the police about a rape or sexual assault as evidence that the allegation is false, despite the fact that there are many reasons that a victim may not tell anyone or make a report to the police about a sexual offence committed against them until some time after it has happened. Police Scotland management information for 2013-14 indicated that a quarter of all sexual crimes and 36% of rapes were reported 1 year or more after the alleged incident took place.

60. In individual cases, COPFS can and do lead expert evidence on the question of the different ways in which people respond to sexual violence, the fact that there can be good reasons a victim may not report the crime to the police for some time after it has happened, and the fact that a victim of a sexual assault may not offer physical resistance to their attacker and may be as likely to “freeze” or avoid physical resistance for fear of provoking their assailant.

61. However, the Scottish Government considers that, where relevant, directions should be given to juries by the trial judge on these matters without the need to lead expert evidence in every case. It will remain open to COPFS to lead such expert evidence in individual cases where they consider it would be helpful and appropriate to do so.

62. In recent years, there has been a significant increase in the proportion of cases in which sexual offences have been reported to the police only some years after they were alleged to have been committed. This may be the result of changes in police investigations, the media attention given to cases involving certain high-profile sex offenders and may also reflect greater confidence among victims that their cases will be taken seriously by the justice system. As a consequence, juries are more often being asked to consider cases in which a significant period of time has elapsed between the time an offence is alleged to have been committed and the point at which it is reported to the police.

63. A statutory jury direction is a provision which requires that, in the circumstances set out in that provision, the trial judge must or may direct a jury about the matter set out in the provision. At present, there are no statutory jury directions in place in Scots law. The “Scottish Jury Manual”<sup>5</sup>, produced by the Judicial Institute for Scotland, provides information and guidance to judges who have the responsibility of charging juries in criminal trials, but it does not specifically address the question of how the judge should direct the jury on the question of what account to take of any significant period of time elapsing between the incident taking place and it being reported to the police, or concerning any suggestion by the defence that an apparent lack of resistance on the part of the alleged victim or a lack of physical force being used by the alleged perpetrator might indicate that the allegation is false.

64. A number of jurisdictions have mechanisms in place, whether statutory or based in case law, to enable or to require a judge to caution a jury not to dismiss an allegation of rape or sexual assault simply because the complainer did not report the crime for some time after it was alleged to have taken place, and to bring to the jury’s attention the reasons why a victim may not report a sexual offence at the time it took place.

65. For example, the Australian states of New South Wales<sup>6</sup> and the Northern Territory<sup>7</sup> have provision requiring the trial judge to direct the jury on this matter when evidence is led or a question is asked of a witness which tends to suggest delay by the person making the complaint. In New Zealand<sup>8</sup>, there is provision that judges can direct a jury that there may be good reasons why the victim of a sexual offence may take some time before making a complaint (or not report the offence at all) though, in contrast with the position in the Northern Territories and New South

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<sup>5</sup> <http://www.scotland-judiciary.org.uk/Upload/Documents/JuryManual2015.pdf>

<sup>6</sup> [http://www.austlii.edu.au/au/legis/nsw/consol\\_act/cpa1986188/s294.html](http://www.austlii.edu.au/au/legis/nsw/consol_act/cpa1986188/s294.html)

<sup>7</sup> [http://www.austlii.edu.au/au/legis/nt/consol\\_act/soapa333/s4.html](http://www.austlii.edu.au/au/legis/nt/consol_act/soapa333/s4.html)

<sup>8</sup> <http://www.legislation.govt.nz/act/public/2006/0069/latest/DLM393966.html>

Wales, Australia, any such direction is made at the discretion of the judge. In Canada, the Supreme Court has held that in relevant cases, the trial judge should inform the jury about the reasons a victim may delay in reporting a sexual assault, and in England and Wales, guidance is provided to judges in the “Bench Book on Directing the Jury”<sup>9</sup>, produced by the Judicial Studies Board, on a number of issues which may arise in the context of sexual offence trials, and includes an illustrative example of how the trial judge might direct the jury when questions arise about delayed reporting by the complainant.

66. Similarly, there is some concern that juries may be unduly reluctant to convict in cases where the complainer in a sexual offence case did not physically resist their attacker, or where the accused did not use physical force to overcome the will of the complainer when committing the assault.

67. Under Scots law, a sexual offence is committed when a person engages in sexual activity with another person without consent. There is no requirement that the offender must use physical force to overcome the will of their victim, or that the victim must attempt to physically resist their assailant for an offence to be committed. However, unfortunately, many people may wrongly believe that a person who was sexually assaulted or raped would be likely to attempt to physically resist their attacker and that an absence of physical resistance could be indicative that an allegation is false.

68. There are, of course, many reasons why the victim of a rape or other sexual assault may not physically resist their attacker. They might fear that physical resistance may cause their attacker to retaliate and escalate the physical violence of the assault, or the shock of being sexually assaulted may cause the victim to freeze and simply wish for the horrific experience to be over as soon as possible.

69. The Scottish Government is not aware of any jurisdiction that has legislated to provide for statutory jury directions concerning what weight to place on the fact that there was a lack of physical resistance on the part of the complainer, or that the alleged perpetrator did not use physical force to overcome the will of the complainer, in a sexual offence case.

70. However, the “Bench Book on Directing the Jury” provides “example” jury directions<sup>10</sup> for judges in England and Wales to use where this issue arises, which are intended to make clear to a jury that there is no single “typical” response to non-consensual sexual activity and that it should not be assumed that a victim will necessarily resist or loudly protest. A number of other jurisdictions address the issue indirectly through judicial directions concerning consent, though these address a slightly different issue in that they are concerned with impressing upon a jury that physical resistance (or verbal protest) is not required for the crime of rape (or sexual assault) to be committed.

71. The Bill makes provision for two statutory jury directions. The first provides that, where evidence is led at trial which suggests that a person did not tell or delayed in telling anyone about

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<sup>9</sup> [https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Training/benchbook\\_criminal\\_2010.pdf](https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Training/benchbook_criminal_2010.pdf)

<sup>10</sup> [http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Training/benchbook\\_criminal\\_2010.pdf](http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Training/benchbook_criminal_2010.pdf) – see Page 359.

the offence, or did not report or delayed in reporting, the offence to the police, the judge, in charging the jury, must advise that there can be good reasons why the victim of a sexual offence may not tell others about it or report it to the police, or may delay in doing so, and that this does not necessarily indicate that an allegation is false.

72. The second provides that, where evidence is given which suggests that sexual activity took place without physical resistance on the part of the person against whom the offence is alleged to have been committed, the judge, in charging the jury, must advise that a person against whom a sexual offence is committed might not physically resist the sexual activity and that the absence of such physical resistance does not necessarily indicate that an allegation is false. It also provides that, where evidence is given which suggests that that sexual activity took place without the accused using physical force to overcome the will of the victim, the judge, in charging the jury must advise that a person may commit a sexual offence without using physical force to overcome the will of the victim and that an absence of the use of such physical force does not necessarily indicate that the allegation is false.

#### *Alternative approaches*

73. There are no other approaches that would meet the desired policy objective. While it could be left to the discretion of judges in individual cases to decide whether it is appropriate to direct the jury on what account to take of apparent “delay” in reporting an alleged sexual offence, or of the absence of the use of physical force by the alleged perpetrator or of the absence of physical resistance by the alleged victim, responses to the consultation underlined concern that such directions are not necessarily being given in appropriate cases at present. Furthermore, in the absence of statutory jury directions on these issues, the prosecution may decide it is necessary to lead expert evidence on these issues in cases where they would not otherwise consider it appropriate, which may incur unnecessary expense and increase the time taken for a case to be tried.

#### *Consultation*

74. The Scottish Government’s consultation, *Equally Safe – Reforming the criminal law to address domestic abuse and sexual offences*, sought views on proposals to introduce statutory jury directions to provide guidance on how juries should consider the fact that a significant period of time elapsed between the time the offence was alleged to have been committed and the point at which it was reported to the police, or the fact that it is not alleged that the alleged attacker used physical force, or that the alleged victim did not physically resist their attacker.

75. The majority of respondents to the consultation (89%) agreed that the proposed statutory jury directions should be introduced. Groups representing victims of sexual crime and which campaign on issues relating to violence against women were especially likely to be supportive. However, some respondents, mainly those from a legal or academic background, expressed concern that the introduction of mandatory jury directions interfered with the independence of the judiciary and that it is the role of the trial judge to direct the jury as he or she sees fit in each individual case.

76. A number of those who supported the introduction of statutory directions concerning delay in reporting commented that many damaging myths and common misconceptions and

prejudices that persist in relation to rape and sexual offences and delays in reporting in particular. The majority of consultation respondents (88%) considered that the terms of the jury direction used in New South Wales, Australia, offered an appropriate model for a similar direction concerning delay in reporting in Scots law.

77. Similarly, those who supported the introduction of jury directions concerning the absence of the use of physical force by the accused, or the absence of physical resistance by the alleged victim, referenced prevalent myths and misconceptions regarding how victims of sexual assault typically respond.

## **Child sexual offences committed elsewhere in the United Kingdom**

### *Policy objectives*

78. To extend the extra-territorial effect of the law concerning sexual offences committed against children to include offences committed elsewhere in the United Kingdom.

### *Key information*

79. As a general principle, criminal offences can usually be prosecuted only in the jurisdiction in which a crime was committed. A theft which occurred in Spain could not be prosecuted in Scotland, irrespective of whether the perpetrator (or indeed the victim) of the theft was a UK national normally resident in Scotland.

80. However, the Sexual Offences (Scotland) Act 2009 (“the 2009 Act”) provides for an exception to this rule in respect of sexual offences committed against children. Sections 54 to 56 of the 2009 Act provide that the sexual offences against children listed at Parts 1 and 2 of schedule 4 of that Act have extra-territorial effect. As such, if a UK national does an act in a country outside the United Kingdom which would, if it had been done in Scotland, constitute a listed offence, then the UK national commits the offence. This applies irrespective of whether the conduct constituted an offence in the country in which it took place.

81. In 2013, following consideration of public petition PE1393<sup>11</sup> by Barnardos Scotland on tackling child sexual exploitation in Scotland, the Public Petitions Committee of the Scottish Parliament set up an inquiry<sup>12</sup> with the following remit:

“To examine the nature and extent of child sexual exploitation in Scotland; in conjunction with relevant agencies and stakeholders to determine the most pertinent issues which need to be addressed; to examine the effectiveness of current measures aimed at tackling, preventing and disrupting child sexual exploitation; and to make recommendations on what needs to be done to improve the effectiveness of those measures.”

82. In 2013, the Committee took evidence from the Lord Advocate<sup>13</sup> about the prosecution of child sexual exploitation offences and he raised concerns about the fact that, while extra-territorial jurisdiction for sexual offences against children extends to the rest of the world, the

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<sup>11</sup> [www.scottish.parliament.uk/Petitions\\_Archive/PE1393.pdf](http://www.scottish.parliament.uk/Petitions_Archive/PE1393.pdf)

<sup>12</sup> <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/60242.aspx>

<sup>13</sup> <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=8408&mode=pdf>

Scottish courts have no jurisdiction to prosecute sexual offences against children committed elsewhere in the United Kingdom.

83. In the vast majority of cases this does not present significant difficulties as it is most appropriate to prosecute such offences in the jurisdiction in which they were committed, and there is no suggestion that other jurisdictions within the UK are failing to prosecute the sexual abuse of children.

84. However, the fact that extra-territorial jurisdiction does not extend to the rest of the UK has created difficulties for prosecutors in a small number of cases. In cases where an offender engages in a course of conduct, consisting of a number of separate but connected offences committed over a period of time, it can be useful to prosecute all the offending behaviour on a single indictment or complaint. For example, in a case where an offender has a child in different locations around the UK over a period of time, it may be useful to be able to prosecute all the conduct on a single indictment, as the alternative would be to require the child to go through the ordeal of two separate trials or to prosecute only the offences which were committed in one jurisdiction. There may also be cases where a single offender commits offences against two (or more) different children in different jurisdictions within the UK and it may be useful to prosecute all the conduct on a single indictment (particularly where the two victims' accounts corroborate each other under the *Moorov* doctrine).

85. The Bill amends the 2009 Act so as to provide that the extra-territorial effect of the offences listed at Parts 1 and 2 of schedule 4 of the Act extends to offences committed in England, Wales and Northern Ireland.

#### *Consultation*

86. The Scottish Government's consultation, *Equally Safe – Reforming the criminal law to address domestic abuse and sexual offences*, sought views on a proposal to amend the provisions concerning the extra-territorial effect of Scots law concerning sexual offences committed against children to enable the Scottish courts to prosecute offences committed elsewhere in the UK.

87. The clear majority of respondents (98%) agreed with this proposal. Amongst the reasons given by consultation respondents for supporting the proposed change to the law was that it would allow for additional evidence that may exist in the rest of the UK to corroborate or strengthen a criminal case in Scotland, and could enable prosecution on a single indictment, which would avoid forcing a child to go through the trauma of two trials in different jurisdictions.

#### *Alternative approaches*

88. There is no alternative approach that would meet the policy objective of allowing these offences to be prosecuted in the Scottish courts in the small number of cases where it is appropriate to do so.

## **Reforms to system of civil orders available to protect communities from those who may commit sexual offences**

### *Policy objectives*

89. To simplify and rationalise the existing system of civil orders available to protect communities from those who may commit sex offences.

### *Key information*

90. Practitioners, including the Child Exploitation & Online Protection Centre (“CEOP”) and the police, have for some years raised concerns about the practical efficacy of sexual offences prevention orders (SOPOs) and foreign travel orders (FTOs) made under the Sexual Offences Act 2003 (“the 2003 Act”) and risk of sexual harm orders (RSHOs) made under the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (“the 2005 Act”). These concerns, which were reinforced in an independent report by Hugh Davies QC which was published in May 2013<sup>14</sup>, predominantly related to the flexibility of the orders and their remit (in terms of who they can be imposed on and who they are designed to protect).

91. More recently, the Scottish Parliament’s Public Petitions Committee Report on tackling child sexual exploitation in Scotland published by the Scottish Parliament on 14 January 2014<sup>15</sup> noted, by virtue of certain freedom of information requests in 2012, that Lothian and Borders, Strathclyde and Central Police forces had each only ever made two RSHOs. Accordingly the Committee made the following recommendation: “The Committee recommends that risk of sexual harm orders (RSHOs) are used in a much more comprehensive way for the protection of young people in Scotland”.

92. The Centre for Excellence for Looked After Children in Scotland (CELCIS) 2013 study<sup>16</sup> also reported disquiet among practitioners that the 2005 Act was not well known or well used. Among other things this study noted that voluntary sector organisations and Police Scotland “called for RSHOs to be available for children up to the age of 18”.

93. For its part, the UK Government introduced amendments to the Anti-social Behaviour, Crime and Policing Act 2014<sup>17</sup> (“the 2014 Act”) to address the concerns of professionals, including the police, that the use and effectiveness of the existing civil orders imposed on sex offenders and those who pose a risk could be improved to better protect the public from sexual harm. Schedule 5 of the 2014 Act therefore amends the 2003 Act to repeal the SOPO, FTO, and RSHO in England and Wales and replaced them with two new orders: the sexual harm prevention order and the sexual risk order. The new orders have a lower risk requirement than the previous orders. The existing test of “serious sexual harm” in existing provision will be replaced with a test of “risk of sexual harm”. Both orders can also be used to manage risk against adults and vulnerable adults abroad, as well as children. In addition, their remit is wider, enabling, for example, foreign travel restrictions to be applied under either order. Again, the aim

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<sup>14</sup> [http://www.ecpat.org.uk/sites/default/files/the\\_davies\\_review.pdf](http://www.ecpat.org.uk/sites/default/files/the_davies_review.pdf)

<sup>15</sup> [http://www.scottish.parliament.uk/S4\\_PublicPetitionsCommittee/Reports/puR-14-01w-rev.pdf](http://www.scottish.parliament.uk/S4_PublicPetitionsCommittee/Reports/puR-14-01w-rev.pdf)

<sup>16</sup> <http://www.celcis.org/media/resources/publications/Sexual-Exploitation-of-Looked-After-Children.pdf> (page 46 of the report)

<sup>17</sup> <http://www.legislation.gov.uk/ukpga/2014/12/schedule/5> (see Schedule 5).



of streamlining the orders was to provide the police and practitioners with greater clarity and flexibility.

94. The Scottish Parliament recognised the civil order measures in the Anti-social Behaviour, Crime and Policing Act 2014, by virtue of a Legislative Consent Motion (January 2014) to ensure that any new orders issued in England and Wales are enforceable in Scotland.

95. The Bill therefore makes largely equivalent provision for sexual harm prevention orders in Scotland. This will be a civil preventative order designed to protect the public from sexual harm. The order will replace SOPOs and the FTOs in Scotland. The Bill also makes provision for the sexual risk order (“SRO”). Again this will be a civil preventative order designed to protect the public from sexual harm. The order will be available in Scotland and replaces RSHOs as provided for by sections 2 to 8 of the 2005 Act. The person in respect of whom the SRO is made may or may not have a conviction for a sexual (or any other) offence. The grounds on which both these orders will be made are wider than those for the current orders, so they could be used by the police to manage risk against adults as well as children. The available prohibitions are also wider so, for example, foreign travel restrictions could be imposed under either order.

96. The test of “serious sexual harm” in existing provision is also replaced. Accordingly a court will be able to grant a new order if it is satisfied that it is necessary to protect a person from “sexual harm.”

#### *Alternative approaches*

97. While the reforms are beneficial in their own policy terms, it should be noted that the UK Government introduced similar measures. There has been a parallel regime for sex offenders north and south of the border for many years until the recent UK Government reforms and one of the benefits of reforms being progressed in Scotland is to re-introduce this parallel regime. For example, those individuals who may be subject to the orders may well have sought to take advantage of a less robust regime operating in Scotland.

#### *Consultation*

98. 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)<sup>18</sup>. The Ministerial Working Group overseeing implementation of the plan also highlighted the need to see progress in this area.

### **EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.**

#### **Equal opportunities**

99. An Equality Impact Assessment (EQIA) has been carried out and the results will be published on the Scottish Government’s website at <http://www.gov.scot/publications/recent>.

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<sup>18</sup> <http://www.gov.scot/resource/0046/00463120.pdf>

100. In relation to the provisions contained within the Bill, 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.

## **Human rights**

101. The Scottish Government has considered the extent to which the provisions in this Bill engage Articles 6 (right to a fair trial), 7 (no punishment without law), 8 (right to respect for private and family life) and 10 (freedom of expression) of the European Convention on Human Rights and is satisfied that the provisions of the Bill are compatible with those rights. It is not considered that the Bill engages rights under any other article of the Convention.

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

102. This section enables courts to consider an offence to be aggravated if it is committed with the intention of causing physical or psychological harm to a partner or ex-partner, or (where it is committed against the partner or ex-partner only) with recklessness as to that being the effect. The fact that the offence was so aggravated will be recorded and the court is required to take this fact into account in sentencing the offender.

103. In taking account of the aggravation when sentencing the offender, the court is bound under the Human Rights Act 1998 to exercise its powers compatibly with the offender's Convention rights.

### *Disclosing or threatening to disclose intimate images (sections 2 to 4)*

104. This provision is intended to protect the rights of persons who may be caused fear, alarm or distress by the non-consensual sharing of private and intimate images in which they appear.

105. The Scottish Government considers that it is compatible with the ECHR rights under Article 10 concerning freedom of expression as this is a qualified right which may be interfered with where it is necessary in a democratic society in pursuit of one of the "legitimate aims" set out in Article 10(2), which include protecting the rights or reputation of others.

### *Making of non-harassment orders in criminal cases (section 5)*

106. This provision enables a non-harassment order (NHO) to be granted where a person is acquitted on the grounds they were not criminally responsible at the time of the offence due to a mental disorder, or where a court finds that they did the acts constituting the offence but are unfit to stand trial by reason of a mental or physical condition. It is intended to give the courts an alternative means to protect victims in cases involving abuse and harassment of individuals where there can be no conviction, for example, due to a mental disorder.

107. The Scottish Government considers this provision is compatible with Article 6(1) right to a fair trial in relation to civil rights and obligations. Section 234A of the 1995 Act, which provides for NHOs, contains a number of procedural protections, giving the person against whom a NHO is granted the opportunity to make representations and providing a mechanism for the NHO to be varied or revoked on application. The imposition of a NHO can be appealed as if it were a sentence.

108. The Scottish Government recognises that NHOs engage a person's rights under Article 8 (respect for private and family life) and Article 10 (freedom of expression). However, these are qualified rights which may be interfered with where it is necessary in pursuit of, for example, safeguarding public safety, preventing disorder or crime, and protecting the rights and freedoms of others. The court in determining whether to grant a NHO is bound under the Human Rights Act 1998 to exercise its powers compatibly with the person's Convention rights.

*Jury directions relating to sexual offence cases (section 6)*

109. These provisions oblige judges, when certain sexual offences are being tried by way of solemn proceedings, to direct the jury with regard to certain evidential matters.

110. The Scottish Government considers that the provisions are compatible with the right to a fair trial at Article 6 of the ECHR. Jury directions will only be required to be made if certain circumstances arise and while the provisions mandate what the directions must relate to, the wording and form of those directions is left to the trial judge, who is required to act in accordance with the convention rights set out in the Human Rights Act 1998.

*Enabling child sexual offences committed elsewhere in the UK to be prosecuted in Scotland (sections 7 and 8)*

111. The Scottish Government considers that this provision protects the rights of child victims of sexual offences by ensuring that, where these offences are committed in another jurisdiction within the United Kingdom, the Scottish courts have the same powers to prosecute these offences as they currently have in respect of offences committed in jurisdictions outside the United Kingdom.

112. The Bill makes provision to prevent the prosecution of a matter in Scotland where it has already been prosecuted elsewhere within the UK and to require Scottish prosecutors to consult with their counterparts in other parts of the UK before prosecuting acts which have taken place elsewhere within the UK. The Scottish Government considers this provision is compatible with the Article 6 right to a fair trial.

*Sexual harm prevention orders (sections 9 to 24)*

113. Sexual harm prevention orders (SHPOs) can be made by a court when it is dealing with a person convicted of a sexual offence listed at schedule 3 of the 2003 Act or via an application at the instance of the chief constable at another date subsequent to the conviction.

114. SHPOs could interfere with a person's Article 8 right to respect for private life. A prohibition on foreign travel is an example of a prohibition which may interfere with this right, though there may be others, depending on the facts and circumstances of the particular case. SHPOs are intended to prevent disorder and crime, protect health and morals and protect the rights and freedoms of others, and as such, as the rights at Article 8 are qualified rights, and the orders are intended to prevent the very serious harm which can be experienced by a victim of sexual offending, the Scottish Government considers this interference to be justified.

115. 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 that it is necessary to do so for the purpose of

protecting the public from sexual harm. Furthermore, the only prohibitions or requirements which a court may impose in an order are those which it considers necessary to protect the public or a particular member of the public from sexual harm. Such orders are to be of time-limited duration, and there is provision enabling them to be appealed against, or for an application to be made for discharge or variation.

#### *Sexual risk orders (sections 25 to 34)*

116. Sexual risk orders (SROs) can be made by a Scottish court on the application of the chief constable. A court may make a SRO only if it is satisfied that it is necessary to do so for the purpose of protecting the public or any individual member of the public from sexual harm from the person who is to be the subject of the order. SROs are intended to replace risk of sexual harm orders and will prohibit the person against whom they are made from doing anything described in the order, or will require the person to do a thing described in the order.

117. The Scottish Government recognise that SROs could significantly interfere with a person's right to respect for private life without the person having been convicted of an offence. However, the court must be satisfied that the person to whom the order will apply has done an act of a sexual nature and that as a result of that act it is necessary to make a SRO for the purpose of protecting the public from sexual harm. Furthermore, the only prohibitions or requirements which a court may impose in an order are those which it considers necessary to protect the public or a particular member of the public from harm from the person to whom the order relates. Such orders are to be of time-limited duration, and there is provision enabling them to be appealed against, or for an application to be made for discharge or variation.

#### **Island and rural communities**

118. Domestic abuse and sexual offences can occur in urban, rural and island communities. The Scottish Government is satisfied that the Bill has no differential impact upon island or rural communities

#### **Local government**

119. Courts may use community sentences in dealing with those committing some of the offences provided for in the Bill. Local authorities will have responsibility for implementing such sentences as part of their wider responsibility for criminal justice social work. This would include, for example, responsibility for planning and supervising unpaid work to be carried out by an offender as part of a community payback order. The financial implications for local government are set out in the Financial Memorandum accompanying the Bill.

#### **Sustainable development and environmental issues**

120. The Scottish Government is satisfied that the Bill has no negative effect on sustainable development. The potential environmental impact of the Bill has been considered. A pre-screening report confirmed that the Bill has no impact on the environment and consequently that a full Strategic Environmental Assessment does not need to be undertaken. It is, therefore, exempt for the purposes of section 7 of the Environmental Assessment (Scotland) Act 2005.

**Business and regulatory impact assessment**

121. The Scottish Government is satisfied that the Bill has no significant impact on businesses and other non-public bodies.

# **ABUSIVE BEHAVIOUR AND SEXUAL HARM (SCOTLAND) BILL BILL**

## **POLICY MEMORANDUM**

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# **ABUSIVE BEHAVIOUR AND SEXUAL HARM (SCOTLAND) BILL**

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## **EXPLANATORY NOTES (AND OTHER ACCOMPANYING DOCUMENTS)**

### **CONTENTS**

As required under Rule 9.3 of the Parliament's Standing Orders, the following documents are published to accompany the Abusive Behaviour and Sexual Harm (Scotland) Bill introduced in the Scottish Parliament on 8 October 2015:

- Explanatory Notes;
- a Financial Memorandum;
- a Scottish Government statement on legislative competence; and
- the Presiding Officer's statement on legislative competence.

A Policy Memorandum is published separately as SP Bill 81–PM.





## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
2. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

### **THE BILL**

3. The Bill's overarching objective is to improve how the justice system responds to abusive behaviour, including domestic abuse and sexual harm, helping to improve public safety by ensuring that perpetrators are appropriately held to account for their conduct.
4. A more detailed explanation of the Bill's purpose can be found in the Policy Memorandum, which also explains the thinking and policy intentions that underpin it.

### **THE STRUCTURE AND A SUMMARY OF THE BILL**

5. The Bill is in three Parts.
6. Part 1 (Abusive behaviour) includes provision for a new specific "domestic abuse" aggravator, for a specific offence concerning the non-consensual sharing of private, intimate images (often called "revenge porn") and makes provision to allow courts to make a non-harassment order in cases where the court is satisfied that a person did harass another person but a conviction does not take place due to the mental or physical condition of the person.
7. Part 2 (Sexual harm) makes provision to require juries in sexual offence cases to be given specific directions about how to consider the evidence, ensures that sexual offences against children committed in England and Wales by Scottish residents are capable of being prosecuted in Scotland and reforms the system of civil orders available to protect communities from sexual offences.
8. Part 3 contains general and ancillary provision.

### **PART ONE – ABUSIVE BEHAVIOUR**

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

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

9. Section 1 provides for a statutory aggravation that an offence is aggravated by constituting abuse of a partner or ex-partner where the person convicted of the offence either

intended to cause or else was reckless as to whether their actions would cause, physical or psychological harm to their partner or ex-partner.

10. Subsection (2)(a) provides that, where it is libelled that the accused acted with the *intent* of causing their partner to suffer physical or psychological harm the offence itself does not have to have been committed against the person's partner or ex-partner. As such, the aggravation could be libelled where, for example, a person commits an assault against their ex-partner's child with the intent of causing psychological harm to their ex-partner.

11. Subsection (2)(b) provides that, where the offence is committed against the person's partner or ex-partner, the offence is aggravated where the convicted person is reckless as to causing the partner or ex-partner to suffer physical or psychological harm. As such, the aggravation applies where, for example, someone assaults their partner, irrespective of whether it was their *intent* to cause such harm to that person.

12. Subsection (5) requires that, where the aggravation is proved, the court must take that aggravation into account when determining sentence. It must also explain how the aggravation has affected the sentence (if at all) and record the conviction in a manner which shows that the offence was aggravated by constituting abuse of a partner or ex-partner.

13. Subsection (6) provides that, for the purpose of the aggravation, "partner" means a person's spouse or civil partner (or cohabiting equivalent), or a person in an intimate personal relationship with the applicant. Former relationships of the specified types are covered in addition to current relationships. The phrase "intimate personal relationship" is intended to cover relationships between boyfriends and girlfriends (including same-sex relationships), although the relationship need not be sexual. Other family relationships and other types of relationship (e.g. between friends or business partners or work colleagues) are not covered by the aggravation.

#### *Disclosure of an intimate photograph or film*

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

14. Section 2 creates two new offences relating to disclosure of intimate images.

15. Subsection (1) provides that it is an offence to disclose a photograph or film showing a person in an intimate situation, or to threaten to do so. The *mens rea* of the offences is intention to cause fear, alarm or distress to the person shown in the intimate situation or recklessness as to fear, alarm or distress being caused. However an offence will not be committed where the intimate image has already been made publicly available with the consent of the person shown in the intimate situation.

16. Subsection (2) brings within the scope of the offences disclosure of material in a format from which a photograph or film can be created, for example a photographic negative or data stored electronically on a portable hard drive or disk.

17. Subsection (3) provides for four defences to the offences. The defence at subsection (3)(c) is that the disclosure was reasonably believed to be necessary for the prevention, detection, investigation or prosecution of crime (for example, disclosing to the police an image believed to be portraying illegal activity). It is anticipated that there will be few occasions on which disclosure of intimate photographs or images could be reasonably believed to be in the public interest in terms of the defence at subsection (3)(d), bearing in mind that what is of interest to the public is not the same thing as what is in the public interest; this will be a matter for the courts to assess in the particular circumstances of a case. Subsection (4) provides clarification of the meaning of “consent” for the purpose of the defences at subsections (3)(a) and (b).

18. Subsection (5) provides that it is a defence that the intimate photograph or film was taken in a public place and members of the public were present. This has the effect of excluding from the scope of the offence photographs or films taken of, for example, “naked protestors” or “streakers” in a public place.

19. Subsection (6) provides that, for the purpose of the defences at subsections (3) and (5), an evidential burden of proof is placed on the accused to bring forward sufficient evidence to raise an issue with respect to the defence, but the legal burden of disproving the defence and proving that the offence has been committed remains with the prosecution.

20. Subsection (7) makes provision for the penalties which will attach to the offences.

### **Section 3 – Interpretation of section 2**

21. Section 3 defines the meaning of certain terms for the purpose of section 2.

22. Subsection (2) provides definitions of “film” and “photograph”. Those terms include any material that was originally captured by photography or by making a recording of a moving image, whether or not it has been altered in any way. As such, the offences apply to digitally enhanced or manipulated photographs or films, but it does not apply to material that looks like a photograph or film but does not in fact contain any photographic element (for example, because it had been generated entirely by computer).

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

23. Section 4 introduces schedule 1, which addresses the position of information society services in respect of the new offences at section 2, to give effect to Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, often referred to as the E-Commerce Directive (“the Directive”).

24. Paragraph 1 of schedule 1 sets out the conditions under which service providers may be exempted from liability under the section 2 offence where acting as “mere conduits” for the transmission of, or provision of access to, information. This means that, providing the conditions in paragraph 1 are met, a business providing access to the internet (e.g. a home

internet service provider) is exempted from liability if the person using their service discloses an intimate image while making use of the internet. This accords with Article 12 of the Directive.

25. Paragraph 2 of schedule 1 sets out the conditions under which service providers may be exempted from liability for “caching” information, that is, for the automatic, intermediate and temporary storage of information. This means that when an internet service provider automatically makes and “caches” a local copy of a file accessed by a user of its service (which is done in order to provide a more efficient service) it is not criminally liable in the event that the information consists of an intimate image, providing the conditions in paragraph 2 are met. This accords with Article 13 of the Directive.

26. Paragraph 3 of schedule 1 sets out the conditions under which service providers may be exempted from liability for “hosting” information, that is, storing information at the request of a recipient of the service. For example, if a person discloses an intimate image using a social network, then, providing the conditions in paragraph 3 are met, the social network is exempt from criminal liability. This accords with Article 14 of the Directive.

27. Paragraph 4 of schedule 1 defines “information society services”, “recipient” and “service provider”.

#### *Non-harassment orders*

### **Section 5 – Making of non-harassment orders in criminal cases**

28. Section 234A of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) provides that the prosecutor may apply to a court to impose a non-harassment order where a person is convicted of an offence involving harassment of a person. The court may, if it is satisfied on the balance of probabilities that it is necessary to do so to protect the victim from further harassment, make a non-harassment order.

29. Section 5(2) amends section 234A of the 1995 Act to empower a court to make a non-harassment order where a person has been found unfit to stand trial under section 53F by reason of a mental or physical condition and the court has determined that the person has done the act or made the omission constituting the offence, or where the accused is acquitted under section 51A of the 1995 Act because they were not criminally responsible for their actions at the time of the offence by reason of mental disorder.

30. Sections 5(3) and 5(4) make consequential amendments to section 234A to reflect the changes to the structure of section 234A(1) and to take account of the fact that the person upon whom a non-harassment order may be imposed will not necessarily have been convicted of a criminal offence.

31. Section 5(5) inserts new subsection 234A(2BA), which enables the prosecutor to put information to the court about previous instances on which the person against whom the order is sought has, in relation to the same victim, been found to have done acts constituting an offence, but has not been fit to stand trial, or has been acquitted of the offence on the basis of a lack of criminal responsibility.

32. Section 5(6) makes a consequential amendment to section 234A(2C) to reflect the fact that the person against whom a non-harassment order is sought may not have been convicted of a criminal offence.

33. Section 5(7) amends section 234A(3) to provide that non-harassment orders, including orders granted by virtue of the amendments in section 5, and any variations or revocations of those orders, are to be appealed as if they were a sentence. This means that the procedural safeguards of the 1995 Act will apply to such appeals.

## **PART TWO – SEXUAL HARM**

### **Chapter 1 – Jury directions relating to sexual offences**

#### **Section 6 – Jury directions relating to sexual offences**

34. Section 6 inserts two new sections, 288DA and 288DB, into the 1995 Act, which provide that jury directions must be given by the judge in sexual offence trials where certain conditions apply.

35. Jury directions form part of the judge's charge to the jury. The judge's charge is given after the prosecution and defence have given their concluding address but prior to the jury returning their verdict or retiring to consider their verdict. Jury directions will ordinarily include those matters which require to be considered by the jury in determining whether they are of the view that a particular offence has been committed. The provisions set out in section 6 provide that the judge will be required to set out certain matters to the jury if particular circumstances arise during the trial.

36. The matters which will be required to be brought to the attention of the jury already form part of the existing law. The purpose of these provisions is to place a requirement on judges to direct on that existing law. The wording of the jury directions will remain a matter for the particular judge.

37. Section 288DA applies in a trial for certain sexual offences and sets out that particular directions must be given by the trial judge to the jury in certain circumstances. Subsection (1) sets out those circumstances, with subsection (2) setting out what the particular directions must cover. Subsection (3) provides an exception to when the circumstances set out in subsection (1) will require the particular directions to be made, with subsection (4) defining particular terms used in the section.

38. Section 288DA(1) provides that during a trial on indictment for particular sexual offences the requirement to give a direction as set out in subsection (2) applies in two general circumstances.

39. Firstly where evidence is given which suggests that the complainer did not tell, or delayed in telling, anyone, or a particular person (such as a partner, friend or family member), about the offence or did not report, or delayed reporting, the offence to any investigating agency

or a particular investigating agency, such as the police. Secondly, where a question is asked or a statement is made with a view to eliciting or drawing attention to evidence of that nature.

40. Section 288DA(2) provides that where subsection (1) applies, the judge must advise the jury that there can be good reasons why a person may not tell another person that they have been a victim of a sexual offence, or not report that matter to the police, or may delay in doing so, and that this does not necessarily indicate that the allegation is false.

41. Section 288DA(3) provides that a direction need not be given if the judge considers that the circumstances of the case are such that no reasonable jury could consider the fact that there was a delay or failure to report the offence, or tell another person about the offence, to be relevant to the question of whether the offence has been proven. This may be the case where, for example, the offence is alleged to have been committed against someone who was a baby or very young child at the time the offence was alleged to have been committed and could not understand that an offence had been committed against them.

42. Section 288DA(4) defines the meaning of certain terms for the purpose of this section. Sexual offence takes its meaning from section 210A of the 1995 Act which itself lists a variety of offences. However, offences under section 170 of the Customs and Excise Management Act 1979, in relation to goods prohibited to be imported under section 42 of the Customs Consolidation Act 1876 (where the prohibited goods include indecent photographs of persons), or under 52A of the Civic Government (Scotland) Act 1982 (possession of indecent images of children) are excluded from the definition of sexual offence as used in section 288DA as it is considered that neither of these offences could be committed “against” a person who may not tell or report it, or delay in telling or reporting it.

43. Section 288DB makes provision that directions must be given by the trial judge to the jury when, during a trial for a sexual offence listed at section 288DB(7), evidence is led that the person against whom the offence is alleged to have been committed did not offer physical resistance or that the alleged perpetrator did not use physical force to overcome the will of the alleged victim.

44. Section 288DB(1) provides that subsection (2) applies where during a trial for a sexual offence, evidence is given which suggests that sexual activity took place between the accused and the complainer and the complainer did not physically resist their alleged attacker, or where a question is asked or a statement is made with a view to eliciting or drawing attention to that evidence.

45. Section 288DB(2) provides that the judge must advise the jury that there can be good reasons why a person against whom a sexual offence is committed may not physically resist the sexual activity and that this does not necessarily indicate that the allegation is false. Examples of a lack of physical resistance which this provision is designed to cover are instances such as where a person may freeze in fright, or may fear that offering physical resistance will provoke their attacker to become more violent.

46. Section 288DB(3) provides that the judge does not need to give such a direction where the judge considers that the circumstances of the case are such that no reasonable jury could

consider the fact that the complainer did not offer physical resistance to their alleged attacker to be relevant to the question of whether the offence was proven. This may be the case where, for example, the person against whom the offence is alleged to have been committed was asleep or unconscious at the time of the alleged offence.

47. Section 288DB(4) provides that subsection (5) applies where during a trial for a sexual offence, evidence is given which suggests that sexual activity took place between the accused and the complainer without the accused using physical force to overcome the will of the person against whom the offence is alleged to have been committed, or where a question is asked or a statement is made with a view to eliciting or drawing attention to that evidence.

48. Section 288DB(5) provides that where subsection (4) applies, the judge must advise the jury that there can be good reasons why a person may not need to use physical force to overcome the will of the person against whom a sexual offence is committed and that the fact that the accused did not use physical force does not necessarily indicate the allegation is false. Examples where a person may not need to use physical force to overcome the will of a person could include where the victim has frozen in fear and offers no resistance.

49. Section 288DB(6) provides that the judge does not need to give such a direction where the judge considers that the circumstances of the case are such that no reasonable jury could consider the fact that the complainer did not offer physical resistance to their alleged attacker to be relevant to the question of whether the offence was proven. This may be the case where, for example, the person against whom the offence is alleged to have been committed was asleep or unconscious at the time of the alleged offence.

50. Section 288DB(7) defines the meaning of certain terms for the purpose of this section. The definition of “sexual offence” is narrower than that provided for at section 288DA as it is restricted to those offences which involve physical contact between the perpetrator and the victim.

## **Chapter 2 – Sexual acts elsewhere in the United Kingdom**

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

51. Section 7 amends section 54 of the Sexual Offences (Scotland) Act 2009 (“the 2009 Act”) so as to provide that it is a criminal offence under Scots law for a person to incite the commission of a sexual act that would constitute an offence listed at Part 1 of schedule 4 to the 2009 Act (“a listed offence”) in Scotland, where the act in question is intended to occur outside Scotland, whether within or outside the United Kingdom. Section 54 currently only provides for the incitement offence to have extraterritorial effect where the criminal act is intended to occur outside the United Kingdom.

52. The listed offences are inciting any of the following offences: offences under Part 1 of the 2009 Act (rape etc.) which are committed against a person under the age of 18; the offences against children set out in Part 4 of that Act; the sexual abuse of trust offences in sections 42 and 46 (where committed against a person under the age of 18) of that Act; and indecent assault of a person under the age of 18.

53. Subsection (3) amends section 54(2) of the 2009 Act and inserts a new section 54(2A). This provides that where the person inciting the commission of a sexual act elsewhere in the United Kingdom is not a habitual Scottish resident, they only commit an offence if the act which they are inciting involves the commission of a criminal offence in the part of the United Kingdom in which it is intended to take place. This means that, for example, in the event that a person habitually resident in Northern Ireland incites the commission of a sexual act in Northern Ireland which is a criminal offence under Scots law listed at part 1 of schedule 4 of the 2009 Act, but which is not unlawful in Northern Ireland, they would not commit the offence. But if a Scottish habitual resident incited an offence in Northern Ireland in the same circumstances, the section 54 incitement offence would be committed, because in that case there is no requirement for the intended conduct to be a criminal offence in both jurisdictions.

54. Subsections (4) and (5) make consequential amendments.

55. Subsection (6) amends section 54(8) of the 2009 Act to add a definition of “a habitual resident of Scotland” as someone who was at the time the act of incitement took place, or who has subsequently become, habitually resident in Scotland. Habitual residence is a much-used concept in private international law and it is expected that the courts would interpret this provision in accordance with those principles.

56. Subsection (7) amends the heading to section 54 to reflect the fact that it now applies to incitement to commit certain sexual acts anywhere outside Scotland.

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

57. Section 8 inserts new sections 54A and 54B into the 2009 Act, so as to provide that the Scottish courts may take jurisdiction over an act which takes place elsewhere in the United Kingdom that would have constituted a “listed offence” had it taken place in Scotland.

58. The effect of this provision is that the extra-territorial jurisdiction of Scottish courts in this area is expanded to cover the other jurisdictions of the United Kingdom, as well as places outwith the United Kingdom (which is provided for at section 55 of the 2009 Act).

59. Section 54A(2) and (3) restrict the extra-territorial offence by providing that it may be committed by a person who is not a habitual resident of Scotland only if the act in question is also a criminal offence, however described, in the place where it was alleged to have taken place.

60. Sections 54A(4) to 54A(6) set out the procedure that a person accused of an offence must follow if they intend to argue that the conduct did not constitute a criminal offence in the part of the United Kingdom in which it took place.

61. Section 54A(8) sets out some relevant definitions, including a definition of habitual resident of Scotland in the same terms as in the amendments to section 54 of the 2009 Act by section 7.



62. New section 54B places limitations on the use of section 54A to prosecute listed sexual offences which were committed elsewhere in the United Kingdom and which also constitute a criminal offence in the country where they were committed. This applies whether the person committing the offence is a Scottish habitual resident or not.

63. Section 54B(3)(a) provides that the offence cannot be prosecuted in the Scottish courts if the person is being or has been prosecuted for the same conduct in the country within the United Kingdom where the act took place.

64. Section 54B(3)(b)(i) provides that, before initiating a prosecution for a listed offence which is alleged to have occurred in another country within the United Kingdom, the prosecutor must consult the director of public prosecutions in the country in which the offence is alleged to have been committed.

65. Section 54B(3)(b)(ii) provides that prosecution for a listed offence which is alleged to have occurred in another country within the United Kingdom is only competent where the accused is also charged, on the same indictment, with an act in Scotland constituting a listed offence. This is intended to ensure that the Scottish courts can only hear a case relating to an offence alleged to have been committed elsewhere in the United Kingdom where it forms part of a course of conduct of offending, a part of which took place in Scotland.

### **Chapter 3 – Sexual harm prevention orders**

66. Sections 9 to 24 make provision for the sexual harm prevention order (“SHPO”). This will be a civil preventative order designed to protect the public from sexual harm. The order will be available in Scotland and replaces the sexual offences prevention order (SOPO) and the foreign travel order (FTO) provided for in sections 104 and 113 of the Sexual Offences Act 2003 (“the 2003 Act”).

#### **Section 9 – Meaning of sexual harm**

67. Section 9 provides a definition of “sexual harm” to include physical or psychological harm caused by a person committing an offence or offences listed in schedule 3 of the 2003 Act (or, broadly, equivalent offences outside the UK). The offences in schedule 3 are exclusively sexual offences.

#### **Section 10 – Making of order on dealing with person for offence**

68. Section 10 provides that a court may, in certain circumstances, in addition to dealing with the person in any other way, make a SHPO on sentencing the person (subsection (2)).

69. Subsection (1) sets out the three circumstances where the court may make a SHPO against a person on sentencing. The first is on conviction when it deals with a person in respect of an offence listed in schedule 3 of the 2003 Act. The second circumstance is acquittal of such an offence by reason of the special defence set out in section 51A of the 1995 Act (which provides a defence where a person is unable by reason of mental disorder to appreciate the nature or wrongfulness of their conduct). The third circumstance is a finding of unfitness for trial in

relation to such an offence under section 53F of that Act (which provides that a person is unfit for trial if it is established on the balance of probabilities that the person is incapable, by reason of a mental or physical condition, of participating effectively in that trial). In relation to the third circumstance there must also be a finding that the person has done the act constituting the offence.

70. Subsection (3) provides that the court may make a SHPO at its own instance or on the motion of the prosecutor.

71. Subsection (4) provides the tests for making a SHPO on sentencing. The court must be satisfied that it is necessary to do so for the purpose of protecting the public or any particular members of the public from sexual harm from the person or protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the person outside the United Kingdom.

### **Section 11 – Making of order against qualifying offender on application to sheriff**

72. Section 11 provides that a court may make a SHPO when an application for such an order is made to it by the chief constable in respect of a person.

73. Subsection (2) sets out the tests for making a SHPO on application. The sheriff must be satisfied that the person in respect of whom the order is sought is a qualifying offender (subsection (2)(a)) and that the person's behaviour since the person first became a qualifying offender makes it necessary to make the prohibitions or requirements in the order for the purpose of protecting persons generally, or particular persons, from sexual harm or protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the person outside the UK (subsection (2)(b)).

### **Section 12 – Qualifying offender: conviction etc. in Scotland**

74. Section 12 provides part of the definition of “qualifying offender” for the purposes of section 11.

75. Subsection (1) provides that a person is a qualifying offender if any of the court disposals listed in the subsection have been made in Scotland in relation to that person.

76. Subsections (2) provides that for the purposes of section 11 a person is also a “qualifying offender” if any of the court disposals listed were made before 1 May 2004 (i.e. when the 2003 Act came into force) and the sheriff is satisfied that there was a significant sexual element to the person's behaviour in committing the offence.

### **Section 13 – Qualifying offender: conviction etc. elsewhere in the United Kingdom**

77. Section 13 provides further definition of what is meant by a “qualifying offender” for the purposes of section 11 in circumstances when that person is a qualifying offender if any of the court disposals listed in the subsection have been made elsewhere in the UK in relation to that person.

## **Section 14 – Qualifying offender: conviction etc. outside United Kingdom**

78. Section 14 provides further definition of what is meant by a “qualifying offender” for the purposes of section 11 in circumstances when that person is a qualifying offender if any of the court disposals listed in the subsection have been made outside the UK in relation to that person.

79. Subsection (1) sets out the circumstances which have taken place under the law in force outside the United Kingdom by which section 14 applies to a person, and therefore the circumstances under which that person is a “qualifying offender”. Subsection (2) defines the phrase “equivalent offence” as it is used in subsection (1) providing that it is an act which at the time it was done constituted an offence under the law in force in that country and would have also constituted an offence listed in certain parts of the 2003 Act.

80. Subsection (3) makes clear, in relation to the definition in subsection (2), that an act punishable under the law in force in a country outside the United Kingdom will constitute an offence under that law however it is described under that law.

81. Subsection (4) provides that where it is alleged that section 14 applies to a person, the assertion that the act carried out would have also constituted an offence listed in certain parts of the 2003 Act is to be accepted by the court unless either: it is challenged by way of notice served on the chief constable by the person, (the details of which are set out in subsection (4)(a)); or the court, without requiring the person to serve such a notice, allows the person to require the chief constable to prove that assertion.

## **Section 15 – Content and duration of order**

82. Section 15 makes provision about the prohibitions or requirements (or both) that may be contained in a SHPO. Each prohibition and requirement in a SHPO is for a fixed period and the order itself is for a fixed period. The order and the prohibitions and requirements may all be for the same period. However, the Bill provides that the order ceases to have effect, if it has not already done so, if all of the requirements and prohibitions in the order have ceased to have effect.

83. Subsection (2) provides that those prohibitions or requirements will relate to things to be done or not done throughout the UK (unless expressly confined to particular localities).

84. Subsection (3) provides that any prohibition or requirement in the order must have a specified fixed period of not less than five years. The only exception to that requirement relates to a prohibition on foreign travel (which is dealt with in section 16) and relates to a period of not more than five years.

85. The order can include any prohibition or requirement the court considers necessary for the purpose of subsection (6), including the prohibition of foreign travel to the country or countries specified in the order (or to all foreign countries, if that is what the order provides), as set out in section 16.

86. A SHPO may prohibit the person in respect of whom the order is made from doing things or require that person to do things. Subsection (4) provides that different prohibitions and requirements may have effect for different periods.

87. Subsection (6) sets out the tests for imposing prohibitions and requirements in a SHPO, namely that they are necessary to protect the public or any particular members of the public from sexual harm from the person (subsection (6)(a)) or to protect children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the person outside the UK (subsection (6)(b)).

88. Subsection (7) provides that, if the court makes a SHPO in respect of a person already subject to such an order, the earlier order will cease to have effect.

## **Section 16 – Prohibitions on foreign travel**

89. Section 16 makes provision about prohibitions on foreign travel in SHPOs.

90. Subsection (1) provides that the duration of the foreign travel prohibition may not exceed 5 years.

91. Subsection (2) provides that the order may prohibit the subject from travelling to a country outside the UK named in the order (such as Thailand and Malaysia); or from travelling to any country outside the UK that is not named in the order (for example, this may be needed where the offender is banned from travelling anywhere in the world other than to a named country which he/she may need to visit for family reasons); or from travelling to any country outside the UK (where the offender is such a risk to children or vulnerable adults that a universal ban is required).

92. Subsection (3) determines that a prohibition on foreign travel may be extended for further fixed periods of no more than five years each time (following an application under section 19).

93. Subsection (4) provides that an offender subject to a SHPO with a prohibition from travelling to any country outside the UK must surrender their passports at a police station specified in the order.

94. Subsection (6) requires the police to return any surrendered passport as soon as reasonably practicable after the relevant foreign travel prohibition ceases, unless the person subject to the order is subject to an equivalent prohibition specified in another order. Circumstances where this subsection would not apply are provided for at subsection (7) (for example, where a passport has already been returned to the relevant authority).

## **Section 17 – Application of notification requirements where order made**

95. Subsection (2) provides that if the person is subject to the notification requirements under Part 2 of the 2003 Act who would, if not for the order, cease to be subject to the notification requirements, they will remain subject to the requirements for the duration of the order.

96. Subsection (3) provides that where the person is not subject to the notification requirements under Part 2 of the 2003 Act, the order makes them subject to the notification requirements for registered sex offenders (as set out in Part 2 of the 2003 Act) for the duration of the order.

### **Section 18 – Cessation of order: relevant sexual offenders**

97. Section 18 provides that where a review is successfully and finally completed by virtue of sections 88F or 88G of the 2003 Act and the relevant sex offender was subject to a SHPO then that order ceases to have effect.

### **Section 19 – Variation, renewal and discharge**

98. Section 19 provides that a court can vary, renew or discharge a SHPO upon application from the person in respect of whom the order was made, the chief constable or, in appropriate cases, the prosecutor.

99. Subsections (1) and (3) set out general powers in this context. The person in respect of whom the SHPO is made, the chief constable or, in appropriate cases, the prosecutor may apply for variation, renewal or discharge of such a SHPO. That application is to be made to the High Court where that court made the order and to the sheriff otherwise. Subsection (3)(b) makes provision about shrieval jurisdiction in this connection. Where the relevant court receives such an application, it may vary, renew or discharge individual prohibitions or requirements or add new prohibitions or requirements, it may renew the whole order or it may discharge the whole order.

100. Subsection (5) sets out the tests the court must consider when deciding whether to vary, renew or discharge SHPOs (including by adding new prohibitions or requirements) or any prohibitions or requirements within them. Subsections (5) and (6) apply the tests for the making of a SHPO to any variation (including an increase or a relaxation of a requirement or prohibition), renewal, addition or discharge.

### **Section 20 – Interim orders**

101. Section 20 allows the chief constable to apply for an interim SHPO where an application has been made for a full order.

102. Subsection (1) gives power to a sheriff to make an interim SHPO while the main application under section 11 is being determined. The sheriff may make such an order if the sheriff considers it just to do so (subsection (2)) and such an order may contain prohibitions or requirements (or both) in relation to the person in respect of whom the order is to have effect, for a fixed period (subsection (5)). Those prohibitions or requirements will relate to things to be done or not done throughout the United Kingdom (unless expressly confined to particular localities) (subsection (4)).

103. Subsection (9) provides that an interim SHPO will cease to have effect on the determination of the related application for a SHPO under section 11 or earlier, if all prohibitions or requirements cease to have effect.

104. Subsection (10) allows for an application to a sheriff in the sheriffdom of the sheriff who made the interim SHPO for variation, renewal or discharge of that interim order. Such an application may be made by the person in respect of whom the order was made or the chief constable.

## **Section 21 – Appeals**

105. Section 21 provides for an appeals process in relation to SHPOs and interim SHPOs.

106. Subsection (1) makes provision about SHPOs made on sentencing and any order granting or refusing a variation, renewal or discharge of such a SHPO. These are to be treated as sentences only for the purposes of any appeal.

## **Section 22 – Requirement for clerk of court to serve order**

107. Section 22 imposes a requirement on the clerk of court relative to a document to be served under sections 9 to 24 is to be served on a person who is subject to a SHPO or an interim SHPO or that order has been discharged.

## **Section 23 – Offence of breaching order**

108. Section 23 makes provision about breach of SHPOs.

109. Subsection (1) provides that breach of SHPO, without reasonable excuse, will be a criminal offence.

110. Subsection (2) specifies that a person convicted of such an offence on summary conviction will be liable to a term of imprisonment of up to 12 months or to a fine or both; a person convicted on indictment will be liable to a term of imprisonment of up to five years or to a fine or both.

111. Subsection (3) provides that a person convicted under section 23 cannot be dealt with by way of a community payback order, or dismissed with an admonition or discharged absolutely.

## **Section 24 – Interpretation of Chapter**

112. Section 24 defines certain terms used in Chapter 3 of Part 2 of the Bill.

## **Chapter 4 – Sexual risk orders**

113. Sections 25 to 38 make provision for the sexual risk order (“SRO”). This will be a civil preventative order designed to protect the public from sexual harm. The order will be available

in Scotland and replaces the risk of sexual harm order (RSHO) as provided for by sections 2 to 8 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (“the 2005 Act”). The person in respect of whom the SRO is made may or may not have a conviction for a sexual (or any other) offence.

## **Section 25 – Meaning of harm**

114. Section 25 provides a definition of “harm” to include physical or psychological harm caused by a person doing an act of a sexual nature.

## **Section 26 – Making of order**

115. Section 26 provides that the chief constable may apply to a sheriff for a SRO against a person. A SRO differs from a SHPO in that it may be made where a person has not previously been convicted of a sexual offence (or any offence) but the person’s behaviour indicates a risk that others may be harmed, and intervention at an early stage is necessary to prevent that harm.

116. Subsection (2) sets out the tests for making a SRO. The sheriff may only make an order if satisfied that the person in respect of whom the order is sought has done an act of a sexual nature and, as a result, an order is necessary to protect the public or any particular members of the public from harm from the person (subsection (2)(a)), or to protect children or vulnerable adults generally, or any particular children or vulnerable adults, from harm from the person outside the United Kingdom (subsection (2)(b)).

117. The SRO can include any prohibition, restriction or requirement the court considers necessary for this purpose, including the prevention of foreign travel to the country or countries specified in the order, as set out in section 28. Where the order prohibits all travel outside the UK, they must surrender their passport to the police for the duration of this prohibition (section 28(4)).

## **Section 27 – Content and duration of order**

118. Section 27 makes provision about the prohibitions or requirements (or both) that may be contained in a SRO. Each prohibition and requirement in a SRO is for a fixed period and the order itself is for a fixed period. The order and the prohibitions and requirements may all be for the same period. However, the Bill provides that the order ceases to have effect, if it has not already done so, if all of the requirements and prohibitions in the order have ceased to have effect.

119. Subsection (2) provides that those prohibitions or requirements will relate to things to be done or not done throughout the UK (unless expressly confined to particular localities).

120. Subsection (3) provides that a SRO will last a minimum of two years although there is no maximum period (with the exception of any foreign travel restriction which expires after a maximum of five years, unless renewed), any prohibition or requirement must be for a fixed period.

121. Subsection (4) provides that different prohibitions and requirements may have effect for different periods.

122. Subsection (5) sets out the tests for imposing prohibitions and requirements in a SRO, namely that they are necessary to protect the public or any particular members of the public from sexual harm from the person (subsection (5)(a)) or to protect children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the person outside the UK (subsection (5)(b)).

123. Subsection (7) provides that, if the court makes a SRO in respect of a person already subject to such an order, the earlier order will cease to have effect.

## **Section 28 – Prohibitions on foreign travel**

124. Section 28 makes provision about prohibitions on foreign travel in SROs.

125. Subsection (1) provides that the duration of the foreign travel prohibition may not exceed 5 years.

126. Subsection (2) provides that the order may prohibit the subject from travelling to a country outside the UK named in the order (such as Thailand and Malaysia); or from travelling to any country outside the UK that is not named in the order (for example, this may be needed where the offender is banned from travelling anywhere in the world other than to a named country which he/she may need to visit for family reasons); or from travelling to any country outside the UK (where the offender is such a risk to children or vulnerable adults that a universal ban is required).

127. Subsection (3) determines that a prohibition on foreign travel may be extended for further fixed periods of no more than five years each time (following an application under section 29).

128. Subsection (4) provides that an offender subject to a SRO with a prohibition from travelling to any country outside the UK must surrender their passports at a police station specified in the order.

129. Subsection (6) requires the police to return any surrendered passport as soon as reasonably practicable after the relevant foreign travel prohibition ceases, unless the person subject to the order is subject to an equivalent prohibition specified in another order. Circumstances where this subsection would not apply are provided for at subsection (7) (for example, where a passport has already been returned to the relevant authority).

## **Section 29 – Variations, renewal and discharge**

130. Section 29 makes provision about the variation, renewal or discharge of SROs.

131. Subsection (1) provides that a court can vary, renew or discharge a SRO upon the application of the subject of the order or the police.



132. Subsection (3) makes provision about shrieval jurisdiction in this connection.

133. Subsection (4) sets out the tests the sheriff must consider when deciding whether to vary, renew or discharge a SRO (including by adding new prohibitions or requirements) or any prohibitions or requirements within them.

### **Section 30 – Interim orders**

134. Section 30 allows the police to apply for an interim SRO where an application has been made for a full order.

135. Subsection (1) gives power to a sheriff to make an interim SRO while the main application under section 26 is being determined.

136. Subsection (2) provides that the sheriff may make such an order if the sheriff considers it just to do so.

137. Subsection (4) provides that the prohibitions or requirements contained in an interim SRO will relate to things to be done or not done throughout the United Kingdom (unless expressly confined to particular localities).

138. Subsection (5) specifies that such an order may contain prohibitions or requirements (or both) in relation to the person in respect of whom the order is to have effect, for a fixed period.

139. Subsection (8) provides that an interim SRO will cease to have effect on the determination of the related application for a SRO under section 26 or earlier, if all prohibitions or requirements cease to have effect.

140. Subsection (11) allows for an application to a sheriff in the sheriffdom of the sheriff who made the interim SRO for variation, renewal or discharge of that order. Such an application may be made by the person in respect of whom the order was made or the chief constable (subsection (10)).

### **Section 31 – Appeals**

141. Section 31 provides for appeals against a decision to make, refuse to make, vary, renew or discharge (or refuse to vary, renew or discharge) a SRO under sections 26 or 30.

### **Section 32 – Offence of breaching order**

142. Section 32 makes provision about breach of SROs.

143. Subsection (1) provides that breach of a SRO, without reasonable excuse, is a criminal offence.

144. Subsection (2) specifies that a person convicted of such an offence on summary conviction will be liable to a term of imprisonment of up to 12 months or to a fine or both; a person convicted on indictment will be liable to a term of imprisonment of up to five years or to a fine or both.

145. Subsection (3) provides that a person convicted under section 32 cannot be sentenced to a community payback order, or dismissed with an admonition or discharged absolutely.

146. Subsection (4) sets out the jurisdictional rules as regards proceedings for an offence under section 32.

### **Section 33 – Application of notification requirements on breach of order**

147. Section 33 provides that a conviction for breach of a SRO or interim SRO will render the person subject to the notification requirements of Part 2 of the 2003 Act. These requirements will remain in place for the duration of the breached SRO. If the conviction is for breach of an interim SRO, the restrictions or requirements will remain in place for the duration of the interim order or, if a full order is subsequently made, for the duration of the full order.

### **Section 34 – Interpretation of Chapter**

148. Section 34 defines certain terms used in Chapter 4 of Part 2 of the Bill.

## **Chapter 5 – Equivalent orders elsewhere in UK**

### **Section 35 – Breach of orders equivalent to orders in Chapters 3 and 4: offence**

149. Subsection (1) ensures that it is an offence in Scotland to contravene a SHPO, interim SHPO, SRO and interim SRO made in England and Wales (“equivalent England and Wales order”). It also ensures that it is an offence in Scotland to contravene a SOPO and interim SOPO, (RSHO), and interim RSHO, and FTO made in Northern Ireland (“equivalent Northern Ireland order”).

150. Subsection (2) specifies that a person convicted of such an offence on summary conviction will be liable to a term of imprisonment of up to 12 months or to a fine, or both; a person convicted on indictment will be liable to a term of imprisonment of up to five years or to a fine or both.

151. Subsection (3) provides that a person convicted under section 20 cannot be dealt with by a community payback order, or dismissed with an admonition or discharged absolutely.

152. Subsection (4) provides that the prohibitions imposed by the equivalent England and Wales order or the equivalent Northern Ireland order apply throughout the United Kingdom (unless expressly confined to particular localities).

### **Section 36 – Breach of certain equivalent orders: application of notification requirements**

153. Section 36 provides that a conviction for breach of an SRO or interim SRO made in England and Wales or a RSHO or interim RSHO in Northern Ireland will render the person subject to the notification requirements of Part 2 of the 2003 Act. These requirements will remain in place for the duration of the breached order. If the conviction is for breach of an interim order, the restrictions will remain in place for the duration of the interim order or, if a full order is subsequently made, for the duration of the full order.

### **Chapter 6 – Previous orders**

#### **Section 37 – Repeals of provisions as to previous orders**

154. Subsection (1) repeals various sections of the 2003 Act relating to SOPOs and FTOs.

155. Subsection (2) repeals sections 2 to 8 of the 2005 Act, which made provision for RSHOs.

#### **Section 38 – Saving and transitional provision**

156. Subsection (1) defines a SOPO, FTO, or RSHO as an “existing order”, a SHPO or SRO as a “new order” and a sex offender order as an “old order”.

157. Subsection (2) provides that the repeals made by section 37 of this Bill do not apply to an existing order made, an application for an existing order or anything done in connection with such an order before the commencement of the provisions in this Bill for the new orders.

158. The purpose of subsection (3) is to allow any “old orders” that are still in effect to be varied, renewed and discharged, and to allow a breach of any such order to be prosecuted. This is necessary because of the repeal by the Bill of provisions of the 2003 Act and the 2005 Act that deal with these matters.

159. Subsection (3)(a) prevents the variation of SOPOs, FTOs, RSHOs to extend their duration on or after the date the new orders come into force.

160. Subsection (3)(b) provides that five years after the new orders come into force, the provisions in any SOPO or RSHO which continues to have effect will be treated as if they were provisions in a new order.

### **PART 3 – GENERAL**

#### **Section 39 – Interpretation**

161. Section 39 defines certain terms for the purpose of this Bill.

### **Section 41 – Minor and consequential modifications**

162. Section 41 introduces schedule 2, which makes minor amendments and amendments consequential on the provisions of the Bill.

### **Section 42 – Crown application**

163. Section 42 provides that none of the provisions made by or under the Bill are capable of making the Crown criminally liable. In accordance with subsection (2), enforcement of offences against the Crown is to be done by the Scottish Ministers or any other public body or office-holder with responsibility for enforcing the provision applying to the Court of Session for a civil declarator of non-compliance. This provision does not apply to persons in the public service of the Crown.

### **Section 43 – Commencement**

164. Section 43 provides that sections 40, 42 and 44 of the Bill come into force on the day after Royal Assent. All other provisions are to come into force on a day appointed by regulations made by the Scottish Ministers.

## **FINANCIAL MEMORANDUM**

### **INTRODUCTION**

1. This Financial Memorandum has been prepared by the Scottish Government to satisfy Rule 9.3.2 of the Parliament's Standing Orders. It does not form part of the Bill and has not been endorsed by the Parliament.
2. The Abusive Behaviour and Sexual Harm (Scotland) Bill ("the Bill") will improve how the justice system deals with abusive behaviour including domestic abuse and sexual offending.
3. The Bill:
  - provides a new specific domestic abuse aggravator that an offence was aggravated by involving abuse or a person's partner or ex-partner,
  - provides a new specific offence for the non-consensual sharing of intimate images (often called "revenge porn"),
  - allows courts to directly protect victims where the court is satisfied a person did harass another person, but a conviction does not take place due to the mental or physical condition of the person,
  - requires juries in sexual offence cases to be given specific directions about how to consider the evidence,
  - ensures child sexual offences committed in England and Wales by Scottish residents are capable of being prosecuted in Scotland, and
  - reforms the system of civil orders available to protect communities from those who may commit sex offences.
4. The Memorandum has been drafted on the basis that the provisions come into effect at the beginning of the financial year 2016-17. In practice, it is likely that the provisions will be commenced at some point during 2016-17, following Royal Assent and the first year costs may therefore be lower than estimated. Details of the estimated financial impact of the individual elements of the Bill are provided below.

### **A NEW SPECIFIC AGGRAVATOR OF ABUSE OF PARTNER OR EX-PARTNER**

#### **Costs on the Scottish Administration**

5. These provisions create a new statutory aggravation that an offence involved abuse of a person's partner or ex-partner, and require courts to take account of that fact in sentencing the offender. It is not anticipated that there will be any additional costs falling on the Crown Office and Procurator Fiscal Service (COPFS) and Police Scotland. Cases are already "flagged" as being associated with domestic abuse through current IT arrangements. For example, it is this system that allows for data on the number of incidents constituting domestic abuse recorded by the police to be available. The statutory aggravator will formalise these arrangements, but it is not thought new costs will arise.

6. In addition, the statutory aggravator will formally require the court to consider whether a more severe sentence is required in any given case. The aggravator does not increase the maximum sentence available for any given offence and this, coupled with the fact that courts are already likely to be considering whether sentences currently imposed for offences associated with domestic abuse should be increased to reflect this fact, means that it is unlikely new costs will arise. However, in view of the very large number of cases relating to domestic abuse which come before the courts, the Scottish Courts and Tribunals Service (SCTS) consider that this provision will result in additional costs being incurred. SCTS estimates that, though the cost in any individual case will be very small, the requirement to state and record the extent of, and reasons for, any difference in sentence as a result of the domestic abuse aggravation in each of around 14,000 cases each year which carry a domestic abuse marker which proceed to sentencing will result in additional costs of £66,250 each year for SCTS. If the aggravation is not used in all the cases that currently carry the domestic abuse marker then this cost may be lower. On the other hand, if the aggravation is libelled in cases which do not currently attract the domestic abuse marker (which is less likely as the conditions which require to be met to prove the aggravation are more stringent than are required to add the existing domestic abuse marker) then the costs could be higher. This cost will be met from within SCTS' existing budget and will not require any additional funding.

#### **Costs on local authorities**

7. It is not anticipated that there will be any new costs falling on local authorities from the domestic abuse aggravator.

#### **Costs on other bodies, individuals and businesses**

8. It is not anticipated that there will be any new costs falling on other bodies, individuals or businesses from the new domestic abuse aggravator.

### **A NEW SPECIFIC OFFENCE FOR THE NON-CONSENSUAL SHARING OF INTIMATE IMAGES**

#### **Costs on the Scottish Administration**

9. These provisions create a new offence of disclosing or threatening to disclose intimate images featuring another person, without their consent. The key factor concerning cost implications will be the number of investigations and prosecutions. In this respect, it is important to bear in mind that much, though not all, of the behaviour covered by this offence is capable of being prosecuted under the existing criminal law, for example, using the offences of threatening or abusive behaviour, misuse of a public electronic communications network, breach of the peace, stalking or blackmail.

10. As such, the creation of a specific offence may not, of itself, significantly increase the number of offences reported to COPFS for prosecution. However, previous experience with the introduction of a specific stalking offence indicates that it is likely that, by making it clearer that such behaviour is criminal, more victims may be encouraged to come forward and report such behaviour to the police. This may in turn lead to more cases being prosecuted in the courts. The new offence will cover some conduct that cannot currently be prosecuted under the existing law.

Aside from this, intimate image abuse is already gaining an increased media profile and it is likely that the introduction of new legislation will result in more cases being reported. For these reasons, it is expected that there will be an increase in the number of cases reported for prosecution.

11. Set against this, it may also be the case that, over the longer term at least, the existence of a specific offence may deter some people who might otherwise have engaged in this kind of behaviour because it will be clear to them that they would be committing a criminal offence if they did so.

12. Police Scotland and COPFS do not have comprehensive data of the number of cases currently reported to them which relate to the non-consensual sharing of intimate images. However, Police Scotland were able to obtain figures from 4 of their Divisions whose IT systems had a marker added to record incidents of this kind, which shows that these divisions had 57 cases reported to the police in 2014-15, of which 39 were reported to the Procurator Fiscal. These 4 Divisions, which do not cover the largest cities, account for just under 25% of the total number of domestic abuse charges reported by the police to COPFS.

13. Based on this, it is estimated that around 230 cases are reported to the police each year across Scotland. Of these, it is estimated that approximately 160 are reported to COPFS for consideration of prosecution. COPFS prosecuted 86% of cases reported to them with a domestic abuse marker in 2014-15, and if it is assumed that a similar proportion of cases of intimate image abuse reported to them are prosecuted, this indicates that COPFS may prosecute just under 140 cases involving the sharing of intimate images each year at present.

14. Based on the limited information available, and taking account of their experience with the introduction of new criminal offences in other areas, such as stalking, COPFS estimates that they could receive between 50 and 100 extra reports each year, and prosecute between 60 and 100 additional cases, some of which will be cases which are currently being reported to the police and/or to COPFS, but which cannot be prosecuted under the law as it stands.

15. In 2011, Audit Scotland estimated that the cost to criminal justice agencies of processing a case through the summary courts was approximately £2,150<sup>1</sup>. It is not considered that there has been a significant increase in such costs since then. This includes the costs to Police Scotland, COPFS and SCTS as well as Scottish Legal Aid Board (SLAB) costs for an average summary case.

16. This estimated average cost does not take into account whether a higher proportion of cases for the new offence will lead to evidence being led at trial than is the case for other offences. It is difficult to estimate with any degree of precision whether this offence will generate a higher or lower proportion than average for being evidence led trials and so the figures do not include this as part of the estimate. The “Cost of the Criminal Justice System” publication<sup>2</sup> estimates that the average court cost for COPFS, SCTS and SLAB associated with a

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<sup>1</sup> Page 17 [http://www.audit-scotland.gov.uk/docs/central/2011/nr\\_110906\\_justice\\_overview.pdf](http://www.audit-scotland.gov.uk/docs/central/2011/nr_110906_justice_overview.pdf)

<sup>2</sup> <http://www.gov.scot/Topics/Statistics/Browse/Crime-Justice/Publications/costcrimjustscot/costcrimjustdataset>

summary case in the Sheriff Court is £1,069. However, where a case goes to trial and evidence is led, the average court costs rise to £2,667.

17. With maximum summary sentencing levels allowing custody up to 12 months and a fine up to £10,000 to be imposed by a sheriff summary court, it is estimated that the vast majority of additional cases are likely to be processed as summary cases.

18. An estimate of the total additional annual cost to criminal justice agencies as a result of the creation of the new offence would be between £129,000 (based on the low estimate of 60 additional cases) and £215,000 (based on the high estimate of 100 additional cases). These costs will be met from within existing budgets available to criminal justice agencies.

19. These costs do not include the costs associated with carrying out any court-imposed sentences for the new offence. In 2013-14, 87% of all cases prosecuted in the courts in Scotland resulted in a conviction and so for the purposes of this exercise, it has been assumed that 87% of the additional prosecutions will result in conviction.

20. COPFS note that existing cases of intimate image abuse that they deal with are typically committed by partners or ex-partners of the victim and can be seen as a form of domestic abuse. For the purpose of this exercise, it has therefore been assumed that people convicted of this offence will be sentenced in a similar manner to perpetrators of other forms of domestic abuse.

21. In 2013-14, there were 13,500 convictions for offences recorded as being associated with domestic abuse. The most common crime type was in the category “breach of the peace, etc.”<sup>3</sup> with 5,935 convictions (44% of all offences flagged as being associated with domestic abuse) flagged as being associated with domestic abuse. The second most common crime type was common assault with 4,005 convictions (30%) with crimes against public justice being the third most common crime type with 1,928 convictions (14%).

22. From these 13,500 convictions, 2,160 (16%) resulted in a custodial sentence with the average length being 209 days, 3,240 (24%) resulted in a financial penalty, 4,050 (30%) resulted in a community payback order and the remaining 4,050 (30%) resulted in another form of non-custodial disposal including admonishment.

23. Applying the breakdown of disposals from existing offences associated with domestic abuse to the new offence, this would result in between 8 and 14 convictions leading to an average custodial sentence of 209 days (16%), between 13 and 21 convictions leading to a financial penalty (24%), between 16 and 26 convictions leading to a community payback order (30%) and between 16 and 26 convictions leading to another form of non-custodial disposal. It should be noted that, in reality, the proportion of cases resulting in a custodial sentence may be lower as the sentencing outcomes for offences associated with domestic abuse will include crimes of assault to severe injury, sexual assault and rape where a custodial sentence is highly likely.

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<sup>3</sup> This crime type includes the statutory offence of threatening and abusive behaviour.



24. Under existing prisoner early release rules, offenders receiving an average sentence of 209 days will be released after serving half their sentence in custody.

25. The Scottish Government publication “Cost of the Criminal Justice System” estimated the average cost of a prison place in 2013-14 to be £37,059<sup>4</sup>. The estimated cost in terms of prison places would be between £84,880 and £148,541.

26. There will also be a requirement for Police Scotland to provide training for officers on the new offence. However it is expected that the majority of this will be addressed via existing training.

27. The total recurring costs to criminal justice agencies are estimated to total between £213,880 (based on COPFS low estimate of the number of additional cases) and £363,541 (based on their high estimate of the number of additional cases). These costs will be met from existing budgets for COPFS, SCTS, Police Scotland and SLAB and will not require any additional funding.

#### **Costs on local authorities**

28. The new offence is estimated to give rise to between 16 and 26 convictions each year where a community sentence would be imposed. The “Cost of the Criminal Justice System” publication estimates the cost of a community sentence such as the community payback order to be £1,909 in 2013-14. This would equate to a cost of between £30,544 and £49,634 on local authority criminal justice social work departments. This will be met from existing resources provided to local authorities in this area and will not require any additional funding.

#### **Costs on other bodies, individuals and businesses**

29. It is not anticipated that there will be any new costs falling on other bodies, individuals or businesses as a result of the new offence.

### **COURT IMPOSED PROTECTION FOR VICTIMS FOLLOWING HARASSMENT**

#### **Costs on the Scottish Administration**

30. It is not anticipated that there will be any new costs falling on the Scottish Administration. The effect of the provision is that in a very specific set of circumstances (namely where an individual is found by a court to have committed harassment of another person, but they are not convicted due to being either unfit to plead or not responsible for their conduct due to a mental disorder), a criminal court will be able to impose a non-harassment order on a person.

31. Although it is expected that the court’s new powers will result in a small number of additional non-harassment orders being imposed, there is no direct cost associated with a non-

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<sup>4</sup> See page 63 of <http://www.sps.gov.uk/Publications/Publication-4809.aspx>

harassment order. The costs for law enforcement agencies of taking action in response to the breach of a non-harassment order should be more than offset by not having to take action against criminal activity that can arise when such an order is not in place. As such, it is not anticipated that there will be any significant new costs arising.

#### **Costs on local authorities**

32. It is not anticipated that there will be any new costs falling on local authorities.

#### **Costs on other bodies, individuals and businesses**

33. It is not anticipated that there will be any new costs falling on other bodies, individuals or businesses.

### **JURY DIRECTIONS IN SEXUAL OFFENCE CASES**

#### **Costs on the Scottish Administration**

34. These provisions require judges in sexual offence trials to provide juries with directions in cases where evidence is led or elicited at trial that: an alleged sexual offence may not have been reported until some time after it was alleged to have been committed, of the fact that it is not alleged that the accused used physical force to overcome the victim, or that the alleged victim did not physically resist their assailant. The judge's directions must set out that there may be good reasons why that happened and that may not necessarily indicate that an allegation is false. It is not anticipated that there will be significant new costs arising from the requirement for jury directions to be given in certain sexual offence cases. Judges already can decide in the circumstances of a given case to offer direction to the jury in the manner provided for in the Bill.

35. However, the SCTS have estimated that there will be a small cost resulting from the time required to deliver additional instructions in a charge to the jury. A total of 1,438 sexual offence cases were tried in the Scottish courts in 2013-14<sup>5</sup> where this was the main offence for which the offender was tried. However, only a proportion of these will have been tried before a jury, and a proportion of those cases will not have proceeded to a full trial as the offender will have entered a guilty plea. On the other hand, it is known that a larger proportion of rape trials proceed to full trial than is the case for most other types of offences, and these are always tried in the High Court before a jury. The issues requiring direction will not arise in every case and, for the purpose of this exercise, it has been assumed that 100 cases in the High Court and 100 cases in the Sheriff Court will require additional instruction each year. In practice, this will depend on both the number of sexual offence cases which are tried before a jury each year, and the proportion of those cases which raise issues which would require the directions to be given on these matters. While more sexual offence cases are tried in the Sheriff Court than in the High Court, the fact that all rape trials are tried in the High Court, and that these issues are more likely to arise in such trials, means it is reasonable to assume that the proposed directions will affect equal numbers of trials in the Sheriff and High Courts. SCTS estimate this would result in additional costs of £3,800 each year for High Court cases and £2,800 each year for Sheriff Court

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<sup>5</sup> See Criminal Proceedings in Scottish Courts 2013-14: <http://www.gov.scot/Publications/2014/12/1343/4#t3>

cases. This cost will be met from within SCTS' existing budget and will not require any additional funding.

36. The Judicial Institute for Scotland is responsible for training to the judiciary and it will be a matter for them to decide how best to ensure judges are made aware of and trained for this new statutory requirement.

#### **Costs on local authorities**

37. It is not anticipated that there will be any new costs falling on local authorities.

#### **Costs on other bodies, individuals and businesses**

38. It is not anticipated that there will be any new costs falling on other bodies, individuals or businesses.

### **CHILD SEXUAL OFFENCES COMMITTED ELSEWHERE IN THE UK**

#### **Costs on the Scottish Administration**

39. It is not anticipated that any new significant costs will arise on the Scottish Administration. The provision will allow prosecution to take place in Scotland of child sex offences committed by Scottish residents elsewhere in the United Kingdom. However, it is not considered likely that many prosecutions will take place as it will continue to be the norm that where a Scottish resident commits a child sexual offence elsewhere in the UK, any prosecution will take place where the offence took place. This provision is intended to ensure that where, for example, an offender has abused a child in different locations around the UK over a period of time, it is possible to prosecute all the conduct on a single indictment, as the alternative would be to require the child to go through the ordeal of two separate trials, or to prosecute only the offences which were committed in one jurisdiction.

#### **Costs on local authorities**

40. It is not anticipated that there will be any new costs falling on local authorities.

#### **Costs on other bodies, individuals and businesses**

41. It is not anticipated that there will be any new costs falling on other bodies, individuals or businesses.

### **REFORMS TO SYSTEM OF CIVIL ORDERS AVAILABLE TO PROTECT COMMUNITIES FROM THOSE WHO MAY COMMIT SEXUAL OFFENCES**

#### **Costs on the Scottish Administration**

42. It is not anticipated that there will be any new costs arising on the Scottish Administration. The new provisions simplify and rationalise the existing civil orders by introducing:

- sexual harm prevention order – a post-conviction order which replaces the sexual offences prevention order (SOPO) and foreign travel order (FTO) under the Sexual Offences Act 2003 and can apply to those convicted of a relevant sexual offence; and
- sexual risk order (SRO) – a non-conviction order which replaces the risk of sexual harm order (RSHO) under the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005, and can apply to any individual who poses a risk of sexual harm.

43. The orders will be used to tailor conditions and restrictions on sex offenders and those who pose a risk of sexual harm on a case-by-case basis. Both will be available for the purposes of protecting both under-18s and adults.

44. Rationalising the existing orders will also simplify the landscape (thereby giving greater clarity to Police Scotland, with a possible time/cost saving), and help to ensure that Police Scotland and others are able to exercise their professional discretion. Whilst there may be an initial impact in terms of the training required, it is expected that the majority of this will be addressed via existing training. There may be a positive impact in terms of a more flexible civil order being more effective in managing the risks posed by individuals, and thereby reducing the numbers of further sexual offences committed – benefitting the public directly and, in the long term, potentially reducing the number of these cases that must be dealt with by Police Scotland, the SCTS and other parts of the criminal justice system.

45. The number of orders currently imposed and what might be expected under the proposed new system are set out below.

46. The number of orders imposed under the current system are as follows:

Year	SOPOs imposed	RSHOs imposed	FTOs imposed
2006-07	34	1	0
2007-08	43	3	0
2008-09	37	7	0
2009-10	39	4	0
2010-11	46	7	0
2011-12	47	10	0
2012-13	26	13	0
2013-14	48	4	1

Source: Police Scotland/MAPPA annual reports

#### *Sexual harm prevention order*

47. The proposed changes will bring together the provisions available under current SOPOs and FTOs into one post-conviction order. There may be some increase, for example in orders imposed to restrict foreign travel, but a significant increase is not expected. In this connection, based on information provided by Police Scotland, it has been estimated that it costs about £1,300 to make a very straightforward application for an order, this includes court fees and Sheriff Officers' fees. Breaches and applications for variations would incur similar costs. Moreover it is not expected that there will be an increase in the number of appeals to the Sheriff Principal against the making of such orders. Information from Police Scotland suggests that it

might expect 1 such appeal every year, and, depending on the length and complexity of the case, that might cost in the region of between £10,000 and £15,000.

48. Information from Police Scotland suggests that there are currently 488 live SOPOs as at July 2015. However this is in the context that SOPOs were first introduced on 1 May 2004 and they are a closely focused intervention only suitable for the most dangerous offenders. Accordingly, while it is expected that the number of sexual harm prevention orders imposed to be higher, given this baseline is relatively low, any increase is not expected to have a significant impact on the criminal justice system.

#### *Sexual risk order*

49. The SRO will replace the RSHO and will be used to tailor conditions and restrictions on offenders on a case-by-case basis. To impose an order the court will have to be satisfied that the individual has committed a sexual act that suggests that he or she poses a risk of sexual harm to adults or children in the UK and/or that he or she poses a risk of sexual harm to children or vulnerable adults outside of the UK. A sexual risk order may require a person to do anything described in it or may prohibit the person from doing anything described in it, including preventing travel overseas (where the individual poses a risk outside of the UK). The police will be able to apply to the Sheriff Court for an order to be imposed.

50. Information from Police Scotland suggests that the number of RSHOs imposed has historically been low – for example, 74 RSHOs have been granted as either interim or full orders in Scotland since the legislation first came into force (7 October 2005). There are currently only 16 live orders as at July 2015. Again, while it is expected that the number of SROs imposed to be higher, given this baseline is low, it is not expected that there will be a significant impact on the criminal justice system. Applications for RSHOs currently cost about £1300. However it should be noted that the “evidential hurdle” for the SRO is much lower than the current equivalent and this is expected to have a consequence in terms of cost. Moreover there should not be any additional police costs as reports or indications of such behaviour are already investigated by the police. It is important to note that these orders may also generate savings as they would prevent offending and the costs associated with investigating, prosecuting offences, and providing support for victims.

51. Whilst it is possible that a higher number than at present may breach the order, it is considered that the number is again likely to be very low – so any impact on the courts, prison or social work services will also be low. Data on the number that currently breach is not available.

#### **Costs on local authorities**

52. It is not anticipated that there will be any new costs falling on local authorities.

#### **Costs on other bodies, individuals and businesses**

53. It is not anticipated that there will be any new costs falling on other bodies, individuals or businesses.

ESTIMATED COSTS OF THE BILL			
Year		2016-17	2017-18 (and annually thereafter)
Recurring costs	New domestic aggravator	£66,250	£66,250
	New offence of sharing intimate images	Low estimate £244,424 High estimate £413,175	Low estimate £244,424 High estimate £413,175
	Jury directions	£6,600	£6,600
	Criminal non-harassment orders	Nil	Nil
	Prosecution of child sex offences committed elsewhere in the UK	Nil	Nil
	Reforms to civil orders to protect communities from sexual offending	Nil	Nil
Total		Low estimate £317,274 High estimate £486,025	Low estimate £317,274 High estimate £486,025

*These documents relate to the Abusive Behaviour and Sexual Harm (Scotland) Bill (SP Bill 81)  
as introduced in the Scottish Parliament on 8 October 2015*

## **SCOTTISH GOVERNMENT STATEMENT ON LEGISLATIVE COMPETENCE**

On 8 October 2015, the Cabinet Secretary for Justice (Michael Matheson MSP) made the following statement:

“In my view, the provisions of the Abusive Behaviour and Sexual Harm (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

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## **PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE**

On 8 October 2015, the Presiding Officer (Rt Hon Tricia Marwick MSP) made the following statement:

“In my view, the provisions of the Abusive Behaviour and Sexual Harm (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

*These documents relate to the Abusive Behaviour and Sexual Harm (Scotland) Bill (SP Bill 81)  
as introduced in the Scottish Parliament on 8 October 2015*

# **ABUSIVE BEHAVIOUR AND SEXUAL HARM (SCOTLAND) BILL**

## **EXPLANATORY NOTES (AND OTHER ACCOMPANYING DOCUMENTS)**

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# **ABUSIVE BEHAVIOUR AND SEXUAL HARM (SCOTLAND) BILL**

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## **DELEGATED POWERS MEMORANDUM**

### **INTRODUCTION**

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Abusive Behaviour and Sexual Harm (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions contained in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

### **OUTLINE OF BILL PROVISIONS**

2. The Bill is in three parts. Part 1 (Abusive behaviour) includes provision for a new specific aggravator in relation to offences committed against partners and ex-partners, for a specific offence concerning the non-consensual sharing of private, intimate images (often called "revenge porn") and makes provision to allow courts to make a non-harassment order in cases where the court is satisfied that a person did harass another person but a conviction does not take place due to the mental or physical condition of the person.

3. Part 2 (Sexual harm) makes provision to require juries in sexual offence cases to be given specific directions about how to consider the evidence, ensures that sexual offences against children committed in England and Wales by Scottish residents are capable of being prosecuted in Scotland and reforms the system of civil orders available to protect communities from sexual harm.

4. Part 3 contains general and ancillary provision.

### **RATIONALE FOR SUBORDINATE LEGISLATION**

5. In deciding whether provisions should be specified on the face of the Bill or left to subordinate legislation, we have carefully considered the importance of each matter against the need to:

- achieve the appropriate balance between the importance of the issue and the need to provide flexibility to respond to changing or unforeseen circumstances quickly, in light of experience, without the need for primary legislation; and
- ensure the proper use of parliamentary time is made.

## **DELEGATED POWERS**

### **Section 8 – Time Limit set by Act of Adjournal**

**Power conferred on:**            **the High Court of Justiciary**  
**Power exercisable by:**       **act of adjournal**  
**Parliamentary procedure:** **laid only**

#### ***Provision***

6. Section 8 inserts a new section 54A into the Sexual Offences (Scotland) Act 2009. Section 54(1) provides that if a person does an act elsewhere in the United Kingdom which would, if done in Scotland, constitute a listed offence then the person commits that listed offence. “Listed offences” are those listed in Part 2 of schedule 4 to the 2009 Act. However, section 54A(2) provides that person who is not a habitual resident of Scotland will only commit an offence if the act would also constitute an offence under the law in force in the country where the act took place.

7. Section 54A(4) makes provision to the effect that the condition specified in section 54A(2) is taken to be satisfied unless, not later than such time as the High Court may by Act of adjournal prescribe, the accused serves a notice on the prosecutor—

- stating that on the facts as alleged with respect to the act in question, the condition is not in the accused’s opinion, satisfied;
- setting the grounds for the accused’s opinion; and
- requiring the prosecutor to prove that the condition is satisfied.

#### ***Reason for taking power***

8. Section 54A(4) creates a power for the High Court to make rules specifying the time period within which a person accused of an offence at section 54A(1) must notify the prosecution, of the reasons they do not consider their conduct to have satisfied the condition at section 54A(2). The time period within which the accused should be required to serve such a notice is essentially an administrative and procedural matter for the High Court and as such is not considered appropriate to be included in primary legislation.

#### ***Choice of procedure***

9. The power is subject only to the default laying requirement under section 30 of the Interpretation and Legislation Reform (Scotland) Act 2010. Acts of adjournal are not normally subject to Parliamentary procedure. In this instance the determination of time limits will be in order to ensure the smooth running of the courts and relate to court practice and procedure. As such this is a matter for the courts to regulate in accordance with the principle of the separation of powers.

## **Section 14(5)(a) – Time limit for serving notice**

**Power conferred on:** the Court of Session  
**Power exercisable by:** act of sederunt  
**Parliamentary procedure:** laid only

### ***Provision***

10. Section 11 of the Bill permits the Chief Constable to apply for the sheriff to make a sexual harm prevention order (SHPO). A SHPO may only be made against a “qualifying offender”, and a “qualifying offender” is a person to whom section 12, 13 or 14 of the Bill applies. Section 14 applies to a person (the “respondent”) who has been convicted of an “equivalent offence”, has been cautioned in respect of an equivalent offence, has been found not guilty by reason of insanity in respect of an equivalent offence, or is under a disability but has done the act constituting the equivalent offence.

11. Section 14(3) defines an “equivalent offence” as an act which, at time it was done, constituted an offence under the law in force in a country outside the United Kingdom, and which is an act which, at the time it was done, would have constituted an offence listed in certain parts of the Sexual Offences Act 2003, if it had been done in any part of the United Kingdom. Section 14(5) sets out that the definition set out subsection (3) is taken to be satisfied unless a respondent serves a notice on the Chief Constable, not later than such time as rules of court may provide. The notice—

- states that on the facts as alleged with respect to the act in question, that the condition is not in the respondent’s opinion, satisfied;
- sets out the grounds for the respondent’s opinion; and
- requires the Chief Constable to prove that the condition is satisfied.

### ***Reason for taking power***

12. Section 11 applications are civil proceedings, (as evidenced by the appeal provisions set out in section 21(3)), and “rules of court” are defined in the Interpretation and Legislative Reform (Scotland) Act 2010 as including acts of sederunt. Accordingly the power in section 14(5)(a) is to be used to make an act of sederunt to set a time limit for the service of a notice under that section. The time period within which the respondent should be required to serve such a notice is essentially an administrative and procedural matter for the court and as such is not considered appropriate to be included in primary legislation.

### ***Choice of procedure***

13. The power is subject only to the default laying requirement under section 30 of the Interpretation and Legislation Reform (Scotland) Act 2010. Acts of sederunt are not normally subject to Parliamentary procedure. In this instance the determination of time limits will be in order to ensure the smooth running of the courts and relate to court practice and procedure. As such this is a matter for the courts to regulate in accordance with the principle of the separation of powers.

## **Section 40 – Ancillary provision**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations  
**Parliamentary procedure:** affirmative if amends primary legislation, otherwise negative

### ***Provision***

14. Section 40(1) of the Bill enables the Scottish Ministers to make such incidental, supplementary, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of, in connection with, or for giving full effect to, the Bill.

### ***Reason for taking this power***

15. This power is necessary to allow flexibility when commencing provisions in the Bill or that may arise in light of experience on the operation of the Act. The power is limited to the extent that it can only be used if Scottish Ministers consider it appropriate for the purposes of, in connection with, or for giving full effect to the Bill. Several of the Bill's provisions are inserted into or interact with other processes or legislation. While the Scottish Government has given careful consideration to such interaction there may be unforeseen matters which require the assistance of this ancillary power in order to ensure the proper effect of the Bill is realised. That is particularly so given the technical nature of some of the provisions and, in particular, the complex and cross-jurisdictional landscape in which the system of civil orders for the prevention of sexual harm will operate.

### ***Choice of procedure***

16. Regulations made under this section which contain a provision which adds to, omits or replaces any part of an Act are subject to affirmative procedure. Otherwise, regulations made under this section are subject to negative procedure. This approach is normal for ancillary powers of this type.

## **Section 43 – Commencement**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations  
**Parliamentary procedure:** laid only

### ***Provision***

17. Section 43 of the Bill enables the Scottish Ministers to make regulations appointing days on which the provisions in the Bill come into force (other than sections 40, 42 and 44, which come in to force on the day after Royal Assent). Regulations may include such transitional, transitory or saving provision.

### ***Reason for taking this power***

18. The power is necessary to enable Scottish Ministers to commence the provisions in the Bill appropriately by allowing them to take into account the existing law and provide for the transition to the system established by those provisions.

***Choice of procedure***

19. The power is subject only to the default laying requirement under section 30 of the Interpretation and Legislation Reform (Scotland) Act 2010. This is typical for commencement regulations. The nature of the laying requirement means that the Scottish Government anticipates the use of this power to effect straightforward and obvious transitional, transitory or saving provisions only. The Government would intend to make use of the powers in section 40, which benefit from a higher degree of scrutiny, in order to give effect to complex transitional, transitory or saving provisions.

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# **ABUSIVE BEHAVIOUR AND SEXUAL HARM (SCOTLAND) BILL**

## **DELEGATED POWERS MEMORANDUM**

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