

EXECUTIVE NOTE

THE SEXUAL OFFENCES ACT 2003 (REMEDIAL) (SCOTLAND) ORDER 2010

SSI 2010/370

Introduction

1. The Sexual Offences Act 2003 (Remedial) (Scotland) Order 2010 (“the Order”) makes amendments to Part 2 of the Sexual Offences Act 2003 (“the 2003 Act”) to remedy the incompatibility of the indefinite notification period in section 82(1) of that Act with a Convention right. The Supreme Court of the United Kingdom made its declaration of incompatibility on 21 April 2010 in *R (on the application of F) and Thompson (FC) v Secretary of State for the Home Department* [2010] UKSC 17. Section 82(1) of the Sexual Offences Act 2003 extends throughout the United Kingdom. A challenge considering identical issues is currently before the Scottish Courts in *Mr A v Scottish Ministers*.

Parliamentary procedure

2. The Order is subject to the “urgent” procedure under section 14 of the 2001 Act. Section 14(1) confers power on the Scottish Ministers, for reasons of urgency, to make a Remedial Order without following the procedure specified in section 13 of the 2001 Act. Annex A provides the statement of reasons which were laid before the Scottish Parliament, in accordance with section 14(2)(b) of the 2001 Act.

3. While the Order came into force on 25th October 2010, section 14(2) also provides that Scottish Ministers must, after making the Order, give public notice of it, inviting comments to be made in writing within 60 days of the Order being made. Once the 60 day consultation period has expired, the Scottish Ministers will publish a report summarising all the comments and what, if any, modifications they consider appropriate to make to it.

4. Section 14(5) of the 2001 Act provides that if the Order is to be modified, Scottish Ministers shall make and lay before the Scottish Parliament a further Order incorporating the relevant changes. In accordance with section 14(6), either the first remedial Order or the revised Order must be approved within 120 days (commencing on 25th October 2010), otherwise the Order will cease to have effect.

Policy objectives

5. The Order amends Part 2 of the 2003 Act to address the Supreme Court ruling that it is incompatible under Article 8 of the European Convention on Human Rights to require sex offenders to notify their details to the police indefinitely (commonly referred to as “being on the sex offender register”) without the right to review.

6. Indefinite notification will not be removed. A review mechanism will be introduced under which offenders who are convicted of an offence as adults (over the age of 18) and become subject to indefinite notification will be eligible for review

after notifying for 15 years. For offenders who were convicted of an offence when they were under 18, this period will be 8 years.

7. When an offender who is notifying indefinitely has been doing so for the prescribed period, the police will carry out a review. A senior police officer will decide (taking into account any risk assessments carried out through the multi agency public protection arrangements (MAPPA)) whether individuals need to remain on the register because of the risk of sexual harm they pose to the public. The police will then write to the offender to notifying them of the police decision. If it is decided that an offender should remain on the register, the police will set a period of up to 15 years for further review

8. Should the offender wish to challenge the police decision to keep them on the sex offender register, or the police fail to complete a review by the expiry of the prescribed period, he or she can go to the Court. It will then be for a Sheriff to decide, based on the test of 'risk of sexual harm', whether he or she agrees with the case made by the police. If the Sheriff does agree, the offender will be kept on the register for a further period of up to 15 years. If not, the offender will no longer require to notify (i.e. be removed from the register). Both the police and the offender will be able to appeal the Sheriff's decision to the Sheriff Principal, whose decision will be final.

Summary of Order

9. In order to remove the incompatibility, the Remedial Order:

- provides sex offenders, who are subject to the notification requirements of Part 2 of the Sexual Offences Act 2003 for an indefinite period, with a mechanism for the review of the justification for continuing to remain subject to those requirements for a further period of time.
- provides that sex offenders aged 18 or over at the time of their conviction or other finding ("adult sex offenders"), the date of discharge will be 15 years from the date of that conviction or other finding, after disregarding any time spent in prison, detained in hospital etc in relation to that offence.
- provides that sex offenders who are aged under 18 on the date of their conviction or finding ("young sex offenders") the date of discharge will be 8 years from the date of their conviction or other finding after disregarding any time spent in custody, detention in hospital etc in relation to that offence. For young sex offenders who have already been subject to the notification requirements for a total period of at least 8 years prior to the date the Remedial Order comes into force, i.e. 25 October 2010, the police will be required to make a decision as to whether such offenders should cease to be subject to the notification requirements within 3 months, i.e. 25 January 2011.
- provides that chief constables will make a notification continuation order if they are satisfied that an offender continues to pose a risk of sexual harm to the public.

- provides a list of factors which chief constables must take into account when determining whether such offenders continue to pose a risk of sexual harm. Chief constables can impose a notification continuation order for a fixed period of no more than 15 years.
- provides that if the police have not completed a review the offender can make an application to a sheriff.
- provides that the decision of the police to make a notification continuation order, and duration of that order can be appealed to a sheriff, and that the decision of a sheriff to grant or refuse an appeal can be appealed to the sheriff principal whose decision is final.

Consultation

10. No formal consultation has been undertaken on this Remedial Order. However the intention to introduce the review mechanism was publicised by means of a Parliamentary Question on 25 October 2010. Moreover, section 14(2) of the 2001 Act provides that Scottish Ministers must, upon making the Order, undertake a public consultation, inviting comments to be made in writing within 60 days of the Order being made. Once the 60 day consultation period has expired, the Scottish Government will publish a report summarising all the comments and what, if any, modifications they consider appropriate to make to the Order. It will be for the Scottish Parliament to approve the Order within 120 days of its being made or it will fall.

11. A list of the interested parties to be consulted is attached at Annex B.

Regulatory Impact

12. A Regulatory Impact Assessment has not been prepared for this instrument as it has no adverse impact on business, charities or voluntary bodies.

ANNEX A

THE SEXUAL OFFENCES ACT 2003 (REMEDIAL) (SCOTLAND) ORDER 2010

STATEMENT OF REASONS

This Statement of Reasons is provided by the Scottish Ministers in accordance with section 14(2)(b) of the Convention Rights (Compliance) (Scotland) Act 2001.

The Scottish Ministers have made the Sexual Offences Act 2003 (Remedial) (Scotland) Order 2010 for the following reasons –

On 21 April 2010 the UK Supreme Court issued a judgment in the English case of R (on the application of F (by his litigation friend F)) and Thompson (FC) v Secretary of State for the Home Department [2010] UKSC 17 in which it declared that the indefinite notification requirements in section 82(1) of the Sexual Offences Act 2003 are incompatible with Article 8 of the European Convention on Human Rights because they do not contain any mechanism for the review of the justification for continuing the requirements in individual cases. Section 82 and its associated provisions extend to Scotland. The Scottish Ministers therefore consider that the provision is or may be incompatible with Convention rights (as defined in the Human Rights Act 1998). In order to remedy any incompatibility the Scottish Ministers have made the above Order to amend the Sexual Offences Act 2003 so as to provide those who are subject to the notification requirements of Part 2 of that Act for an indefinite period with a mechanism for the review of the justification for their continuing to remain subject to those requirements.

It is important to ensure, in the interests of public safety, that relevant offenders remain subject to the notification requirements. If the incompatibility were not addressed, there would be a real risk that some offenders who are currently required to notify indefinitely might no longer be subject to those requirements. Consequently any incompatibility requires to be remedied as a matter of urgency without utilising the procedure under section 13(2) to (4) of the 2001 Act.

ANNEX B

List of Consultees

Police

ACPOS
Chief Constables
Scottish Police College
Scottish Crime and Drug Enforcement Agency
Scottish Police Services Authority
Scottish Police Federation
HM Inspectorate of Constabulary

Local Authorities

Chief Executives
Directors of Social Work
Association of Directors of Social Work
British Association of Social Work (Scotland)

Prisons

Chief Executive, Scottish Prison Service
HM Inspectorate of Prisons
Prison Governors
Scottish Prison Officers Association
Scottish Prison Service College
Chairs of Prison Visiting Committees

Health

Health Boards
Special Health Boards
British Medical Association
Forensic Mental Health Services Managed Care Network (Medical Director and Chairperson)
General Medical Council
Mental Welfare Commission for Scotland
Royal College of Psychiatrists

Courts etc

Chief Executive, Scottish Court Service
Chief Executive, Crown Office and Procurator Fiscal Service
Lord President and Lord Justice General
Law Society of Scotland
Faculty of Advocates
District Courts Association
Stipendiary Magistrates
Sheriff Principals
Sheriffs Association
Scottish Law Commission

Scottish Legal Aid Board
Scottish Committee of the Council of Tribunals
Scottish Children's Reporter Association
Judicial Studies Board
Parole Board for Scotland

Victims Organisations

Victim Support Scotland

Voluntary Organisations, including

SCVO
Children 1ST
Stop it Now!

Academic

University Departments of Social Work
Law Schools
Social Work Research Centre, Stirling
Criminal Justice Social Work Development Centre

Other Criminal Justice Organisations, including

HMI Probation (England and Wales)
Northern Ireland Probation Board
Scottish Consortium on Crime and Criminal Justice
NOTA (Scotland)
Howard League for Penal Reform
Scottish Association for the Study of Delinquency
Scottish Commission for Human Rights
Scottish Commissioner for Children and Young People