

# **PROTECTION OF CHILDREN AND PREVENTION OF SEXUAL OFFENCES (SCOTLAND) ACT 2005**

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## **EXPLANATORY NOTES**

### **THE ACT – COMMENTARY ON SECTIONS**

#### ***Section 17 – Prevention of sexual offences: further provision***

47. **Section 17** of the Act amends the 2003 Act in relation to sexual offences prevention orders (SOPOs). A SOPO is intended to protect the public from the risks posed by sex offenders by placing restrictions on their behaviour.
48. At present, the 2003 Act provides that in Scotland a SOPO can be made only on application to a sheriff court by a chief constable in respect of an offender who has previously been dealt with in connection with an offence listed in Schedules 3 or 5 to the 2003 Act (except paragraphs 64 to 111 of Schedule 5). The list of trigger offences covers persons with convictions under both Scots law and the law of England and Wales and Northern Ireland to cover the situation in which a person with an English conviction lives in Scotland and is exhibiting sexually risky behaviour that causes concern. The list of offences also includes any offence committed in Scotland where the court determines that there is a significant sexual element in the offender's behaviour in committing the offence. The court must be satisfied that an order is necessary to protect the public or an individual from serious sexual harm from the defender.
49. This kind of SOPO, granted on the application of the police (a "police SOPO") under the 2003 Act replaced the power conferred on the police to apply for sex offender orders that were introduced in the Crime and Disorder Act 1998 for Scotland, England and Wales and Northern Ireland.
50. **Section 17** of the Act amends the 2003 Act so as to bring the procedure for applying for SOPOs in Scotland more closely into line with the normal jurisdictional arrangements applicable to orders made under civil law. The effect of this change is that an order can only be applied for in a sheriffdom where the person who would be subject to the order resides, is believed to be or is intending to come to, or where the alleged acts are said to have taken place. Section 17 also amends the 2003 Act so that an application for an interim SOPO must be made in the same sheriffdom as the main application.
51. The 2003 Act also enabled the courts in England and Wales to impose a SOPO on conviction – a "court SOPO". This court SOPO replaced the sex offender restraining order for England and Wales that had been introduced in 2000. The court there may impose a SOPO when it deals with an accused following a conviction for an offence listed in Schedule 3 or 5 or a finding that he or she is not guilty of such an offence by reason of insanity or that he or she is under a disability but has done the act charged. Under the 2003 Act, court SOPOs were not available in Scotland.

52. **Section 17** of the Act therefore amends the 2003 Act so as to enable the Scottish courts to impose a SOPO on conviction for a sexual offence or an offence with a significant sexual element, or on finding that a person is not guilty of an offence by reason of insanity or that he or she is under a disability but has done the act charged. It does this by amending section 112 of the 2003 Act which sets out the way in which the existing SOPO provisions apply to Scotland. Section 112 is amended so as to remove the current disapplication to Scotland of the sentencing court's power to impose a SOPO on conviction (section 17(3)). The new court SOPO can be imposed by the sheriff court when exercising criminal jurisdiction or by the High Court. Section 17(2) amends section 111 of the 2003 Act to make provision for appeals against the new Scottish court SOPOs. The amendment to section 111 provides that the appeal process for the court SOPO is to be equivalent to the appeal process for other community justice disposals, such as probation and community service orders.
53. A Scottish Court SOPO can be imposed on conviction for one of the offences listed in paragraphs 30 to 60 of Schedule 3 to the 2003 Act. The offences listed in paragraphs 36 to 59C are all sexual offences or offences which are likely to have a significant sexual element. Paragraph 60 covers any others offences committed in Scotland where the court determines that there is a significant sexual element in the offender's behaviour in committing the offence, as recommended in the report of the Expert Panel on Sex Offending "Reducing the Risk – Improving the Response to Sex Offending". There is a power for Scottish Ministers to amend the list of relevant offences by a statutory instrument under section 130 of the 2003 Act.
54. It is not necessary to apply to the court to make a SOPO at the point of sentence although the prosecutor may ask the court to consider making an order in appropriate cases.
55. As with the existing police SOPOs and court SOPOs for England and Wales, in order to make a Scottish court SOPO, the court must form a view that the offender presents a risk of serious sexual harm to the public and that an order is necessary to provide protection from this. The evidence presented in the trial is likely to be a key factor in the formation of this judgement, together with the offender's previous convictions, of which the sheriff would have a copy. Courts may also ask social enquiry report writers to consider the suitability of a SOPO on a non-prejudicial basis.
56. In line with the provisions for existing SOPOs, a Scottish court SOPO can contain only those prohibitions on the behaviour of the offender that are necessary for the purpose of protecting the public or any particular members of the public from serious sexual harm from the offender (section 107(2) of the 2003 Act). It cannot require the offender to comply with conditions requiring positive action. Prohibitions could include, for example, preventing an offender from contacting victims, or from taking part in sporting activities that involve close contact with children, or from living in a household with girls under 16. Also, in line with the existing provisions for SOPOs in the 2003 Act, the Scottish court SOPO will also have the effect of making the offender subject to the notification requirements of Part 2 of the 2003 Act for the duration of the order. This will apply even if the offender is already subject to notification, if notification would end during the currency of the order (section 107 of the 2003 Act). The notification period runs from the date that the order is served on the offender (not from the date of conviction) – see section 107(5) of the 2003 Act. The minimum duration for an order is five years (section 107(1)(b) of the 2003 Act). There is no upper limit.
57. Breach of a court SOPO, without reasonable excuse, would be a criminal offence. An accused convicted of such an offence on summary conviction would be liable to a term of imprisonment of up to six months or to a fine or both; an offender convicted on indictment would be liable to a term of imprisonment of up to five years (section 113 of the 2003 Act).