

# **POLICE, PUBLIC ORDER AND CRIMINAL JUSTICE (SCOTLAND) ACT 2006 (ASP 10)**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### **Part 2: Public Order Etc.**

##### *Chapter Three: Other Provisions*

#### **Offensive Weapons**

##### *Section 73 – Increase in maximum term of imprisonment for certain offences*

123. This section amends sections 49(1)(a) (penalty on summary conviction for offence of possessing an article with a blade or point in a public place) and 49A(5)(a)(i) (penalty on summary conviction for offence of possessing an article with a blade or point on school premises) of the Criminal Law (Consolidation) (Scotland) Act 1995 by increasing the maximum term of imprisonment on summary conviction from 6 to 12 months. It also amends section 49(1)(b) (penalty on indictment for offence of possessing an article with a blade or point in a public place) and section 49A(5)(a)(ii) (penalty on indictment for offence of possessing an article with a blade or point on school premises) of the Criminal Law (Consolidation) (Scotland) Act 1995 by increasing the maximum term of imprisonment for these offences from 2 to 4 years.

##### *Section 74 – Amendment of requirements for exercise of certain powers of arrest*

124. This section amends the following sections of the Criminal Law (Consolidation) (Scotland) Act 1995:
- section 47(3) (power of constable to arrest without warrant person suspected of possessing an offensive weapon in a public place);
  - section 48(3) (power of constable to arrest without warrant person suspected of obstructing search for offensive weapon); and
  - section 50(3) (power of constable to arrest without warrant person suspected of contravening section 49(1) or 49A(1) or (2)).

These amendments widen constables' powers of arrest in relation to offences under:

- section 47(1) (offence of carrying offensive weapon in a public place);
- section 48(2) (offences of obstructing a constable or concealing an offensive weapon from a constable);
- section 49(1) (offence of having in public place article with blade or point); and
- section 49A(1) and (2) (offence of having article with blade or point (or offensive weapon) on school premises).

***Section 75 – Sale of knives and articles with blade or point to young persons***

125. This section amends section 141A(1) of the Criminal Justice Act 1988 (offence of sale of knives and certain articles with blade or point to persons under sixteen) by increasing the minimum age of persons to whom such items (other than knives designed for domestic use) may be sold, from 16 to 18 years. The amendment also makes clear that swords are included in the list of items to which this provision applies.

**Fireworks**

***Section 76 – Possession of prohibited fireworks: powers of search and arrest***

126. This section amends the Fireworks Act 2003 to give police powers of search, seizure and arrest without warrant in relation to possession offences created by regulations under that Act. Sections 3 and 5 of the 2003 Act enable regulations to make provision prohibiting the possession of fireworks by persons of a specified age and provision prohibiting the possession of fireworks of a specified description including by persons of a specified description. At present, the [Fireworks Regulations 2004 \(2004/1836\)](#) provide that subject to regulation 6 of those regulations no person under the age of 18 years shall possess an adult firework in a public place and no person shall possess a firework classified as category 4 under Part 1 of BS 7114, which are generally the largest and most powerful fireworks.
127. The new provision sets out the powers of a constable in relation to searching, detaining or arresting a person when the constable has reasonable grounds to believe that the person is committing an offence in relation to the possession of fireworks, as well as powers of seizure.

**Control of Sex Offenders**

***Section 77 – Powers to take data and samples from persons subject to notification requirements***

128. [Section 77](#) amends the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) by inserting new sections 19AA and 19AB into that Act. The new sections allow the police to take relevant physical data (primarily fingerprints and palm prints), or any DNA samples from persons subject to the notification requirements of Part 2 of the Sexual Offences Act 2003 (“the 2003 Act”), a risk of sexual harm order (RSHO) under section 2 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act (“the 2005 Act”) or section 123 of the 2003 Act, if a DNA sample or data from these individuals is not already held on the database, or if such material has been lost or destroyed. This section also amends section 87 of the 2003 Act so that the police can also take a DNA sample as well as any relevant physical data from a registered sex offender who attends a police station to notify their details to the police.
129. Subsection (1) of section 19AA provides that these arrangements only apply to persons subject to the notification requirements or RSHOs.
130. Subsection (2) of section 19AA provides that the police will be able to take samples or data from any person who was subject to the notification requirements or a RSHO at the time the provisions commence, as well as from an individual who becomes subject to notification requirements or RSHO after commencement. The police will not be able to take samples or data from any person who may have been subject to the notification requirements or RSHO before the date of commencement, if that person was no longer subject to the notification requirements or a RSHO at that date.
131. Subsection (3) of section 19AA provides that a constable, or police custody and security officer (at a constable’s direction) can take any samples or data by certain means specified in section 18(6) and (6A) of the 1995 Act. Any samples which are retained from a registered sex offender can be retained indefinitely.

132. Subsection (4) of section 19AA enables the police to take samples or data from a person who is subject to a RSHO made under section 123 of the 2003 Act, if they reasonably believe that that person is resident in Scotland. The police will therefore be able to take and retain fingerprints and DNA samples from individuals who are subject to RSHOs (or who become subject to RSHOs) made in England, Wales or Northern Ireland, if these people move to Scotland.
133. Subsection (5) of section 19AA provides that the police must not exercise their powers under this section, if samples or data have already been taken from a sex offender who is subject to the notification requirements, or a person who is subject to a RSHO, under sections 19(2) or 19A(2) of the 1995 Act. However, if any samples or data which have previously been taken under sections 19(2) or 19A(2) of the 1995 Act have been lost or destroyed, the police will be able to use their powers under this section to take further samples or data.
134. Subsection (6) of section 19AA provides that the police can take further samples or data under this section, if the data and samples that were initially taken in exercise of the power in this section have been lost or destroyed, or were not suitable or sufficient for analysis.
135. Subsection (7) of section 19AA provides that the police may only take samples or data under this section at a police station, prison, hospital or any other place where a person is held in legal custody.
136. Subsection (8) of section 19AA provides that the police can only exercise their power to take samples or data in a police station when a person has been required to come to the station so their samples and data can be taken, or if a person to whom this section applies, is held in custody in a police station after being arrested or detained for any offence. This means that in appropriate circumstances, the police can exercise their powers under section 19AA to take samples and data from any relevant person who is brought into custody, without having to ask that person to return to the station on another occasion for that specific purpose.
137. Subsection (9) of section 19AA provides that the police must give a relevant person at least seven days notice of the requirement to attend a police station to provide samples or data. Any such notice which the police issue to a person who is subject to a RSHO must warn that person that they will commit an offence if they fail, without reasonable excuse, to comply with the requirements under this section.
138. Subsection (10) of section 19AA provides that if a relevant person is required to attend a police station to give samples or data under subsection (8) because a previous sample has either been lost or destroyed or is deemed unsuitable for the purposes of analysis, then these circumstances shall be explained to the person.
139. Subsection (11) of section 19AA provides that if a relevant person is in a police station due to having been arrested or detained for an offence, and a sample is to be taken from that person under this section, then this shall be explained to the person.
140. Subsection (12) of section 19AA confers a power of arrest on the police if a relevant person fails to comply with the obligations to attend a police station within the requested timeframe.
141. Subsection (13) of section 19AA ensures that any of the powers which are exercised in this section are without prejudice to the exercise of any powers in section 18 of the 1995 Act. If the police have taken any samples or data from an individual under section 19AA of the 1995 Act, they will still be able to take samples or data under section 18 of the 1995 Act and use these for investigating an offence, if an individual is arrested or detained under suspicion of having committed an imprisonable offence.

142. Subsection (1) of section 19AB provides that the arrangements under this section only apply to persons who are subject to risk of sexual harm orders (RSHO) under section 2 of the 2005 Act or section 123 of the 2003 Act.
143. Subsection (2) of section 19AB provides that a person subject to a RSHO will commit an offence if they do not comply with a notice issued by the police under section 19AA(8) (a) of the 1995 Act, or if they attend the police station but refuse to provide (or allow to be taken) a required sample or data. However, an offence will not be committed where the person has a "reasonable excuse."
144. Subsections (4), and (6) of section 19AB provide that any samples or data taken from a person subject to a RSHO under section 19AA(3) shall be destroyed as soon as possible following the expiry of the RSHO, unless prior to the duty to destroy such samples or data the individual in question is convicted of an offence or becomes subject to the notification requirements of the 2003 Act. In such circumstances, the samples and data will be retained indefinitely.
145. Subsection (5) provides that an RSHO shall not be deemed to have expired for the purpose of sections 19AA and 19AB of the 1995 Act, if it is suspended pending the outcome of an appeal under section 6(2) of the 2005 Act or any corresponding power exercised in the other UK jurisdictions.
146. Subsections (3) and (4) of section 77 make consequential amendments to sections 19 and 19A of the 1995 Act. These changes mean that the police will not be able to exercise their powers to take data and samples from a relevant person under those sections, if the police have already taken this material under section 19AA of the 1995 Act. However, the police will be able to exercise their powers under sections 19 or 19A of the 1995 Act, if any samples or data which have been taken under section 19AA, have been lost or destroyed.
147. Subsection (5) of section 77 amends section 19B of the 1995 Act to enable the police to use reasonable force in exercising the powers in section 19AA, but only when taking samples or data from a person who is subject to the notification requirements of the 2003 Act. The police cannot use reasonable force to take samples and data from a person who is subject to a RSHO.
148. Subsection (7) of section 77 amends section 87 of the 2003 Act by replacing subsections (4) and (5) with a new subsection (5A) which operates alongside the notification requirements provided for in sections 83(1), 84(1) or 85(1) of the 2003 Act. The police will be able to take samples or data from a relevant sex offender when he or she attends a police station to notify their details to the police. This will enable the police to obtain samples or data from these offenders without having to give them notice to return to a police station so this information can be obtained. Any samples and prints taken under section 87(5A) can be retained indefinitely.
149. Subsection (8) of section 77 inserts a definition of "relevant physical data" into section 88 of the 2003 Act. This definition has the same meaning as that in section 18(7A) of the 1995 Act.
150. Subsection (9) of section 77 amends section 91(1)(a) of the 2003 Act to make it an offence for a relevant sex offender to fail to provide or to allow to be taken from them any sample or data.

### ***Section 78 – Sex offender notification requirements***

151. **Section 78** amends the 2003 Act to require relevant sex offenders in Scotland to provide the police with details of their passports in order to comply with the notification requirements of Part 2 of the 2003 Act. This is achieved by amending sections 83, 84, 87, 91, and 138 of the 2003 Act, which contain the statutory powers governing the notification requirements. The amendment to section 83 also confers power on the Scottish Ministers to make regulations subject to affirmative resolution procedure

which prescribe further information that sex offenders are required to provide to the police.

152. Subsection (2) amends section 83 of the 2003 Act to:
- insert subsection (5)(h) which provides that relevant sex offenders are required to provide details of their passports to the police in order to comply with the notification requirements;
  - insert subsection (5)(i) which allows the Scottish Ministers to make regulations, subject to affirmative resolution procedure, requiring those who are subject to the notification requirements to notify other relevant information about themselves or their personal details as are prescribed in the regulations;
  - insert subsection (5A) which provides the details of the passport that are required to be provided. This includes the passport number, and dates of issue and expiry.
153. Subsection (3) amends section 83 of the 2003 Act to insert a subsection (8) to provide a definition of a passport. The definition includes passports issued by countries and authorities outside the UK. This means that a relevant sex offender may have to provide the police with details of all passports which he or she holds.
154. Subsection (5) amends section 84 of the 2003 Act to insert subsections (e), and (f), which provide that a relevant sex offender has 3 days to notify the police if he or she has lost or ceases to have a passport, or if a new passport is obtained. A new subsection (g) is also inserted in consequence of the new power in section 83(5)(i) to prescribe further notification requirements. The power allows Ministers to prescribe by regulations, subject to affirmative resolution procedure, the events in relation to any information prescribed under section 83(5)(i) that will require to be notified under this section.
155. Subsection (7) amends section 87 of the 2003 Act to insert subsection (5B) which states that when notifying details under the 2003 Act, if requested to do so, a relevant sex offender must produce his or her passport to the police so that it may be examined.
156. Subsection (8) amends section 91 of the 2003 Act to provide that a person commits an offence if he or she fails to comply with section 87(5B).
157. Subsection (9) amends section 138 of the 2003 Act to provide that regulations made under sections 83(5)(i) and 84(1)(g) will be subject to the Scottish Parliament's affirmative resolution procedure.

### ***Section 79 – Information about release: power to require giving of specified information***

158. **Section 79** amends section 96 of the 2003 Act. The Scottish Ministers may make regulations under section 96 which require any person who is responsible for a relevant sex offender to inform any person who is specified in the regulations of any occasion when that offender is transferred or released from an institution. New subsection (2A) provides that any regulations made by the Scottish Ministers under section 96 may set out what information about a relevant sex offender a responsible person is required to provide to any specified person. The regulations may also set out when a responsible person is required to give to a specified person a photograph of any part of the relevant sex offender (so that, for example, photographs may be taken of distinguishing features such as a tattoo, as well as of an offender's face).
159. New subsection (2B) provides that the meaning of "photograph" in the section is the same as the meaning in section 88(2) of the 2003 Act.
160. Subsection (3) allows the regulations made under section 96 of the 2003 Act to prescribe different and specific types of information for different purposes.

**Section 80 – Police powers of entry to and examination of relevant offender’s home address**

161. Section 80 amends the 2003 Act by inserting a new section 96A that provides that the police can apply to a sheriff to obtain a warrant to enter, examine and search the premises of sex offenders who are subject to the notification requirements under Part 2 of the 2003 Act.
162. Subsection (1) of section 96A of the 2003 Act gives a sheriff power to issue such a warrant, on application of a senior police officer, to enter and search the premises of a relevant sex offender and if necessary to use reasonable force, if he or she is satisfied that the necessary conditions are met.
163. Under subsection (2) of section 96A the application for a warrant to enter, examine, and search will only be granted if the sheriff is satisfied that:
  - the address has been notified as the relevant sex offender’s home address or an address at which the relevant sex offender resides or is regularly found;
  - the relevant sex offender is living in the community and is not in legal custody, prison, detained in hospital or outside the UK (subsection (4));
  - a warrant would assist the police in carrying out a risk assessment as to the likelihood of a relevant sex offender committing another sexual offence (subsection (3)); and
  - the police have previously tried to gain access to the said premises on more than one occasion but have failed to do so.
164. Subsection (5) provides that the sheriff will not need to determine the application for a warrant, without the need to hear from the relevant sex offender or anyone with an interest in the premises.
165. Subsection (6) provides that the warrant to enter, examine, and search premises does not allow the police to seize and retain anything which they find in the premises.
166. Subsection (7) states that the police must execute the warrant at a reasonable hour.
167. Subsection (8) provides that the warrant will expire after one month from the date when the warrant is granted. The police will not be able to execute the warrant after this date.
168. Subsection (9) provides that the warrant can only be executed on one occasion.
169. Subsection (10) provides that the powers described above will not prejudice any other police powers to enter, examine, search, and seize (which are contained in other legislation or in common law) in the normal way if they believe there is evidence to support the fact that an offence may have been committed.
170. Subsection (11) provides definitions for various terms.