

# **ADULT SUPPORT AND PROTECTION (SCOTLAND) ACT 2007**

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## **EXPLANATORY NOTES**

### **THE ACT – AN OVERVIEW**

#### **Part 1**

#### **Protection of Adults at Risk of Harm**

#### **Banning orders**

##### ***Section 19 – Banning orders***

28. This section deals with applications to the sheriff for banning orders, which specify the place from which, and the length of time for which, a person is banned. The specified place may, for example, be the adult at risk's home or place of residence.
29. Subsection (2) enables a banning order to ban the subject from the vicinity of the specified place, permit the summary ejection of the subject from the specified place or its vicinity, and prohibit the subject from moving anything set out in the order from the place. The banning order may also direct any specified person to take measures to preserve the moveable property of the subject which remains in the premises during the order. The subsection also gives the sheriff flexibility to specify other conditions, or to place requirements on individuals to allow proper enforcement of the order.
30. Subsection (3) permits the inclusion of conditions within a banning order which allow the subject of a banning order, under certain specified circumstances, to be in the place from which he or she is banned. Examples of such circumstances are when the subject is being supervised by another person (e.g. a council officer) or during specified times only. Subsection (4) states that before including this type of condition within a banning order, the sheriff must have regard to the views of the applicant of the order, the adult at risk, the subject of the order and any other person with an interest in the adult at risk's well-being or property.
31. However, a sheriff can decide to disapply the provisions contained within subsection (4) in relation to representations if he or she can be satisfied that doing so will protect an adult at risk from serious harm and will not prejudice any person affected by the disapplication (see section 41(2), Applications: procedure).
32. The sheriff has the power to attach a power of arrest to any banning order (see section 25). Subsection (5) states that the period of the banning order may not exceed 6 months.

##### ***Section 20 – Criteria for granting banning order***

33. This section specifies that a sheriff may only grant a banning order where satisfied that an adult at risk is likely to be seriously harmed, and that banning the other person from a place occupied by the adult (for example, their home or place of residence) would

better safeguard the adult's well-being and property than the removal of the adult at risk. In addition, the sheriff must also be satisfied that the adult at risk is entitled, or permitted, to occupy the place from which the subject is to be banned or, alternatively, that neither the adult at risk nor the subject is so entitled or permitted. This means that a person who is entitled to occupy a place cannot be banned from that place by someone who is not so entitled.

### ***Section 21 – Temporary banning orders***

34. This allows for temporary banning orders to be granted by a sheriff pending determination of a banning order. Temporary orders may include any of the provisions contained in a banning order. If a temporary banning order is granted, the sheriff must grant or refuse the full banning order within a time limit to be fixed in court rules. The expiry of a temporary banning order will be the earliest of: the date specified at the time of granting; the date the order is recalled; the date on which the sheriff determines the banning order or the date by which the sheriff is required to determine the banning order by virtue of court rules.

### ***Section 22 – Right to apply for banning order***

35. This section limits those who are able to apply for a banning order to particular persons. These are the adult at risk, any other person entitled to occupy the property from which the subject would be banned, or the council. These persons are also entitled to apply for a temporary banning order in respect of the same case. An application can also be made by those who are acting on behalf of those listed above.
36. The council can only apply for a banning order under certain circumstances. Where a council applies, it must be satisfied that an adult at risk is being, or is likely to be, seriously harmed by another person and that the adult would be more effectively safeguarded by banning the subject of the order than being removed themselves.
37. In addition, the council must be satisfied that no other person is likely to apply for a banning order and no other proceedings are before a court to eject or exclude the subject of the order from the place concerned. Where so satisfied, a council must apply for a banning order.

### ***Section 23 - Banning orders: occupancy rights of adult at risk***

38. The granting of a banning or temporary banning order does not affect the adult at risk's rights, as a non-entitled spouse, to occupy a home within the place from where the subject of the order is banned under the Matrimonial Homes (Family Protection) (Scotland) Act 1981.

### ***Section 24 – Variation or recall of banning order***

39. This section allows the sheriff to vary or recall a banning order or temporary banning order, but only if he or she is satisfied that there has been a change in the facts or circumstances in respect of which the banning order was made or last varied.
40. An application for variation or recall can only be made by the banned person, the person who originally applied for the order, the adult who is being protected by the order, or any other person claiming an interest in the well-being or property of the adult at risk. An application can also be made by those who are acting on behalf of those listed above.

### ***Section 25 – Powers of arrest***

41. This section allows a sheriff to attach a power of arrest to any banning order or temporary banning order. The power of arrest becomes effective only when served on the subject of the order and it will expire at the same time as the order.

***Section 26 - Notification to adult at risk etc.***

42. Where the applicant seeking a banning order or temporary banning order (or its variation or recall) is not the adult at risk, this section imposes a duty on the applicant, or such other person who may be specified, to notify the adult at risk of the order by delivering a copy of the order (and any power of arrest attached) to the adult or any other person with an interest in the adult's well-being or property. Failure to deliver the order does not, however, invalidate it.

***Section 27 – Notification to police***

43. This section states that the police, via the chief constable, must be notified as soon as possible after any power of arrest attached to a banning order or temporary banning order becomes effective. This should be done by the applicant for the order (or another prescribed person e.g. sheriff officers). The police must also be notified in the event of a variation or recall of a banning order.

***Section 28 - Arrest for breach of banning order***

44. Subsection (1) sets out the two-step test that must be satisfied if a police constable is to carry out an arrest. The subject of a banning order or temporary banning order, to which a power of arrest is attached, may be arrested without warrant if a constable reasonably suspects the subject to be in breach of the order and that he or she is likely to breach the order again if not arrested. Subsection (2) states that the arrested person must be told immediately the reason for the arrest and then taken by the constable to a police station as soon as is reasonably possible.

***Section 29 – Police duties after arrest***

45. Following an arrest under section 28, the officer in charge of the police station must detain the arrested person in custody until the person is either brought before the sheriff or accused on petition or charged on complaint with a criminal offence arising from the incident for which he or she is arrested. The officer in charge must also ensure that the facts and circumstances which gave rise to the arrest are communicated to the procurator fiscal as soon as is practicable. This is linked to the procurator fiscal's duty to present a petition to the sheriff setting out the relevant facts and circumstances on the first available court day after arrest (see section 33).

***Section 30 – Notification of detention***

46. Where a person has been detained under section 29 above, this section sets out a series of entitlements that may be accessed by the arrested person including the right of access to a solicitor. Subsection (2) provides that where the arrested person appears to be a child then intimation of the detention and place of detention must be given without delay to any person known to have parental responsibilities for the person.

***Section 31 – Duty to keep record of detention***

47. This section lists the information that the police must record in connection with the detention of a person under section 29.

***Section 32 – Duty to bring detained person before sheriff***

48. In this section, subsection (1) makes it clear that the procedure under the Act would only apply in circumstances where the procurator fiscal has not yet decided to take criminal proceedings against the arrested person as a result of the facts leading to the arrest. The arrested person should be brought to court on the next court day on which it is practicable to do so.

***Section 33 – Information to be presented to sheriff***

49. This section sets out the matters that should be referred to in the procurator fiscal's petition to the court. This allows the procurator fiscal to present to the court information that will assist the sheriff in deciding whether it would be appropriate to order the arrested person's further detention.

***Section 34 – Criteria for authorising longer detention***

50. This section sets out the test that the sheriff must apply in deciding whether or not to order the further detention of the arrested person for a maximum of two days. The sheriff must be satisfied, based on the information provided by the fiscal, that a breach of the banning order or temporary banning order has taken place and also that there is a substantial risk that the detained person will breach the order again. Subsection (3) provides that the arrested person must be given an opportunity to make representations before the sheriff decides whether or not to grant an order under this section. If the sheriff decides not to authorise the further detention, the detained person must be released (unless he or she is to be detained in custody in respect of another matter).