

ANTI-SOCIAL BEHAVIOUR, CRIME AND POLICING BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS

SUPPLEMENTAL MEMORANDUM BY THE HOME OFFICE

Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to provisions contained in the Government’s new Schedule *Amendments of Part 2 of the Sexual Offences Act 2003* tabled for Commons Report stage of the Anti-social Behaviour, Crime and Policing Bill. The memorandum has been prepared by the Home Office.

Summary

2. The relevant provisions relates to proposals to amend aspects of Part 2 of the Sexual Offences Act 2003 (“the 2003 Act”).
3. Part 2 of the 2003 Act contains provision including, but not limited to (a) the framework in accordance with which certain sex offenders are subject to the notification requirements (commonly referred to the “sex offenders’ register”), and (b) a number of civil orders which may be made in relation to persons who are considered to pose various types of risk. Part 2 contains provision which set out the basis on which certain sex offenders become subject to the notification requirements, for how long and what they must do to comply with those requirements. It is an offence for a person to fail without reasonable excuse to notify information in accordance with the prescribed requirements or to notify any information which that person knows to be false. There is also a mechanism (which differs between Scotland and England and Wales) by which a person’s indefinite notification requirements may be reviewed¹.
4. Part 2 (specifically sections 97 to 129) also contains provision for four different civil orders. Each order may be made by the court on the application of the police. A summary of each order is below.

Notification order

5. A notification order may be made by the court on the application of the police in relation to a person who has been convicted etc. for an offence outside the United Kingdom in respect of an act which would have constituted an offence in Schedule 3 to the 2003 Act had it been done in the United Kingdom. A notification order makes the person subject to the notification requirements as if that person had been convicted of an offence in Schedule 3 in the United Kingdom.

¹ This was introduced to remove the incompatibility with the ECHR identified by the Supreme Court in *R (on the application of F and Angus Aubrey Thompson) v Secretary of State for the Home Department* [2010] UKSC17.

Sexual offences prevention order (“SOPO”)

6. A SOPO can be made in relation to a person who has been convicted of a specified offence² if the prohibitions in it are considered to be necessary to protect a person or persons in the United Kingdom from serious sexual harm. A SOPO may be made by the court following a person’s conviction and sentence, or at a later time on the application of the police as a freestanding matter. A SOPO prohibits the person from doing anything described in it and may have effect for a fixed period of least 5 years. If the person subject to the SOPO was not hitherto subject to the notification requirements, those requirements apply for the duration of the order. It is an offence to breach a SOPO.

Foreign travel order (“FTO”)

7. An FTO can be made by the court on the application of the police in relation to a person who has been convicted of a child sex offence (or who has been convicted for a corresponding act done outside the United Kingdom) if, on the basis of the person’s behaviour since conviction, the prohibitions in the order are considered to be necessary to protect a child or children outside the United Kingdom from serious sexual harm. An FTO prohibits a person from travelling to one or more countries specified in it, and may have effect for a period not exceeding 5 years. In the case of an all country prohibition, the person is also required to surrender any passport. It is an offence to breach an FTO.

Risk of sexual harm order (“RoSHO”)

8. A RoSHO can be made by the court on the application of the police in relation to a person aged 18 or over who has carried out on two or more occasions a specified act in relation to a child aged under 16 years, if it is therefore considered necessary to make the order to protect a child or children from harm. A conviction in respect of the relevant act (or any act) is not a condition for obtaining this order. A RoSHO prohibits the person from doing anything described in it and may have effect for a fixed period of least 2 years. A person not already subject to the notification requirements does not become subject to them as a result of a RoSHO, but conviction for breach (which is an offence) does have this effect.
9. Although the proceedings by which these orders are obtained are civil proceedings, the burden of proof is the criminal standard³. This position will continue to apply in relation to the new orders described below.

Amendments

10. New Schedule *Amendments of Part 2 of the Sexual Offences Act 2003* contains the relevant provision for the purposes of this memorandum. Notification orders are not the subject of any amendment. SOPOs and FTOs will be replaced in England and Wales by a sexual harm prevention order⁴ (“SHPO”) (available in relation to a person with a relevant conviction) and RoSHOs will be replaced in England and Wales by a sexual risk order⁵

² An offence listed in Schedule 3 (sexual) or Schedule 5 (other), and an “equivalent” conviction etc. for an act done outside the United Kingdom.

³ See *R –v- Crown Court at Manchester ex parte McCann & Others [2002] UKHL 39* and *Commissioner of the Police of the Metropolis –v- Ebanks [2012] EWHC 2368*.

⁴ This will be inserted into the 2003 Act at new sections 103A to 103I.

⁵ This will be inserted into the 2003 Act at new sections 122A to 122I.

("SRO") which like a RoSHO will be available in relation to a person without a relevant conviction.

11. The provisions in this new Schedule clearly engage Article 8(1). The effect of a person being made the subject of any one of the existing or proposed orders will constitute an interference with that person's Article 8(1) rights, and the issue by virtue of Article 8(2) therefore is whether such an interference is in accordance with the law, and is necessary in a democratic society in the interests of public safety, the prevention of crime, the protection of health or for the protection of the rights and freedoms of others.
12. In assessing whether a particular interference with Article 8(1) rights is proportionate, the Court is entitled to take into account the jurisprudence of the European Court of Human Rights on the duties of states in relation to the prevention of sexual offending. In *Stubbings v United Kingdom*⁶, the court noted that Article 8 may impose positive duties on states to protect children and others from sexual offending. In *Adamson v United Kingdom*⁷ (1999), a complaint by a sex offender subject to notification requirements that these requirements breached his rights under (amongst other things) Article 8 was rejected as manifestly inadmissible.
13. The provisions in the amendments to the 2003 Act also confer on the police and the Director General of the National Crime Agency ("the Director General") the power to apply for an order and confer on the courts the power to make an order. As a public authority, each will have a duty under section 6 of the Human Rights Act 1998 to ensure that their own actions are compatible with the ECHR.

SHPOs

14. A SHPO brings together elements from each of a SOPO and FTO. The Government intends that this will provide a more flexible power for both those involved in managing the risk posed by sex offenders and for the courts, which will have more scope to make an order tailored to the specific circumstances of each case. As such, the SHPO will replicate the existing safeguards (essentially comprising independent oversight by the courts and prescribed onward appeal rights to the higher courts) which apply to a SOPO or FTO. A SHPO represents a departure from the existing orders only to the extent that:
 - A SHPO may be made by the court on the application of the police or the Director General (but the Director General will be required to notify the police for the area in which the person resides or is intending to reside as soon as practicable after the application is made). A SOPO or an FTO may only be sought by the police.
 - The court may only make a SHPO if it is satisfied that this step is necessary to protect a person from sexual harm⁸ from the person who is the subject of the order. This replaces the test of "serious sexual harm" in existing provision. The new test is consistent with the test which applies in relation to a review of whether a person subject to indefinite notification requirements should continue to be subject to them⁹.

⁶ (1996) 23 EHRR 213.

⁷ (1999) 28 EHRR CD209.

⁸ See new section 103B(1).

⁹ See new section 91B(4) and (11)(b), and 91C(2) of the 2003 Act.

- The SHPO may be made, in relation to protecting a person abroad, in respect of a vulnerable adult¹⁰ as well as a child.
15. In any case, the court must be satisfied that the order is necessary to protect a person or persons from sexual harm caused by the person in respect of whom the order is sought, and replicating the existing provision about the person's participation in court process (including a prescribed right of appeal and power to subsequently apply to the court to vary or discharge the SHPO) ensures that that person's Convention rights are safeguarded.

SROs

16. This order is based on a RoSHO but will be available in a wider set of circumstances and in respect of a broader category of person. By the same token, the court will have more flexibility in what prohibitions it may order.
17. This order also brings together elements from each of a SOPO and FTO. Like a SHPO, the Government intends that this will provide more flexibility for those involved in managing the risk posed by sex offenders and the courts, and will enable the order to be a better fit to the specific circumstances of each case. As such, an SRO will replicate the existing safeguards (again essentially comprising independent oversight by the courts and prescribed onward appeal rights to the higher courts) which apply to a RoSHO. The SRO represents a departure from the existing orders only to the extent that:
- The order may also be made by the court on the application of the Director General on the same basis as that described above in relation to a SHPO.
 - The application may be made if it appears to the applicant that the person concerned has done any, single act of a sexual nature as a result of which there is reasonable cause to believe that the order is necessary.
 - The order may be made in relation to any person and the prohibitions which may be imposed in it are those which are necessary for the purpose of protecting any person or persons generally from physical or psychological harm caused by the person concerned in the United Kingdom, or for protecting any person or persons generally aged under 18 years or who are vulnerable adults¹¹ from physical or psychological harm caused by the person concerned outside the United Kingdom.
 - By virtue of new section 122F, a person made the subject of this order will be required to notify certain information to the police within 3 days of the order being served. The information is that person's name and home address. Moreover, the person must notify the police of any change to the name or address previously notified, within 3 days of the change taking place. The notification should be made to a police station in accordance with the requirements in and prescribed in regulations made under section 87 of the 2003 Act. This notification requirement would only apply during the period when the order has effect.

¹⁰ See new section 103B(1).

¹¹ See footnote 10 above.

18. In any case, the court will as above have to be satisfied that the order is necessary to protect a person or persons from sexual harm caused by the person in respect of whom the order is sought, and existing provision about the person's participation in court process (including a prescribed right of appeal and power to subsequently apply to the court to vary or discharge the SRO) ensures that the person's Convention rights are safeguarded.
19. The limited notification requirement will be an automatic consequence of the order being made, but is a matter which the court would be expected to take into account when determining whether it is necessary to make the order.
20. In relation to a SHPO or an SRO, the interference with Article 8(1) which may be justified under Article 8(2) is the imposition of prohibitions by virtue of the order. Article 8(2) sets out the basis on which such interference may be justified. The interferences will be in accordance with the law because there is clear provision in primary legislation governing the basis on which the court may make an order. The fact that the process is subject to independent oversight by the courts should ensure that the order will only be made if its purpose is to achieve one or more of the aims in Article 8(2)¹² and it is proportionate in achieving that outcome. This should correspondingly ensure that the prohibitions contained in it, and its duration, satisfy those requirements.
21. The Government considers, therefore, that the provisions in these amendments to the 2003 Act are compatible with the ECHR.

Home Office
8 October 2013

¹² See paragraph 12 above.