

GUIDANCE

Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005

November 2006

Introduction

The Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 came into force on 7 October 2005.

The purpose of this Act is to improve the protection given to children and young people from those who would wish to cause them sexual harm, or exploit them for sexual purposes. The Act also aims to improve the protection given to adults and children alike from those convicted of sexual offences who still pose a risk of sexual harm. The Act does this in the following ways.

- It introduces a new offence of sexual grooming of a person under 16;
- It introduces Risk of Sexual Harm Orders (RSHOs) which are designed to protect children from those who display inappropriate behaviour towards them;
- It introduces a new offence of paying for the sexual services of a person under 18;
- It introduces new offences of causing, inciting, controlling, arranging or facilitating the provision of sexual services by children or child pornography;
- It removes the statutory time limit for prosecution of the offence of unlawful intercourse with a girl between 13 and 16;
- It amends current legislation criminalising the taking, possessing and distribution of indecent images of children so that it applies to images of people under 18 rather than only to images of those under 16;
- It extends the use of Sexual Offences Prevention Orders (SOPOs) so that they can be imposed on those convicted of sex offences by the court when they are sentenced.

This document forms the guidance relating to the Act and is intended for use by those with a role to play in the protection of children and the investigation, enforcement and prosecution of this Act.

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The Act and the explanatory notes which sit alongside it can be viewed on the Office of Public Sector Information website <http://www.opsi.gov.uk>.

Full text of the Act

http://www.opsi.gov.uk/legislation/scotland/acts2005/asp_20050009_en.pdf

Explanatory notes

http://www.opsi.gov.uk/legislation/scotland/en2005/aspen_20050009_en.pdf

SSI – No. 472 – Act of Adjournment (Criminal Procedure Rules Amendment No. 5) (Sexual Offences Prevention Orders) 2005

http://www.opsi.gov.uk/legislation/scotland/ssi2005/ssi_20050472_en.pdf

SSI – No. 473 - Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules) Amendment (Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005) 2005

http://www.opsi.gov.uk/legislation/scotland/ssi2005/ssi_20050473_en.pdf

SSI – No. 480 - The Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (Commencement and Savings) Order 2005

http://www.opsi.gov.uk/legislation/scotland/ssi2005/ssi_20050480_en.pdf

Executive note - The Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (Commencement and Savings) Order 2005 SSI/2005/480 (C.24)

http://www.opsi.gov.uk/legislation/scotland/sen2005/ssien_20050480_en.pdf

PROTECTION OF CHILDREN AND PREVENTION OF SEXUAL OFFENCES (SCOTLAND) ACT

GUIDANCE

Section 1: Meeting a child following certain preliminary contact

New Grooming Offence

1. Section 1 of the Act creates the new “grooming” offence. This offence is intended to catch those who develop relationships with young people under 16 in order to gain their trust and persuade them into vulnerable situations where they can then be sexually assaulted. The offence is complete when the person meets or sets out to meet the child with the intention of engaging in unlawful sexual activity with or in the presence of the child during or after the meeting. The sexual activity does not need to take place. Indeed, if the sexual activity does take place, that sexual activity will probably constitute a separate sexual offence.

2. The offence is set out as follows. It will be an offence for a person (A) intentionally to meet, travel with the intention of meeting, or make arrangements with the intention of meeting another person (B) if A has met or communicated with B on at least one earlier occasion and intends to engage in unlawful sexual activity involving B or in the presence of B either at the time of the meeting or after the meeting.

3. The offence can be committed by a person (A) of any age. The offence can only be committed on a child under 16 (B), and A must believe that B is under 16. If A reasonably believes that B is 16 or over, no offence has taken place. In cases where the accused claims to have reasonably believed that the child was 16 or over, it is for the Crown to prove that s/he held no such belief or that the belief was not reasonably held. (The Act sets out that B can also be a police officer. Para 10 below explains this further.)

4. The prior meeting or communication could take any form. It could, for example, be online communication in a chat room or instant messaging, or it could be telephone conversations. Equally, however, the perpetrator might meet the child regularly through, for example, sporting activities or in a shop, or may even be a member of the child’s family. The initial communication may have a sexually explicit content – for example, conversations about sexual acts which s/he would like the child to engage in or the transmission of indecent images. However, the communication need not have a sexually explicit content and, indeed, engaging in sexually explicit communication with a child may constitute a separate offence.

5. The initial communication between the perpetrator and the child may have taken place before commencement of this Act, provided that the offence was not completed until after the commencement of the Act.

6. The Crown will be required to prove that the accused intended to engage in unlawful sexual activity with the child or in the presence of the child during or after the meeting, but will not need to prove an intention to commit a specific offence. “Sexual activity” is defined in the Act as an activity that a reasonable person would, in all the circumstances, consider to be sexual. The evidence of the accused’s intention to engage in unlawful sexual activity may be drawn from the communications between A and B prior to the meeting. Such evidence might be obtained by examining the contents of emails or letters or text messages, or from the

transcripts of chat room conversations which might have been logged either on an individual's computer or on the computer of an internet service provider. Evidence may also be drawn from other circumstances – for example, travelling to the meeting with condoms and lubricants or ropes.

Nationality of offender and location of offence

7. If the perpetrator is a British citizen or UK resident, an offence will have been committed under Scots law even if no part of it has taken place in Scotland. If the perpetrator is not a British citizen or UK resident, an offence will have been committed under Scots law if at least one of the necessary elements of the offence has a relevant Scottish connection – i.e. if the meeting / making of arrangements / travelling, or any part of it, takes place in Scotland, or if the earlier communication is made from or to or in Scotland.

Where grooming is identified

8. Grooming behaviour may be identified by parents, teachers, other carers, or even by children and young people themselves. Young people with special needs or other vulnerabilities may be particularly at risk from this type of behaviour. Suspicions that grooming is taking place should be reported to the police as soon as possible.

9. In some cases, it might be appropriate to charge a person with attempt to commit the unlawful sexual activity itself (e.g., depending on the circumstances, attempted rape); either in addition to or instead of the grooming offence assuming the necessary evidence was available.

10. In cases where the grooming is taking place online, officers from the National Hi-Tech Crime Unit (Scotland) may take over the communication from the child. The Act therefore provides that the offence will still be complete if A communicates with and arranges to meet a police officer, if A believes that that police officer is a child under 16.

11. In order to be guilty of an offence under this legislation the illegal activity need not have been conducted within Scotland. As long as the complainer is resident here or the location of the proposed meeting is in Scotland, then the offender can be charged under this legislation.

12. When this type of activity is reported to the police, early contact should be made with their local Computer Crime Unit, or direct to the National Hi-Tech Crime Unit at the Scottish Crime and Drug Enforcement Agency (SCDEA). They will provide accurate advice relative to evidence gathering and the potential use of a Covert Internet Investigator to progress the investigation.

13. In cases where two or more communications can be evidenced directly from statements and the forensic examination of a child's computer, there would be no need to take any further action other than using recognised methods to identify the perpetrator. Information such as an e-mail address may be evident from the statements or forensic examination which would allow the identification process to begin. Where this information is not found, consideration must be given to using the Covert Internet Investigator to attempt contact with the offender while authorised as a Covert Human Intelligence Source (CHIS)

under the Regulation of Investigatory Powers (Scotland) Act 2000. This authority would be applied for, and granted by, the SCDEA.

14. In order to ensure the integrity of evidence it is of critical importance that its retrieval of from mobile phones and computer systems is carried out by appropriately trained personnel.

Trial and conviction

15. The offence may be tried summarily or on indictment and has a maximum penalty on indictment of 10 years imprisonment.

16. The Act adds the offence to Schedule 3 to the Sexual Offences Act 2003 (offences which make a person subject to the requirements of Part 2 of the Act) in cases where either

- the offender was 18 or over or had been sentenced in respect of the offence to imprisonment for at least 12 months; or
- in imposing sentence or otherwise disposing of the case, the court determines that it is appropriate that the requirements of Part 2 of the 2003 Act should apply

As a result, where either of these cases applies, the offender will become subject to the notification requirements of Part 2 of the 2003 Act.

17. The Act also adds this offence to Schedule 1 to the Criminal Procedure (Scotland) Act 1995 (offences against children under 17 to which special provisions apply) in cases where the victim was under 17. This provides the additional powers of arrest without warrant specified in section 21 of the 1995 Act and allows child protection procedures to be mobilised in the context of these offences.

Sections 2 – 8: Risk of Sexual Harm Orders

18. Sections 2 – 8 makes provision for a new civil preventative order: the Risk of Sexual Harm Order (RSHO). The purpose of this order is to give courts the power to place restrictions on someone who is behaving in such a way which suggests that they pose a risk of sexual harm to a particular child or to children generally. The person's behaviour need not constitute a criminal offence, and s/he need not have any previous convictions. The Court may impose on the person any restrictions which are required to protect a particular child or children generally from sexual harm from that person.

19. Where a person has a previous conviction for crimes of a sexual nature, a Sexual Offence Prevention Order (SOPO) should be considered rather than a RSHO.

Applying for an RSHO

20. Applications for RSHOs can be made only by a chief constable to a sheriff. A chief constable may apply for an order in respect of a person:

- who resides in the area of the police force; or

- who the chief constable believes is in, or is intending to come to, that area

if the person meets certain criteria.

21. An application for an RSHO can be made to any sheriff:

- in whose sheriffdom the person against whom the order is sought resides;
- in whose sheriffdom that person is believed by the applicant to be;
- to whose sheriffdom that person is believed by the applicant to be intending to come;
or
- whose sheriffdom includes any place where it is alleged that that person engaged in certain inappropriate behaviour that forms the basis for the RSHO application.

22. The application will be made by summary application. The behaviour resulting in the application may have taken place either before or after commencement of the relevant sections. However, in normal circumstances the application must be made within three months of the second relevant incident coming to the attention of the chief constable, although it is open to the sheriff to consider applications made outwith this timescale if the sheriff considers this equitable having regard to all the circumstances.

Criteria for RSHOs

23. An application can be made in respect of any person of any age if it appears to the chief constable that that person has, on at least two occasions, engaged in certain inappropriate sexual conduct or communication with a child or children (under 16), and as a result there is reasonable cause to believe that it is necessary for the order to be made.

24. Before an RSHO will be made, it must be proven to the court that, on the balance of probabilities, the two incidents took place, and the court must be satisfied that it is necessary for an RSHO to be made to protect children generally or a particular child from harm from that person.

25. The Act specifies the trigger behaviour which could result in an RSHO as follows:

- engaging in sexual activity involving a child or in the presence of a child;
- causing or inciting a child to watch a person engaging in sexual activity or to look at a moving or still image that is sexual;
- giving a child anything that relates to sexual activity or contains a reference to such activity;
- communicating with a child, where any part of that communication is sexual.

26. This list covers a wide range of activity from that which is a serious criminal offence, for example engaging in sexual activity with a child, to that which might be entirely innocent and proper behaviour, for example responsibly communicating with a child about sexual matters. In between these extremes will be a range of behaviour and actions, some of which will not be unlawful but nonetheless gives rise to serious concerns about the motivation and future actions of the adult concerned and the consequent risk of harm to children.

27. Examples of behaviour which might lead to an RSHO could include the person phoning the child and talking to him or her about sexual acts s/he wants to engage in with the child. It could involve the person giving the child pornographic images of adults engaging in sexual activity, encouraging the child to watch pornographic films or giving the child sex toys or condoms.

28. The RSHO is not intended as an alternative to a criminal prosecution in situations where the behaviour in question amounts to a criminal offence. The focus of the RSHO is on preventative measures for the future, rather than punitive action in relation to the events which have taken place in the past. The Crown will always prosecute where there is sufficient credible and reliable evidence that an offence has been committed and it is in the public interest to do so. However, it is possible that RSHOs could be used in cases where behaviour which would constitute a criminal offence is said to have taken place, but where it is difficult to find sufficient corroborated evidence to raise criminal proceedings. The court which is considering an RSHO application would still have to find that the alleged behaviour had taken place – on the balance of probabilities – and be satisfied that the order is necessary in order to protect a child or children generally from harm from the subject of the RSHO application.

29. In cases where it is unclear whether criminal proceedings or an RSHO would be the correct option, it is important that the police and the Crown work together to agree the best course of action, bearing in mind the nature of the acts alleged to have taken place, the evidence available, and the perceived risk to a child or children.

30. In applying for an order, the chief constable should have in mind that the court will only make an order where it is proved that the person engaged in the specified behaviour on more than one occasion, and where it is satisfied that an order is necessary for the purpose of protecting children generally or a particular child from harm from that person. “Harm” is defined in the Act as physical or psychological harm caused by the person carrying out any of the trigger behaviour specified above.

31. In assessing whether behaviour has taken place on two or more occasions, chief constables do not require to establish that the same behaviour has taken place on two or more occasions. Entirely different acts can be used as the basis for an RSHO application, provided both acts fall within the list of trigger behaviour noted above.

32. The fact that an order may only be imposed where it is necessary to protect a child or children from harm means that those whose behaviour meets the specified criteria set out above, but who have acted properly in the context of a legitimate role in the education, training, health or welfare of children (such as those providing advice on sexual health matters) will not be caught by the legislation.

33. The fact that it is the police who apply for the order will prevent them being used by parents trying to prevent their child having contact with, for example, an 18 year old boyfriend whom they consider unsuitable for their child. Parents (or any other individuals) who consider that inappropriate sexual conduct or communication is being directed towards a child should bring these concerns to the attention of the police. This will allow the police to consider whether grounds for an RSHO application exist.

Considerations before applying for an RSHO

34. The assessment process to be undertaken by the police will need to involve consideration of the degree of risk that the individual poses at the present time. Where appropriate, the assessment should be carried out in consultation with other agencies, such as social work services and child protection agencies. In cases where it is unclear whether criminal proceedings or an RSHO would be the correct option, the police should consult the local Procurator Fiscal and agree the best course of action, bearing in mind the nature of the acts alleged to have taken place, the evidence available, and the perceived risk to a child or children.

35. The key factor in assessing whether an RSHO is necessary is whether or not an individual presents a risk of harming a child or children generally. Assessment of how the child's safety can best be assured should be informed by consideration, where relevant, of:

- the nature of the behaviour giving rise to concern and any pattern associated with this;
- the nature and extent of the potential harm;
- an assessment of the accuracy and currency of the information about the individual (including an assessment of the status of those expressing concern and their reasons for so doing);
- the current circumstances of the person being considered for an RSHO and how these might change – including employment, training, contact with children generally (including family, friends, voluntary work etc), housing, who s/he lives with and where, any addictions, health problems etc;
- whether, in appropriate cases, the child would be able to give evidence;
- the relevance of any previous convictions or warnings;
- compliance or otherwise with any previous sentences, court orders or supervision arrangements;
- compliance or otherwise with therapeutic help and its outcome;
- whether the person being considered is a convicted sex offender, and fulfils the criteria for a Sexual Offences Prevention Order, and if so, whether that would be a more appropriate order to apply for;
- the development of plans to address the potential impact of any media coverage on the management by relevant agencies of the person in the community.

36. There is no restriction on the age of the person in respect of whom an RSHO can be sought. However, in cases where an RSHO is being considered for a child under the age of 16, the police will wish to consider whether it might be more appropriate for the child to be dealt with by the children's panel, or referred for social work intervention.

Service of the order

37. The application for an RSHO will be intimated automatically to the defender before an order is made. The intimation will advise the person that s/he should contact a solicitor if s/he is uncertain about what action to take. It will also advise the person that s/he may be eligible for legal aid depending on income. It will provide the person with a date at which they should appear at court. The sheriff will consider the order on that date. An order may be granted or refused on that date or, if appropriate, a further hearing may be fixed. The sheriff court summary application rules regulate and provide further detail on the procedures that apply. When an order is made, the order will be served on the defender either in court if s/he is there, or should be served by a Sheriffs Officer or messenger-at-arms.

38. This should be followed up with a Police visit within a number of days of service of the order to ensure that;

- they have received the order;
- they understand the conditions as laid out in the order

This action also ensures that there is additional corroboration that the order was received and understood.

Effect of the RSHO

39. The minimum duration of an order is 2 years, though an application for its revocation can be made at any time.

40. The prohibitions in the order will be tailor-made to the particular case and to the particular harm the person poses. They could, for example, require the person to have no further contact with a particular child, either in person or over the internet. They could prohibit the person from going to a particular place where s/he has previously engaged in sexually inappropriate conduct or communication towards a child, or they could prohibit the person from going to that *type* of place – e.g. a school or sports centre. The activities prohibited by the order may include those that, if carried out in respect of those over the age of consent, might be unremarkable. It is the court's assessment that such activities would cause physical or psychological harm to a child or children generally that makes the prohibitions necessary.

41. The court may only impose prohibitions in the order that are justified by the assessment of risk. As a preventative rather than a punitive measure, the order is designed to address, without recourse to the criminal law, behaviour that puts or could put children at risk of sexual harm. Only prohibitions necessary to protect children from this harm can be included.

42. Only restrictions on the person's behaviour can be contained in the order. The order cannot require him / her to comply with actions requiring positive action. Neither the courts nor the police will, at any stage during the order application process, or as part of any order granted, be able to require the person to take any part in any assessment or receive any support or counselling. Any such actions could be encouraged but would be on a purely voluntary basis.

Interim Orders

43. The purpose of an interim order is to allow restrictions to be placed on the person as soon as possible, in cases where there is an urgent requirement to protect a child or children. An interim RSHO is in effect a temporary RSHO, imposing such prohibitions as the court considers appropriate. Where the chief constable considers that an interim order would be appropriate, an application for an interim order can be made either at the time of the application for a full order or in the time between making the full application and the determination of that application.

44. The sheriff may grant an interim RSHO if satisfied firstly that the person has received intimation of the interim application. The sheriff must then be satisfied on the face of it that, firstly, the person carried out sexually explicit communication or conduct of the kind referred to in Paragraph 7 above with or towards a child on at least two occasions and, secondly, that it is just to make the order. The interim order must be for a fixed period, and will cease to have effect at the end of that period or, if earlier, when a decision is made on the full order.

Breach of an RSHO

45. Breach of an RSHO or interim RSHO without reasonable excuse is a criminal offence that is triable either summarily (with a maximum penalty of 6 months¹ imprisonment or a fine not exceeding £5000 or both) or on indictment (with a maximum penalty of 5 years imprisonment or an unlimited fine or both).

46. Breach in Scotland of an RSHO or interim RSHO made in England, Wales or Northern Ireland is also a criminal offence in Scots law with the same penalties as those available for breach of a Scottish RSHO. The Violent Crime Reduction Bill will make it an offence as a matter of law in England, Wales and Northern Ireland to breach a Scottish RSHO or interim RSHO in those jurisdictions.

47. A conviction for breach of an RSHO or interim RSHO will render the person subject to the notification requirements of Part 2 of the Sexual Offences Act 2003. These requirements will remain in place for the duration of the breached RSHO. If the conviction is for breach of an interim RSHO, the restrictions will remain in place for the duration of the interim order or, if a full order is subsequently made, for the duration of the full order.

Variation, renewal and discharge of RSHOs

48. Variation, renewal or discharge of an RSHO or interim RSHO is by way of application to the appropriate sheriff (as defined in Section 4(6) the Act). Such an application can be made by the person against whom the order has effect, the chief constable on whose application the order was made, the chief constable of the police force in the area of which the person against whom the order has effect resides, or any chief constable who believes that the person is in, or is intending to come to, the area of the chief constable's police force.

¹ 6 months is the current maximum penalty for this offences on summary conviction. The Criminal Proceedings etc. (Reform) (Scotland) Bill proposes to increase the maximum term of imprisonment to which a person is liable on summary conviction to 12 months. The Bill would also increase the maximum fine level 1 to £10,000.00. This Bill is currently being progressed through the Scottish Parliament and further information on the Bill is available on the Scottish Parliament website. <http://www.scottish.parliament.uk/business/bills/55-criminalProceedings/index.htm>

49. Variation might be necessary for a number of reasons. The subject of the order might move to a different area, meaning that the original restrictions might no longer be appropriate. An additional group requiring protection from risk might be identified with the result that supplementary prohibitions need to be added. However, there may be instances where the changes required to the order are such that it would be more appropriate for a new order to be sought.

50. A renewal might be required in cases where the original order is close to expiry and the police have reason to believe that the person continues to pose a risk and that the order continues to be necessary.

51. An order may only be renewed or varied so as to impose additional prohibitions if it is necessary to do so for the purpose of protecting children generally or any particular child from harm from the person in question, and only prohibitions that are necessary for this purpose may be imposed.

52. Orders might be discharged in cases where it is clear that the person no longer poses a risk of sexual harm to a child or children generally. This might occur, for example, in cases where the person posed a risk of harm to a particular child only, and that particular child has reached the age of 16.

Appeal against an order

53. A sheriff's decision in relation to the granting, refusing, varying, renewing or discharging an RSHO or interim RSHO can be appealed. The appeal will be dealt with in the first instance by the sheriff principal or the Outer House of the Court of Session. An existing RSHO would continue to have effect until any appeal had been decided by the court unless it is suspended by the court pending disposal of the appeal.

Disclosure

54. The Protection of Vulnerable Groups (Scotland) Bill² was introduced in the Scottish Parliament on 25 September and will supersede the Protection of Children (Scotland) Act 2003. As well as continuing to allow for organisations to refer individuals for consideration for listing, the new legislation will for the first time allow for the continuous assessment of new vetting information in relation to individuals working in child care positions. The granting of an RSHO in respect of an individual in a child care position is expected to trigger a consideration for listing by the Central Barring Unit (the successor to the listing team under the 2003 Act) at the time that it is granted. Nothing in the Bill will change the police's common law powers to communicate with employers and others directly in the interests of the prevention or detection of crime.

² Further information on the progress of the Protection of Vulnerable Groups (Scotland) Bill is available on the Scottish Parliament website

<http://www.scottish.parliament.uk/business/bills/index.htm>

What if the subject of an RSHO already works with children when the order is imposed?

55. If the order prohibits the subject of the order from working with children, s/he will be committing an offence by continuing to do any job involving work with children.

56. The granting of an RSHO will not automatically put the person on the Disqualified from Working with Children List which is maintained by the Scottish Ministers in terms of the Protection of Children (Scotland) Act 2003. However, as part of their consideration as to whether an RSHO was necessary, the police will have established the contact which the person has with children, including that in paid or unpaid employment. When an RSHO is issued, the police should then give consideration to whether it would be appropriate for the existence of the RSHO to be disclosed to, for example, an employer or voluntary organisation. If the person is employed in a child care position or works with children in a voluntary capacity, that would form a legitimate basis for the disclosure of the information to the employer or organiser of the activity.

57. Separate guidance will be issued to employers and voluntary organisations, explaining RSHOs and encouraging them to assess whether it would be appropriate to move the person from working with children or to dismiss them as a result of this information. The guidance will remind them of their duty, if they do take action, to refer the person to Scottish Ministers for consideration for inclusion on the Disqualified from Working with Children List.

Sections 9 - 14: Offences relating to the sexual services of children and child pornography

58. Sections 9 - 14 creates new offences relating to the exploitation of children and young people under 18 through sexual services and pornography.

59. The Act defines “sexual services” as the performance of sexual activity, or the performance of any other activity that a reasonable person would, in all the circumstances, consider to be for the purpose of providing sexual gratification. Sexual services are obtained where what is obtained is the performance of such an activity by the person. As well as children abused through prostitution, it is therefore intended that “sexual services” should cover activities such as lap dancing, stripping and telephone chat lines.

60. The Act states that a person is involved in pornography if an indecent image of that person is recorded. (Section 13(1))

61. In circumstances where images of this nature are discovered by a forensic computer examiner, consideration must be given by them to instigate an investigation into the identity of the child, the identity of offenders and the location of the incident. This is also prudent when an examiner finds images depicting serious sexual abuse of a child that would be prosecuted under other legislation.

62. In many cases there may be items or individuals within an image or video that would tend to indicate that the offence may have been committed within the UK. Experience suggests that this could be items of clothing, the appearance of the room (i.e. type of windows, items hanging on the wall, type of power socket/phone socket, type of furniture etc). Images that fall into this category should be collated for further investigation. Again, it

is critically important that the retrieval of evidence from computer systems or mobile phones is carried out by appropriately trained personnel.

63. The initial stage of the investigation would be to direct the submission of the case files to the Child Exploitation and Online Protection (CEOP) Centre³ based in London. They operate an image identification system known as 'ChildBase' that already contains around 1 million known child abuse images. The system has the ability to search the database for the images found by the examiner and images that may be similar to those found. There may already have been some work carried out to identify the individuals and location that will eliminate the need for this to be done. Information on any previous investigation will be provided to the officer submitting the images for comparison.

64. Where the images are not present, it is the responsibility of the force to nominate an officer to progress the investigation. Assistance in this regard will be provided by the experts at the Child Exploitation and Online Protection Centre and the National Hi-Tech Crime Unit (Scotland).

65. The offences are not committed if the accused reasonably believes that a child in reality aged 13-17 is aged 18 or over. It will be for the Crown to prove that the accused did not reasonably believe that the child was 18 or over. In cases where the child in question is under 13, the offence is committed regardless of the accused's belief as to the child's age.

66. The Act added each of the offences to section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 (commission of certain sexual acts outside the United Kingdom). As a result, any act done by a British citizen or UK resident in a country or territory outside the UK which constituted an offence in that country and would also have been one of these new offences if it had been done in Scotland shall constitute that offence, and proceedings can be taken in Scotland.

67. The Act added each of the offences to Schedule 1 to the Criminal Procedure (Scotland) Act 1995 (offences against children under 17 to which special provisions apply) in cases where the child or young person involved is under 17. This provides the additional powers of arrest without warrant specified in section 21 of the 1995 Act and allows child protection procedures to be mobilised in the context of these offences.

68. The Act also added each of the offences to Schedule 3 to the Sexual Offences Act 2003 (offences which make a person subject to the requirements of Part 2 of the Act) in cases where either

- the victim / provider of sexual services / person involved in pornography was under 16 and the offender was 18 or over or had been sentenced in respect of the offence to imprisonment for at least 12 months; or
- in imposing sentence or otherwise disposing of the case, the court determines that it is appropriate that the requirements of Part 2 of the 2003 Act apply.

³ CEOP website <http://www.ceop.gov.uk/>

As a result, where either of these cases applies, the offender will become subject to the notification requirements of Part 2 of the 2003 Act.

Section 9: Paying for sexual services of a child

69. Section 9 makes it an offence for any person intentionally to obtain for him/herself the sexual services of a person under 18 where, in advance of obtaining those services, s/he has made or promised payment, or knows that another person has made or promised payment. The payment can be made or promised to the child, or to another person, for example the person controlling the child.

70. The payment does not need to involve money actually changing hands, but could instead involve the discharge of an obligation to pay - such as the waiving of a debt - or provision of goods or services free of charge or at a reduced cost - for example providing food or accommodation, or supplying illegal drugs free or for less than street value.

71. According to Scots law it is, of course, already an offence to engage in sexual activity with a child under 16, regardless of payment. Existing law is unaffected by this new provision. In some respects, section 9 goes further than existing law by making it an offence to engage in sexual activity with a 16 or 17 year old, where that sexual activity is provided in exchange for payment.

72. It should be noted that this new offence does not mean that young people under 18 who solicit for the purposes of prostitution would no longer be committing an offence under section 46 of the Civic Government (Scotland) Act 1982⁴. It will be for the Procurator Fiscal to decide whether to prosecute in each particular case.

73. The offence is not restricted to dealing with the purchase of sex from young people under 18. As the above paragraphs explain, the Act defines sexual services as the performance of sexual activity or the performance of any other activity for the purpose of providing sexual gratification. As such, activities such as lap dancing, stripping and telephone chat lines will also be covered, and anyone paying to obtain these services for themselves from a person under 18 will now be committing an offence. This offence will not cover those who employ people under 18 to provide these services. This will, however, be covered by other offences in the Act, as explained below.

74. The maximum penalty available on summary conviction is 6⁵ months imprisonment or a fine not exceeding the statutory maximum or both. The penalties available for conviction on indictment are determined by the age of the child or young person from whom the sexual services were purchased. Where the child was aged 16 or over, the maximum penalty on indictment is 7 years imprisonment. Where the child was aged under 16, the maximum penalty on indictment is 14 years imprisonment.

⁴ The Prostitution (Public Places) (Scotland) Bill proposes that the current offence of soliciting is repealed and replaced with a new offence of soliciting or loitering in a relevant place for the purpose of engaging in prostitution, or for the purpose of obtaining the services of someone engaged in prostitution, in such manner as to be likely to cause nuisance, alarm or offence to a reasonable person. Further information on the progress of the Bill is available on the Scottish Parliament website <http://www.scottish.parliament.uk/business/bills/index.htm>

⁵ See ref. 1 page 11

Section 10: Causing or inciting provision by child of sexual services or child pornography

75. Section 10 makes it an offence for a person to intentionally cause or incite a young person under 18 to become a provider of sexual services or to be involved in pornography in any part of the world.

76. This offence is intended to cover situations where someone is, for example, recruiting into the provision of sexual services or pornography young people who are not engaged in that activity at the time. This would cover both first time recruitment, and re-recruitment of a young person who has previously been involved in this activity but is not currently involved at the time. (Where the young person is already involved in these activities, the offence at section 11 of controlling a child providing sexual services or involved in pornography might be more appropriate.)

77. The offence would be committed where someone encourages new recruits to work for him / her. It would cover cases where the accused encourages or compels the young person to take part in child pornography for any reason (for example, in order to pay the rent for the accommodation they share). It would also cover situations where someone recruited a young person under 18 to work as a lap dancer or on a telephone sex chat line. The provision of sexual services or pornography itself does not need to take place for the offence to be committed.

78. The provision of sexual services or pornography can take place, or be intended to take place, in any part of the world. However, the causing or inciting must take place in Scotland or in a jurisdiction where this activity is an offence, in which case section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 would apply.

79. The Act provides maximum penalties on summary conviction of 6 months⁶ imprisonment or a fine not exceeding the statutory maximum or both and 14 years imprisonment on indictment.

Section 11: Controlling a child providing sexual services or involved in pornography

80. Section 11 makes it an offence for a person intentionally to control any of the activities of a young person under 18 relating to that young person's provision of sexual services or involvement in pornography in any part of the world.

81. This offence is intended to cover situations where someone is controlling a child involved being abused through prostitution or pornography. It would also cover situations where someone is employing children and young people to work as lap dancers, or as strippers, or on telephone sex chat lines. The person controlling the child might direct the child to charge a certain price for a particular sexual service, or might direct a child to pose for an indecent photograph or film. The employer could control the hours worked by the child in the lap dancing bar, and the wages he or she earned.

82. The provision of sexual services or pornography can take place in any part of the world. However the controlling must take place in Scotland or in a jurisdiction where this

⁶ See ref. 1 page 11

activity is an offence, in which case section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 would apply.

83. The Act provides maximum penalties on summary conviction of 6 months⁷ imprisonment or a fine not exceeding the statutory maximum or both and 14 years imprisonment on indictment.

Section 12: Arranging or facilitating provision by child of sexual services or child pornography

84. Section 12 makes it an offence for a person to arrange or facilitate the provision of sexual services or involvement in pornography of a young person under 18 in any part of the world.

85. This offence is intended to cover situations where the person is, for example, making the practical arrangements or providing premises for the provision of sexual services or pornography to take place, arranging clients for the young person, or delivering the young person to a place where the provision of sexual services or shooting of indecent pictures will take place.

86. The provision of sexual services or pornography can take place in any part of the world. However the arranging or facilitating must take place in Scotland or in a jurisdiction where this activity is an offence, in which case section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 would apply.

87. The Act provides maximum penalties on summary conviction of 6 months⁸ imprisonment or a fine not exceeding the statutory maximum or both and 14 years imprisonment on indictment.

Supplementary

88. The Act provides that a person does not commit one of the offences in sections 10 - 12 (outlined at paragraphs 65 - 77 above) solely by doing something within section 52(1) or 52A(1) of the Civic Government (Scotland) Act 1982. The offences in these sections of the 1982 Act relate to the taking, possessing and distribution of indecent images of a child and are amended by section 16 of this Act to cover images of young people under 18. (Section 16 is discussed below.) As a result, while taking an indecent photograph of a person under 18 would (under some circumstances) be an offence under section 52(1) of the 1982 Act, this would not in itself constitute the offence of causing a child to be involved in pornography. Further behaviour - such as reaching an agreement that the child will receive payment in exchange for posing for the photographs - would have to occur before proceedings could be taken under section 10.

89. However, prosecution for any of the offences at sections 9 - 12 does not exempt any person from any other proceedings for any other offence which is punishable at common law or under any other enactment. This means, for example, that someone could be prosecuted for causing a child to be involved in pornography and for taking indecent photographs of that

⁷ See ref. 1 page 11

⁸ See ref. 1 page 11

child, depending on the circumstances. Similarly, someone could be prosecuted for causing a child to provide sexual services and for unlawful intercourse with a girl under 16 (an offence under section 5 of the Criminal Law (Consolidation) (Scotland) Act 1995), depending on the circumstances. Nevertheless, this does not mean that a person can be punished twice for the same offence.

Section 15: Removal of time limit for prosecution of offence

90. Section 15 removes the time limit that currently applies to proceedings for the offence under section 5(3) of the Criminal Law (Consolidation) (Scotland) Act 1995 which relates to unlawful sexual intercourse with a girl of or over the age of 13 and under the age of 16.

91. Section 5(4) of the 1995 Act directs that no prosecution shall commence for an offence under section 5(3) more than 1 year after the commission of the offence. The apparent purpose of this subsection was to act as a safeguard preventing prosecution for offences long after they had occurred. However, the time bar did not take into account the reality of how long it often takes victims in such cases to disclose fully the circumstances of what has happened to them. The effect of the time bar has therefore been that the Crown has often been unable to prosecute such cases. Section 15 therefore removes this time bar.

Section 16: Indecent photographs of 16 and 17 year olds

92. Section 16 amends sections 52 and 52A of the Civic Government (Scotland) Act 1982. Sections 52 and 52A of the 1982 Act provide a series of offences in relation to

- 52(1)(a) taking / making;
- 52(1)(b) distributing / showing;
- 52(1)(c) possessing with a view to distributing / showing;
- 52(1)(d) advertising; and
- 52A(1) possessing

indecent photographs and pseudo-photographs of children under 16 years of age. Section 16 amends these provisions so that all of the specified activities apply to indecent photographs of young people under 18.

93. This section is intended to provide additional protection to young people. It was considered that 16 and 17 year olds are still vulnerable to those who would seek to abuse them and so still require a certain degree of protection. However, given that they are above the age of sexual consent, it was considered inappropriate to restrict them completely. Section 16 therefore creates a series of exceptions to the indecent photographs offences insofar as they relate to photographs of 16 and 17 year olds.

94. The exceptions relate to the offences at sections 52(1)(a) to (c) and 52A of the 1982 Act - but not to section 52(1)(d) – and apply only where the photograph shows the person aged 16 or 17 alone or with the accused, but not if it shows any other person. If the accused raises all of the issues set out below, the Crown would require to disprove at least one

element in order for the offence to be proved. If the Crown cannot disprove at least one element, the offence has not been committed. If the accused does not raise the issues, the Crown need only prove the offence as set out in section 52(1) or 52A.

95. The issues that the accused would require to raise are:

- either the photograph was of a person aged 16 or over or the accused reasonably believed that to be so;
- at the time of the offence charged, or at the time when the accused obtained the photograph, the accused and the person aged 16 or 17 who is the subject of the photograph were either married to or civil partners of each other or were partners in an established relationship;
- the person aged 16 or 17 who is the subject of the photograph consented to the photograph being taken, made or in the accused's possession (depending on which offence has been charged) or the accused reasonably believed that to be so; and
 - in relation to the offence at section 52(1)(b) of the 1982 Act, that distribution was only to the person aged 16 or 17 who is the subject of the photograph;
 - in relation to the offence at section 52(1)(c) of the 1982 Act, the accused intended to distribute the photograph only to the person aged 16 or 17.

96. The requirement that the 16 or 17 year old and the accused are either married, civil partners, or partners in an established relationship provides an important protection, based on the view that young people in these types of relationships are less likely to be deliberately exploited for the purposes of obtaining indecent photographs, and less likely to make rash or impetuous decisions to consent to such photographs that they might regret later.

97. The penalties for these offences remain unchanged by the Act.

98. The Act adds section 52A of the 1982 Act to section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 (commission of certain sexual acts outside the United Kingdom). As a result, any act done by a British citizen or UK resident in a country or territory outside the UK which constituted an offence in that country and would also have been an offence under section 52A of the 1982 Act if it had been done in Scotland shall constitute that offence, and proceedings can be taken in Scotland. The offences at section 52 of the 1982 Act are already listed in section 16B of the 1995 Act.

99. The Act adds the offences at sections 52 and 52A of the 1982 Act to Schedule 1 to the Criminal Procedure (Scotland) Act 1995 (offences against children under 17 to which special provisions apply) in relation to indecent photographs of children under 17. This provides the additional powers of arrest without warrant specified in section 21 of the 1995 Act and allows child protection procedures to be mobilised in the context of these offences.

100. Finally, the Act amends the references to these offences in Schedule 3 to the Sexual Offences Act 2003 (offences which make a person subject to the requirements of Part 2 of the

Act). Before this Act, the offences were listed in this Schedule without qualification. However, as the offences are now being extended to apply to indecent images of young people under 18, it was considered inappropriate that someone convicted of one of these offences in relation to a 16 or 17 year old should automatically become subject to the notification requirements of Part 2 of the 2003 Act in all circumstances. The reference to these offences in Schedule 3 to the 2003 Act is therefore qualified so that the offender will only become subject to the requirements of Part 2 of the Act in cases where either

- the child was under 16 and the offender was 18 or over or had been sentenced in respect of the offence to imprisonment for at least 12 months; or
- in imposing sentence or otherwise disposing of the case, the court determines that it is appropriate that of the requirements of Part 2 of the 2003 Act apply.

As a result, where either of these cases applies, the offender will become subject to the notification requirements of Part 2 of the 2003 Act.

Section 17: Prevention of sexual offences: further provision

101. Sexual Offences Prevention Orders (SOPOs) and interim SOPOs are intended to protect the public from the risks posed by sex offenders by placing restrictions on their behaviour. The SOPO and interim SOPO also render the offender subject to the notification requirements of Part 2 of the Sexual Offences Act 2003.

Police SOPOs

102. The Sexual Offences Act 2003 provides that, in Scotland, a SOPO can be made 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), and who is continuing to demonstrate behaviour which suggests that s/he is a continuing risk of sexual harm to the public. Before making an order, the court must be satisfied that an order is necessary to protect the public or any particular members of the public from serious sexual harm from the offender. This type of SOPO is generally referred to as a Police SOPO.

103. This Act amends the provisions relating to Police SOPOs, insofar as they apply to Scotland, in two ways. First of all, amendments are made 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. Secondly, the provisions are amended so that an application for an interim SOPO must be made in the same sheriffdom as the main application.

Court SOPOs

104. Separately, the 2003 Act also enabled the courts in England and Wales to impose a SOPO on conviction – a court SOPO. 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 s/he is not guilty by reason of insanity or that s/he is under a disability but has done the

act charged in respect of the offence. There is an opportunity for reporting officers to include in the “remarks” section of their police report; a request that the PF/Crown request that the Sheriff give consideration to granting a SOPO at the time of sentencing. This would result in the accused being placed under a SOPO immediately on leaving court rather than having to rely on the police later applying for and being granted an order. As with a police SOPO, before making a court SOPO the court must be satisfied that an order is necessary to protect the public or any particular members of the public from serious sexual harm from the offender.

105. This Act amends the 2003 Act so as to enable court SOPOs to be made in Scotland. Scottish court SOPOs can be imposed only if the offender had been dealt with in respect of an offence listed at paragraphs 36 to 60 of Schedule 3 to the 2003 Act.

106. Detailed guidance on Sexual Offences Prevention Orders can be found in the Home Office Guidance on Part 2 of the Sexual Offences Act 2003:

[Guidance to Part 2 of the Sexual Offences Act](#)  (file size: 617kb)

The paragraphs below provide some information on the procedures applying to the new court SOPO in Scotland.

Imposing a court SOPO

107. Scottish court SOPOs can be imposed by the sheriff court when exercising criminal jurisdiction, or by the High Court.

108. No application is necessary for the court to make a SOPO, although the Crown may wish to invite the court to consider making an order in appropriate cases. Courts may also ask social enquiry report writers to consider the suitability of a SOPO.

109. As with 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, and the assessment of risk presented in any pre-sentence report. In deciding whether to make a SOPO, the court will need to consider whether the restriction of liberty it would involve is justified and proportionate to the risk that the offender is thought to present. In coming to that decision, the court will take into consideration the range of other sentence options available to it in respect of protecting the public.

Service of the order

110. In making the order, the Court should formally notify the defendant that he/she is subject to the notification requirements of Part 2 of the 2003 Act. The sheriff court summary application rules regulate and provide further detail on the procedures that apply. When an order is made, the order will be served on the defender either in court if s/he is there, or should be served by a Sheriffs Officer or messenger-at-arms.

111. This should be followed up with a Police visit within a number of days of service of the order to ensure that;

- they have received the order;
- they understand the conditions as laid out in the order

This action also ensures that there is additional corroboration that the order was received and understood.

Effect of a court SOPO

112. As with existing police SOPOs and court SOPOs for England and Wales, 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. 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.

113. 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. The notification period runs from the date that the order is served on the offender.

114. The minimum duration for an order is five years. There is no upper limit.

Breach, Appeal, Variation, Renewal, Discharge

115. The procedures for court SOPOs will be the same as those currently available for police SOPOs.

Disclosure

116. The existence of a SOPO or an interim SOPO will be revealed in an Enhanced Disclosure certificate in cases where the chief constable considers that this information is relevant. This information is likely to be relevant in cases where, for example, the subject of the order is applying for a job involving children. The subject's criminal convictions will of course also be listed.

Will a SOPO result in the person going on the list of people unsuitable to work with children?

117. Not automatically. If the person has been convicted of a sexual offence against children, they will be referred to the Scottish Ministers for inclusion on the List as a result of that.

