EXECUTIVE NOTE

THE SEXUAL OFFENCES ACT 2003 (REMEDIAL) (SCOTLAND) ORDER 2011

SSI 2011/45

Introduction

1. The Sexual Offences Act 2003 (Remedial) (Scotland) Order 2011 ("the 2011 Order") revokes the Sexual Offences Act 2003 (Remedial) (Scotland) Order 2010 ("the 2010 Order") and makes amendments to Part 2 of the Sexual Offences Act 2003 ("the 2003 Act") to remove the incompatibility of the indefinite notification period in section 82(1) of that Act with a Convention right. The Supreme Court of the United Kingdom made its declaration of incompatibility on 21 April 2010 in R (on the application of F) and Thompson (FC) v Secretary of State for the Home Department. Section 82(1) of the Sexual Offences Act 2003 extends throughout the United Kingdom.

2. In order to remove the incompatibility, the Scottish Government originally brought into force the "the 2010 Order", which made amendments to the Sexual Offences Act 2003 ("the 2003 Act") to remove the stated incompatibility by providing a mechanism for the periodic review of the justification for continuing the notification requirements in individual cases. The 2010 Order came into force on 25th October 2010.

Parliamentary procedure

3. The 2010 Remedial Order came into force according to the procedures prescribed in section 14 of the Convention Rights (Compliance) (Scotland) Act 2001. Section 14(2) of the 2001 Act provides that the Scottish Ministers must, after making such an order, give appropriate public notice of its contents, and invite written comments to be made within 60 days of the day the order was made.

4. In accordance with Section 14(3) and (4) of the 2001 Act the Scottish Ministers must consider all written observations made; and lay a statement before the Scottish Parliament summarising these comments and specifying the modifications (if any) they consider it appropriate to make to the Remedial Order.

Policy objectives

5. The Order amended Part 2 of the 2003 Act to address the Supreme Court ruling that it is incompatible under article 8 of the European Convention on Human Rights to require offenders to register on the sex offender register indefinitely without the right to review.

6. Indefinite notification will not be removed. A review mechanism will be introduced under which offenders who are convicted of an offence as adults (over the age of 18) and become subject to indefinite notification will be eligible for review

after notifying for 15 years. For offenders who were convicted of an offence when they were under 18, this period will be 8 years.

7. When an offender who is registered indefinitely has been notifying for the prescribed period, the police will carry out a review. A senior police officer will decide (taking into account any risk assessments carried out through the multi agency public protection arrangements (MAPPA)) whether individuals need to remain on the register because of the risk of sexual harm they pose to the public. The police will then write to the offender to notify them of the police decision. If it is decided that an offender should remain on the register, the police will set a period of up to 15 years for further review. The police will also inform the offender of his or her right to appeal this decision to a Sheriff.

8. Should the offender wish to challenge the police decision to keep them on the sex offender register, or the police fail to complete a review by the expiry of the prescribed period, they can apply to the Court. It will then be for a Sheriff to decide, based on a test of 'risk of sexual harm', whether the Sheriff agrees with the case made by the police. If the Sheriff does, the offender will be kept on the register for a further period of up to 15 years (as ordered by the Court, taking into account a recommendation from the police). If not, the offender will be removed from the register. Both the police and the offender will be able to appeal the Sheriff's decision to the Sheriff Principal, whose decision will be final.

Summary of Order

9. In order to remove the incompatibility, the 2010 Order:

- provides sex offenders, who are subject to the notification requirements of Part 2 of the Sexual Offences Act 2003 for an indefinite period, with a mechanism for the review of the justification for continuing to remain subject to those requirements for a further period of time.

- provides that sex offenders aged 18 or over at the time of their conviction or other finding ("adult sex offenders"), the date of discharge will be 15 years from the date of their conviction or other finding, after disregarding any time spent in prison, detained in hospital etc.

- provides that sex offenders who are aged under 18 on the date on their conviction or finding ("young sex offenders") the date of discharge will be 8 years from their date of conviction or other finding after disregarding any time spent in prison, detention in hospital etc. For young sex offenders who have already been subject to the notification requirements for a total period of at least 8 years at the date the 2010 Remedial Order came into force, i.e. 25 October 2010, the police will be required to make a decision as to whether such offenders should cease to be subject to the notification requirements within 3 months i.e. 25 January 2011.

- provides that chief constables will make a notification continuation order if they are satisfied that all such offenders continue to pose a risk of sexual harm to the public.

- provides a list of factors which chief constables must take into account when determining whether such offenders continue to pose a risk of sexual harm. Chief constables can impose a notification continuation order for a fixed period of no more than 15 years.

- provides that if the police have not completed a review the offender can make an application to a sheriff.

- provides that the decision of the police to make a notification continuation order, and duration of that order can be appealed to a sheriff, and that the decision of a sheriff to grant or refuse an appeal can be appealed to the sheriff principal whose decision is final.

Consultation

10. No formal consultation was undertaken on the 2010 Order. However the intention to introduce the review mechanism was publicised by means of a Parliamentary Question on 25 October 2010. Moreover, section 14(2) of the 2001 Act provides that Scottish Ministers must, upon making the Order, undertake a public consultation, inviting comments to be made in writing within 60 days of the order being made. As soon as practicable after the 60 day consultation period expires, the Scottish Ministers must lay a statement before Parliament summarising the comments received and setting out what modifications they consider appropriate to make to the order (if any).

11. The public notice of the contents of the 2010 Order was published on the Scottish Government's website on 25 October 2010 and written observations requested by 23 December 2010. Notice was sent to police forces, local authorities, NHS Scotland, and other organisations including the Scottish Commission for Human Rights, and the Criminal Justice Social Work Development Centre. The Scottish Ministers laid the statement before Parliament on 26 January 2011.

Principal changes to content of 2010 Order

12. The principal differences between the 2011 Order as compared to the 2010 Order are as follows:

- Section 88B (Review of indefinite notification requirements: date of discharge and further date of discharge): has been amended to provide that where a relevant sex offender was on bail pending sentence and the date of discharge would otherwise fall after the date the 2011 Order comes into force, then any time the offender was serving a sentence of imprisonment or term of service detention in respect of the offence is disregarded.

- The 2011 now provides for the automatic discharge of any relevant Sexual Offences Prevention Order for offenders who have successfully appealed the making of a Notification Continuation Order. This will also apply to Sex Offender Orders under the Crime and Disorder Act 1998 and equivalent Northern Ireland legislation.

- Section 88F (Review of the indefinite notification requirements: application to a Sheriff) and 88G (Review of indefinite notification requirements: appeals) have been amended to accord with existing provision in the Sexual Offences Act 2003 to provide that a copy of the interlocutor or order is either given to the relevant offender or sent to him or her by registered post or by the recorded delivery service. Similarly mention of service on the relevant Chief Constable and personal service on either party will also be removed, again in accord with the existing formulation used in the rest of the 2003 Act.

- Section 88G (Review of indefinite notification requirements: appeals) has been amended to provide that in calculating the period for lodging an appeal it will run from the date of the decision being appealed, not the 'date of discharge' etc. as currently provided. This will apply in respect of decisions of the chief constable taken on or after 27 January 2011; decisions made before that date will follow the rules in the 2010 Order. Provision is also included to make it clear that parties may appear or be represented at appeal hearings.

- Transitional and consequential modifications are made in consequence of the revocation and re-enactment of the 2010 Order with the 2011 Order.

13. A statement of the Scottish Ministers summarising the written observations on the and modifications to the 2010 Remedial Order is attached at Annex A and a list of the interested parties consulted is attached at Annex B.

Regulatory Impact

14. A Regulatory Impact Assessment has not been prepared for this instrument as it has no adverse impact on business, charities or voluntary bodies.

Directorate for Safer Communities
January 2011

ANNEX A

STATEMENT OF THE SCOTTISH MINISTERS SUMMARISING WRITTEN OBSERVATIONS ON AND MODIFICATIONS TO THE SEXUAL OFFENCES ACT 2003 (REMEDIAL) (SCOTLAND) ORDER 2010

This statement is laid before the Scottish Parliament in accordance with section 14(4) of the Convention Rights (Compliance) (Scotland) Act 2001.

Introduction

1. This statement contains a summary and analysis of the written observations received in response to the public notice of the content of the Sexual Offences Act 2003 (Remedial) (Scotland) Order 2010 ("the Remedial Order")[1] and specifies the modifications which the Scottish Ministers consider appropriate to make to it. These are listed at Annex A.

Background

2. In the case of R (on the application of F (by his litigation friend F)) and Thompson (FC) v Secretary of State for the Home Department [2010] UKSC 17 (21st April 2010) the Supreme Court of the United Kingdom made a declaration under section 4 of the Human Rights Act 1998 that—

"the indefinite notification requirements in section 82(1) of the Sexual Offences Act 2003 are incompatible with article 8 of the European Convention on Human Rights because they do not contain any mechanism for the review of the justification for continuing the requirements in individual cases."

3. In order to remove the incompatibility, the Scottish Government brought into force the Remedial Order, which made amendments to the Sexual Offences Act 2003 ("the 2003 Act") to remove the stated incompatibility by providing a mechanism for the periodic review of the justification for continuing the notification requirements in individual cases. In summary, the order introduces a right of review for sex offenders who are required to notify under the 2003 Act indefinitely (those who are sentenced to 30 months or more following conviction for a sexual offence). The review is undertaken by the police once the offender has been notifying for 15 years (8 years for those convicted as children) who decide whether notification should continue for a further period based on the risk of sexual harm posed by the individual. The offender has the right to appeal the police decision to a Sheriff and both parties have a final right of appeal to the Sheriff Principal.

4. The Remedial Order came into force on 25th October 2010 according to the procedure prescribed in section 14 of the Convention Rights (Compliance) (Scotland) Act 2001. Section 14(2) of the 2001 Act provides that the Scottish Ministers must,

[1] Consultation document: http://www.scotland.gov.uk/Publications/2010/11/03121822/0

after making such an order, give appropriate public notice of its contents, and invite written comments to be made within 60 days of the day the order was made.

5. In accordance with Section 14(3) and (4) of the 2001 Act the Scottish Ministers must consider all written observations made; and lay a statement before the Scottish Parliament summarising these comments and specifying the modifications (if any) they consider it appropriate to make to the Remedial Order.

The consultation process

6. The public notice of the contents of the Remedial Order was published on the Scottish Government's website on 25 October 2010 and written observations ("responses") requested by 23 December 2010. Notice was sent to police forces, local authorities, NHS Scotland, and other organisations including the Scottish Commission for Human Rights, and the Criminal Justice Social Work Development Centre.

Responses

7. 13 responses were received. 10 respondents indicated that they were fully supportive of the Remedial Order, most holding to the view that it contained sensible proposals that balanced public protection with a fair and proportionate review mechanism for sex offenders. Those organisations and individuals from the legal and human rights community expressed concerns that the proposed measures raised certain ethical issues, particularly that the review periods within the Remedial Order were arbitrary and that there should be more procedural equality in the court processes.

8. Responses from the following organisations and individuals were published on the Scottish Government website and copies have been placed in the Scottish Government library:

- Scottish Police Federation
- Association of Chief Police Officers in Scotland
- The Faculty of Advocates
- The Law Society of Scotland
- West Lothian Council
- Director of Mental Health Services, Ayrshire and Arran Primary Care Trust
- Scottish Court Service
- The Scottish Human Rights Commission
- Aberdeenshire Council, Social Work Services
- Mr Mark Strachan
- Falkirk Council, Criminal Justice Social Work Services
- Mr Terry Thomas and Mr David Thompson, Leeds Metropolitan University
- Grampian Police.

Findings

9. This section discusses written observations received in response to the content of the Remedial Order, and specifies the modifications the Scottish Ministers consider appropriate to make to it in light of them. These modifications are listed at Annex A.

Article 1

10. **Mr Terry Thomas and David Thompson, (Leeds Metropolitan University)** sought clarity about the need to invite comments on the Remedial Order since it had already been made, laid, and brought into force on 25th October 2010. This was based on the assumption that because the Remedial Order had already been brought into force, it could not be amended in light of comments received.

Scottish Government position

11. The Remedial Order was made in exercise of powers conferred by section 12 of the Convention Rights (Compliance) (Scotland) Act 2001 ("the 2001 Act"). This is the first time this procedure (set out in paragraphs 3 and 4 above) has been used. The purpose of Part 6 of the 2001 Act is to provide for changes to be made expeditiously to legislation to remedy domestic legislation which is incompatible with the European Convention on Human Rights. Therefore, in urgent cases, it allows for the order remedying the incompatibility to be made and brought into force, subject to further consultation; and for the order to be revoked and replaced to take account of any issues raised by respondents.

Section 88A Review of indefinite notification requirements: applicable persons

Response and analysis

12. **Mr Mark Strachan** suggested that the term "indefinite period" had no legal meaning and was not understood by members of the public. **Mr Strachan** suggested that the term "life" would be more accurate for the purposes of the Remedial Order.

Scottish Government position

13. The term "indefinite period" is consistent with the terminology used in section 82 of the Sexual Offences Act 2003, which defines the notification periods. Therefore, there are no plans to depart from this terminology.

Section 88B Review of indefinite notification requirements: date of discharge and further date of discharge

Responses and analysis

14. **The Law Society of Scotland, Mr Terry Thomas and David Thompson, (Leeds Metropolitan University), and the Scottish Human Rights Commission** commented that the periods for the review of the indefinite notification requirements of 15 years and 8 years provided in the Remedial Order were arbitrary. **The Law**

Society of Scotland, and the Scottish Human Rights Commission suggested that the periods for the review of the indefinite notification requirements must be sufficiently justified and based on adequate research evidence. **Mr Strachan** considered the review period of 15 years to be too long, and cited the examples of someone convicted of murder who is entitled to a tribunal review every two years after the expiry of their tariff, and long term prisoners who are entitled to a parole review every year.

15. **Mr Strachan** also considered the time limit of 8 years for under 18 year olds to be unsustainable in that it is not one-half of the 15 year period for adult offenders. In this connection, section 82 (2) of the Sexual Offences Act 2003 details that the relevant notification periods would be halved for this age group. Mr Strachan suggests that this formula should be mirrored in the Remedial Order. For their part **Messrs Thomas and Thompson (Leeds Metropolitan University)** questioned the continued use of the 'halving' formula in the Remedial Order for young sex offenders, and suggested that the opportunity should have been taken to consider a different approach to the existing arrangements which largely provide that the notification periods in the 2003 Act are the same as those provided in the Rehabilitation of Offenders Act 1974. **Messrs Thomas and Thompson (Leeds Metropolitan University)** further suggested that young sex offenders, might benefit from being subject to the notification requirements of the 2003 Act for longer periods rather than shorter – if they were given suitable positive welfare interventions and recognising the greater chances of 'change' at a younger age.

16. **The Law Society of Scotland** suggested that there should be provision for early discharge at the application of offenders on the basis that they have not committed any offences and pose no risk of sexual harm to the public.

17. **Grampian Police** suggested that including time spent outwith the United Kingdom within the review period would enable an offender to spend the majority, if not all of his time at liberty abroad, with little or no monitoring, following first notification within the UK. Therefore, if an offender spent a significant period in the run up to the review abroad, it would be difficult for the relevant Chief Constable to assemble, assess and provide evidence of risk of sexual harm during the review process, even if it were considered that notification should continue.

18. **Grampian Police** considered that section 88C (4) (k),(l), and (m) of the Remedial Order to be significant in terms of establishing risk of sexual harm in securing a notification continuation order. However, **Grampian Police** envisaged significant difficulties in taking account of any risk assessments which have been made by local authorities, the prison service, and the Health Service, if relevant offenders have no statutory contact with these authorities. Moreover, **Grampian Police** hold to the view that there are currently no assessments available to the Scottish Police Service in relation to the risk of sexual harm, with the only assessment tools currently used by the police dealing with reconviction and reoffending rates.

19. **Grampian Police** noted that the Remedial Order provides that submissions can be made by offenders and their agents, including reports from contracted psychologists or similar professionals. Such submissions may be based on limited information, but this can only be established through recourse to a similar

professional to represent the police position. **Grampian Police** also noted that offenders cannot be compelled to submit to any such assessment by the police or other responsible authority as stated and that considerable cost is attached to such work which cannot be routinely obtained within potential timescales.

Scottish Government position

20. The argument for having a shorter period for young people is that they are still maturing and developing. Therefore, it seems reasonable to set a shorter review period for these individuals. This also recognises that most young people who commit such offences will not repeat such actions for the rest of their lives. If it is clear that a young person still poses a risk of sexual harm at the time of review, the decision should reflect this and notification should continue.

21. Evidence on which to base the review periods for sex offenders subject to lifetime notification requirements is limited. Studies on this issue are restricted by data availability and often use reconviction data as a proxy for re-offending.

22. In order to inform the review period set out at section 88B, the Scottish Government considered three key studies, all of which examine the risk of reoffending among convicted sex offenders:

- Cann et al. (2004) 'Sexual offenders discharged from prison in England and Wales: a 21 year conviction study'.Legal and Criminological Psychology, 9, 1-10; 202-10;

- Ackerley et al. (1998), 'When Do Sex Offenders Stop Offending?' Research Bulletin, Home Office Research and Statistics Directorate, 39. Home Office, London, pp.51-57; and

- Prentky et al. (1997), 'Recidivism rates among child molestors and rapists: a methodological analysis.' Law and Human Behaviour. 21 (6), 635-659.

23. All of these studies analysed reconviction rates of convicted sex offenders over a follow-up period of 20-25 years. Analysis confirms that there is no evidence that a point can be reached at which a sex offender presents no risk of re-offending. However, approximately a quarter of sex offenders were reconvicted for a sexual offence within this time period, the majority (over 80%) of whom were reconvicted within ten years.

24. The proportion reconvicted increases to a third if all violent offences are considered rather than just sexual offences. Out of the most serious sex offenders (rapists and child abusers), 40% were reconvicted for a sexual offence within 25 years. However, the risk of reconviction is slightly lower for those convicted of a less serious sexual offence in the first instance.

25. Taking into account the evidence above and the existing fixed notification periods (the highest of which is 10 years for those sentenced to more than 6 months but less than 30 months), a review at 15 years appears to be a reasonable threshold for

adults, striking the right balance between protecting the public and the right of the offender to a review.

26. Comments made by the courts in recent ECHR judgements, such as the S & Marper judgement on DNA retention, and in England and Wales the Supreme Court in the F and Thompson case, point towards the fact that it is desirable to have differentiation between the treatment of children and adults within the criminal justice system. Currently under section 82 of the Sexual Offences Act 2003, those under the age of 18 who are not subject to indefinite notification are placed on the register for only half of the fixed period applied to adults.

27. It is considered that the review periods prescribed in the Remedial Order strike the right balance between the rights of the offender and public protection based on evidence currently available. Section 88H of the Remedial Order provides that the Scottish Ministers may by order under affirmative procedure, amend the 15 or 8 year periods in section 88B(1) or the maximum period which a notification continuation order can be made specified in section 88C(2). It is envisaged that if differing research evidence emerges that calls into question the efficacy of the 15 or 8 year periods in section 88B then they can be amended. However, the need to protect the public from individuals who have already been convicted of a serious sexual offence is a key consideration. That is also the reason why the Scottish Government does not intend to allow offenders to apply for earlier review of the notification requirements. We believe that the responsibility for initiating the review should rest with the police. This is also more effective in terms of the practical operation of the scheme.

28. The Scottish Government do not propose that any change is made to section 88C(4) of the Remedial Order with regard to the matters a Chief Constable must take into account in deciding whether to make a notification continuation order as it is clearly relevant that such matters inform part of the considerations of the Chief Constable in reviewing the notification requirements. The Scottish Government consider that there are sufficient tools for assessing risk of sexual harm and for sharing information between agencies – including the Multi-agency Public Protection Arrangements underpinned by the Management of Offenders etc. (Scotland) Act 2005. An analysis can be drawn from the existing information sources listed at s88C(4) of the Remedial Order. Also, while this list is comprehensive the police only need to provide such information which is available, and which they consider to be relevant and necessary to make defensible decisions.

29. There are a number of complex factors affecting the ability of the police to assess the risk of sexual harm if offenders spend significant time outside the UK. Not all states have the interlinked raft of child and public protection legislation that has been developed in the UK, and there are very few states which have parallel systems that would identify relevant offenders about whom relevant information should be routinely exchanged.

On Bail

Responses and analysis

31. **Grampian Police** have highlighted an anomaly in the Remedial Order, whereby those who are convicted and released on bail prior to sentencing, first notify when released on bail. Therefore, in these cases the review period begins prior to sentencing and the imposition of a custodial sentence. In cases attracting a lengthy sentence, this means that review may be required when the offender is still in custody.

32. Similarly, **Grampian Police** suggested that the use of the word 'before' would rule out any period of time spent in custody in relation to a recall of licence or extended sentence where an offender has spent a period of time in the community and notified, or any period in custody for further unrelated non-sexual crimes, being taken into consideration. The consequence of this would require the Chief Constable to seek a notification continuation order prior to the release of such an offender with only the information available from the prison service to establish his current circumstances/risk.

Scottish Government position

33. The Scottish Government agree with the proposal from **Grampian Police** that the Remedial Order be amended to ensure that for those convicted and released on bail pending sentencing, the order fulfils the policy intention and the review period excludes the time the offender spends in custody serving the sentence.

34. The Remedial Order gives effect to the policy intention that time spent in custody, or detention in hospital for the original qualifying sexual offence should not be counted in calculating the review periods. As above, the rationale behind this is that most serious sex offenders will serve a lengthy custodial sentence and, therefore, the review period should start after release from custody to give time to assess the risk of offending in a community setting.

35. It is acknowledged that there will be circumstances when time spent in prison or outside the United Kingdom (after first notification) will count towards the review period. For example for offenders released on licence, the review period will begin from the point they first notify on release, even if they are subsequently recalled to prison for breach of licence. This will also apply to offenders who are released from custody in relation to their original offence and are then sentenced to imprisonment for committing a further unrelated non sexual crime. In developing the review mechanism issues around proportionality and operational efficacy were carefully considered, with input from the Association of Chief Police Officers in Scotland (ACPOS). It is worth noting that when decisions are taken as to whether to make a notification continuation order the chief constable will take account of subsequent breaches and convictions, and information held by the Scottish Prison Service including any risk assessments undertaken whilst the offender has been detained in custody.

Section 88C Review of the indefinite notification requirements: procedure and grounds

Responses and analysis

36. **The Law Society of Scotland** made a number of points on this issue. Firstly, they questioned whether it was compatible with Articles 6 and 8 of the European Convention on Human Rights for the Chief Constable to review and take the decision unilaterally to either continue or cease notification. They considered that a Sheriff should make this determination. Secondly they commented that the offender should be given an opportunity to be heard as part of the review process and prior to the Chief Constable's decision.

37. **Mr Strachan** considered that it would be more appropriate for a different police force to that which monitors the offender to undertake the review as this would ensure that the review is based solely on the information provided to the review body rather than any preconceived ideas which have accumulated over the preceding 15 years. **Messrs Thomas and Thompson, (Leeds Metropolitan University**), commented that it could be difficult if a relevant offender has only just moved into an area – then liaison with old areas would be necessary.

38. **Grampian Police** noted that the Remedial Order made no reference to Sexual Offences Prevention Orders (SOPOs). In doing so **Grampian Police** commented that the granting of a SOPO required that the relevant offender also become subject to the terms of notification. The test of establishing the risk of sexual harm is relevant to both the SOPO and review processes and submissions to remove the offender from indefinite notification would likely impact on the position in relation to an existing SOPO regardless of the fact that they were different procedures.

39. **Grampian Police** made the separate but related point in respect of Orders of Lifelong Restriction (OLRs) made under section 210F of the Criminal Procedure (Procedure) (Scotland) Act 1995. OLRs are made after full risk assessment of those convicted of relevant sexual offences. It appeared to **Grampian Police** that since OLRs met the criteria to establish notification continuation orders under the Remedial Order, there was the potential for conflict on this issue and that this issue should be provided for in the Remedial Order or elsewhere. As well as commenting that the Remedial Order was clear regarding purpose **Aberdeenshire Council Criminal Justice Social Work Services similarly** noted that there was no reference to OLRs.

40. **West Lothian Council** suggested that consideration should be given to the development of a statutory review timetable rather than this being left solely to the discretion of the Police, and that for offenders aged: under 18 years a review required every 2 years; over 18 a review required every 5 years should be considered.

Scottish Government position

41. The UK Supreme Court judgment found indefinite notification requirements for sex offenders, with no opportunity for review, to be incompatible with Article 8 of the ECHR. It is not an option for the Scottish Government to do nothing. Following this judgment, the Scottish Government worked with key partners, including the

ACPOS, in order to ascertain how best to give effect to the Court's judgment. The objective of the Remedial Order is to provide a fair and proportionate and timely response to the Judgment, which fully accords with the Scottish Government's priority of protecting the public. The Scottish Government considers that the review procedure implemented by the Remedial Order, which allows the offender to appeal the Chief Constable's decision to a Sheriff, achieves this aim and is compliant with both articles 6 and 8 of the ECHR.

42. Sex offenders are given an opportunity to be heard both in the police review process and on appeal to the Sheriff Court. The police will write out to the offender to inform them that their notification will be reviewed. Section 88C (4) (m) also provides that any submission or evidence presented by or on behalf of the relevant sex offender which demonstrates that the relevant sex offender does not pose a risk of sexual harm to the public, or any particular members of the public, in the United Kingdom must be considered by the relevant Chief Constable in deciding whether to make a notification continuation order. Should the offender wish to challenge the police decision to require the offender to continue notifying, or the police fail to complete a review by the expiry of the prescribed period, he or she can apply to the Court. By virtue of section 88G(6) a Sheriff will decide, based on the test of 'risk of sexual harm', whether he or she agrees with the case made by the police. If the Sheriff does agree, the offender will be kept on the register for a further period of up to 15 years. If not, the offender will no longer require to notify (i.e. be removed from the register). Both the police and the offender will be able to appeal the Sheriff's decision to the Sheriff Principal, whose decision will be final.

43. The Scottish Government agrees that the Remedial Order should be amended to provide for the automatic discharge of any relevant SOPO for offenders who have successfully appealed the making of a Notification Continuation Order. The policy is that a successful review means that the obligation to notify as well as any other condition contained therein ceases in its entirety. This also has to be applied to sex offender orders made under the Crime and Disorder Act 1998 and equivalent Northern Irish legislation, which SOPOs replaced.

44. On OLRs, the Scottish Government note that these Orders are made under separate legislation, namely section 210F(1) of the Criminal Procedure (Scotland) Act 1995. They are however provided for in section 82 of the Sexual Offences Act 2003 (the notification period), in the sense that a person who, in respect of the offence, has been made subject to such an order will be subject to the notification requirements indefinitely. Notwithstanding, should an OLR offender be successful in an appeal under the Remedial Order it will not automatically affect the OLR, which is created under different legislation and has no bearing on the notification requirements, including the period of notification.

45. In terms of the suggestion that a different police force should carry out the review,, the Scottish Government consider that a degree of specialist/professional knowledge or experience of the relevant offender is necessary to determine the issues relevant to the review of the justification for continuing the indefinite notification requirements. Where an offender has not resided in the police force area conducting the review over the course of the previous 15 years, section 88C(4) allows Chief

Constables to take account of any other information held by other police forces. In this connection the electronic Violent and Sex Offender Register (ViSOR) database, which is available to all police forces in the UK, will assist Chief Constables in assessing the level of risk offenders pose.

46. It is also of note that, in the majority of cases, notification is an administrative arrangement consequent upon conviction. The Chief Constable is therefore independent from, and not directly party to, the circumstances that lead to notification. Moreover there are sufficient procedural safeguards in place elsewhere in the Remedial Order to provide further, judicial, scrutiny of the Chief Constable's decision.

47. Removal of the requirement to comply with the Sexual Offences Act 2003 does not mean that the offender has had a conviction (or sentence) quashed.

Section 88F Review of the indefinite notification requirements: application to a Sheriff

Responses and analysis

48. The **Scottish Court Service** suggested that the process whereby a copy of the Sheriff's decision as to whether the offender should cease to be subject to the notification requirements and any notification continuation order should mirror the common statutory procedure in similar Summary Applications to the court such as already provided for in the Sexual Offences Act 2003. In these cases provision is made for a copy of the court decision or order to either be given to the offender or sent to him by registered post or by the recorded delivery service.

49. **The Scottish Human Rights Commission** felt that the Remedial Order should contain an express guarantee of legal aid.

Scottish Government position

50. The Scottish Government agree with the comments of the **Scottish Court Service** and provision will be made in the new Remedial Order, allowing the copy order or decision of the court to be given to the offender, or where that is not possible to be sent by recorded delivery or registered post.

51. In terms of legal aid, the Scottish Government believe the normal tests should apply as specified in Section 14 of the Legal Aid (Scotland) Act 1986 Act which provides that civil legal aid is available for proceedings in the Sheriff Court (Schedule 2 Part 1). As such the statutory tests for civil legal aid would apply (financial eligibility, probable cause and reasonableness). Therefore, civil legal aid for these proceedings would be available if all the statutory tests were met.

52. The Scottish Government believe the normal tests should apply, since legal aid should not be available where there is no probable cause or it is unreasonable in all the circumstances to provide legal aid.

Section 88G Review of indefinite notification requirements: appeals

Responses and analysis

53. The **Scottish Court Service** suggested that the date of appeal should run from the date of the decision of the relevant Chief Constable, not the date of discharge, as currently provided for. In this connection the **Scottish Court Service** note that such a change would provide for a simpler process for Sheriff Clerks accepting such an appeal to check if it was within the statutory time limits.

54. **The Scottish Human Rights Commission and Mr Strachan** both suggested that a disclosure regime should be introduced under sections 88C and 88F whereby relevant offenders have an opportunity to present their case or challenge the case against them. This should include access to submissions, risk assessments, procedural equality, general access to evidence relied on by other parties and an oral hearing. **The Law Society of Scotland** sought clarity about whether section 88G provided a full judicial appeal or a review against an administrative decision where Sheriffs would not substitute their views for that of Chief Constables.

Scottish Government position

55. The Scottish Government note and agree that in normal course the date of appeal brought by way of Summary Application runs from the date of the decision being appealed, and the Remedial Order should be amended to follow the traditional route since the 'date of discharge' is of no direct relevance to the appeal being lodged.

56. The review in section 88G is a full judicial appeal which will be able to consider matters of fact and law. The nature of the test to be applied by the Court and the issues which it will consider are inherently matters of fact and law. Those issues will be able to be discussed in Court in accordance with summary application procedure. The Scottish Government does, however, consider there is merit in making it clear that parties can appear or be represented at any hearing on appeal and will modify the Remedial Order in that regard.

ANNEX A

SPECIFICATION OF THE SCOTTISH GOVERNMENT'S MODIFICATIONS

Section 88B (Review of indefinite notification requirements: date of discharge and further date of discharge): section 88B will be amended to provide that where a relevant sex offender was on bail pending sentence and the date of discharge would otherwise fall after the date the new Order comes into force, then any time the offender was serving a sentence of imprisonment or term of service detention in respect of the offence is disregarded.

The Remedial Order will be amended to provide for the automatic discharge of any relevant SOPO for offenders who have successfully appealed the making of a Notification Continuation Order. This will also apply to Sex Offender Orders under the Crime and Disorder Act 1998 and equivalent Northern Ireland legislation.

Section 88F (Review of the indefinite notification requirements: application to a Sheriff) will be amended to accord with existing provision in the Sexual Offences Act 2003 to provide that a copy of the interlocutor or order is either given to the relevant offender or sent to him or her by registered post or by the recorded delivery service. Similarly mention of service on the relevant Chief Constable and personal service on either party will also be removed, again in accord with the existing formulation used in the rest of the 2003 Act.

Section 88G (Review of indefinite notification requirements: appeals) will be amended to provide that in calculating the period for lodging an appeal it will run from the date of the decision being appealed, not the 'date of discharge' etc. as currently provided. This will apply in respect of decisions of the chief constable taken on or after 27 January 2011; decisions made before that date will follow the current rules in the Remedial Order. Provision will also be included to make it clear that parties may appear or be represented at appeal hearings.

Transitional and consequential modifications will be made in consequence of the revocation and re-enactment of the Remedial Order with a further remedial order.

ANNEX B

List of Consultees

Police
ACPOS
Chief Constables
Scottish Police College
Scottish Crime and Drug Enforcement Agency
Scottish Police Services Authority
Scottish Police Federation
HM Inspectorate of Constabulary

Local Authorities
Chief Executives
Directors of Social Work
Association of Directors of Social Work
British Association of Social Work (Scotland)

Prisons
Chief Executive, Scottish Prison Service
HM Inspectorate of Prisons
Prison Governors
Scottish Prison Officers Association
Scottish Prison Service College
Chairs of Prison Visiting Committees

Courts etc
Chief Executive, Scottish Court Service
Chief Executive, Crown Office and Procurator Fiscal Service
Lord President and Lord Justice General
Law Society of Scotland
Faculty of Advocates
District Courts Association
Stipendiary Magistrates
Sheriff Principals
Sheriffs Association
Scottish Law Commission
Scottish Legal Aid Board
Scottish Committee of the Council of Tribunals
Scottish Children's Reporter Association
Judicial Studies Board
Parole Board for Scotland

Victims Organisations

Victim Support Scotland

Voluntary Organisations, including
SCVO
Children 1ST
Stop it Now!

Academic
University Departments of Social Work
Law Schools
Social Work Research Centre, Stirling
Criminal Justice Social Work Development Centre

Other Criminal Justice Organisations, including
HMI Probation (England and Wales)
Northern Ireland Probation Board
Scottish Consortium on Crime and Criminal Justice
NOTA (Scotland)
Howard League for Penal Reform
Scottish Association for the Study of Delinquency
Scottish Commission for Human Rights
Scottish Commissioner for Children and Young People