



THE GOVERNMENT RESPONSE TO THE
NINETEENTH REPORT OF THE
JOINT COMMITTEE ON HUMAN RIGHTS
SESSION 2010–12 HC 1549

Proposal for the Sexual Offences Act 2003 (Remedial) Order 2011

**Presented to Parliament
by the Secretary of State for the Home Department
by Command of Her Majesty**

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The Government response to the Nineteenth Report of Session 2010 – 12 HC 1549 Proposal for the Sexual Offences Act 2003 (Remedial) Order 2011

Introduction:

1. The Government is grateful to the Joint Committee on Human Rights (“the Committee”) for its report on the Government’s proposal to make the *Sexual Offences Act 2003 (Remedial) Order 2011* in response to the declaration of incompatibility with Article 8 of the European Convention on Human Rights (“ECHR”) made by the Supreme Court in *R (on the application of F & Angus Aubrey Thompson -v- Secretary of State for the Home Department*¹.
2. Public safety will always be the first priority for the Government. The Secretary of State has given careful consideration to the Supreme Court’s judgment in *F & Thompson* and officials have worked closely with key partners in order to ascertain how best to give effect to it. Following careful consideration of the representations made in relation to the proposal (which was laid before Parliament in accordance with the non-urgent process under paragraph 3 of Schedule 2 to the Human Rights Act 1998), the Government has now laid the draft *Sexual Offences Act 2003 (Remedial) Order 2012* before Parliament.
3. The Government’s intention is to remove the incompatibility in the Sexual Offences Act 2003 found by the Supreme Court to arise from the failure of the 2003 Act to provide any opportunity for review of the necessity for continuing notification.
4. The scheme which the Government proposes to introduce comprises a police-led review of the circumstances of an offender who is subject to indefinite notification requirements, and an individual assessment of whether those requirements should cease. This review process will be thorough and would enable the police to obtain information from the other bodies which form part of the Multi-Agency Public Protection Arrangements² to ensure as full a consideration of the application as possible. This process will be subject to judicial oversight by way of a prescribed right of appeal to the magistrates’ court.
5. The Government has considered the Committee’s report, which has assisted the consideration of this issue, and accepts a number of the Committee’s recommendations. These include:
 - The express inclusion of the test which the police must apply when determining an application for review;
 - The introduction of a right of appeal to the courts from the police determination; and

¹ [2010] UKSC 17.

² These arrangements were established under Part 13 of the Criminal Justice Act 2003 to manage the risk to the public posed by certain offenders; the bodies include the police, probation trusts and prison service.

- A duty on the Secretary of State to issue statutory guidance to the police in relation to the process for the determination of reviews.

Is it proper to proceed by way of a non-urgent remedial order?

6. The Committee stated³, in relation to the information provided by the Government, that:

The Government has produced each of the documents required by the HRA 1998. It has also responded swiftly to the Committee's request for further information. There are no technical issues which the Committee would be required to draw to the attention of both Houses.

7. The Government is pleased to have been able to assist the Committee in this respect.

8. The Committee stated⁴ that:

We agree with the Government's assessment that there are compelling reasons for using the remedial order process to introduce a form of review into the registration of sex offenders. We also agree that an urgent remedial order would not be justified. There is nothing in this case which would justify the use of the urgent remedial order process. An increasing number of people are subject to indefinite notification requirements. However, the significance of the impact of these requirements does not justify the removal of the opportunity for parliamentary scrutiny before the relevant reforms come into force. This is particularly significant in light of the political sensitivity of these measures.

9. The Government welcomes the Committee's support of its assessment⁵ that it is appropriate to proceed by way of a non-urgent remedial order to remedy the incompatibility identified by the Supreme Court.

10. In accordance with this process, the proposal to make the remedial order was laid for an initial 60 day period (during which time the Committee and other persons could make representations).

11. The Government has now laid the draft *Sexual Offences Act (Remedial) Order 2012* which will be subject to the affirmative resolution procedure (a resolution from each House may only be obtained after the draft order has been laid for 60 days).

³ At paragraph 16 (a reference to paragraph numbering in these footnotes is a reference to the paragraph numbering in the Committee's report).

⁴ At paragraph 22.

⁵ See Required Information at <http://legislation.gov.uk/ukdsi/2011/9780111512357/contents> and paragraphs 1 to 5 of the letter from the Home Secretary to the Chair of the Committee dated 19 July 2011.

Does the draft order remedy the incompatibility?

12. The Committee stated⁶ that:

It is our view that the proposals in the Bill do not remove the incompatibility identified by the Supreme Court. We recommend that the draft Order should not be tabled in the terms proposed. It is our view that, without significant amendment, the proposals in the draft order will lead to repeat litigation and further violations of Article 8 ECHR.

13. The Government has amended the proposal in line with the summary of the changes set out in paragraph 5.

Review by an appropriate tribunal

14. The Committee stated⁷ that:

The proposals in the [Bill⁸] will not remove the incompatibility identified by the Supreme Court in *Thompson*. We consider that the draft Order should be amended to introduce a review by application to an independent and impartial tribunal, with a requirement that the Chief Police Officer (and other MAPPA institutions) should be notified of the application and should submit reports on their assessment of the risk posed by the applicant; or that the Order is amended to introduce a full statutory right of appeal from the decision of the Chief Officer to an independent and impartial tribunal. In our view, either of these options would introduce a sufficiently independent element to the review process.

15. The Government accepts the Committee's recommendation and will provide for a right of appeal to the magistrates' court from the determination by the police. This process retains the role of the police as the initial decision-maker and the Government believes that this should remain a police-led process.

16. In accepting the Committee's recommendation, the Government does not agree that the Committee's view⁹ of what is meant by "an appropriate tribunal" is supported by Lords Phillips in the Supreme Court in *F & Thompson* (or the judgments of the courts below) because the court was not addressing the issue of the nature of the decision maker but whether it is possible to make a reliable assessment of the risk of a person committing a further sexual offence. Similarly,

⁶ At paragraph 26.

⁷ At paragraph 29.

⁸ The text in the Committee's report refers at this point to a *Bill* but this is read to mean the draft remedial order.

⁹ At paragraph 28.

the Government does not agree that the decision of the European Court of Human Rights in *Bouchacourt*, to which the Committee refers¹⁰, provides a basis for arguing that the Strasbourg case law is incompatible with a system of administrative review.

17. The Committee makes particular reference to review mechanisms available in other administrations, and in particular to the approaches being taken in Scotland and Northern Ireland in response to the decision of the Supreme Court¹¹. The Government has had regard to the comparative experience of other jurisdictions throughout the development of our proposals. This is reflected in the development of central elements of the proposed scheme for review in England and Wales; these include the appropriate review periods, the application process, the further review periods and the possibility of further appeal.
18. The Government nevertheless believes that, notwithstanding the nature of review mechanisms in other jurisdictions, it is for the Government to develop a process which it considers is appropriate for England and Wales, based on the current available evidence, which will operate effectively within the existing framework for managing sex offenders in the community across England and Wales under the Multi-Agency Public Protection Arrangements.
19. The Government, therefore, remains satisfied that the most appropriate course is to introduce a review process, which will be undertaken by the police in tandem with the other bodies acting under the Multi-Agency Public Protection Arrangements. Coupled with the availability of the right of appeal to the magistrates' court, this process accords with the Committee's recommendation.
20. Therefore, the proposal has been revised and the draft *Sexual Offences Act 2003 (Remedial) Order 2012* allows a right of appeal to the magistrates' court from any decision by the police to continue an individual's notification requirements.
21. Any appeal would be made by way of complaint to the magistrates' court and, as such, the applicant will be required to pay a fee and may be liable for the costs of the hearing should the appeal be dismissed.
22. There will be no onward right of appeal from the decision of the magistrates' court to, for example, the Crown Court. The decision of the magistrates' court will remain subject to the scrutiny of the higher courts (by virtue of the availability of a reference to the High Court by way of case stated or judicial review).

Consideration of the proportionality of continuing notification requirements

23. The Committee stated¹² that:

¹⁰ Ibid.

¹¹ Ibid.

¹² At paragraphs 37 and 38.

In our view, without amendment to make clear that the review of notification requirements involves an assessment of whether the impact on the individual applicant for review of continuing notification continues to be justified and necessary in light of the risk they pose to the public, there is a risk that the Government's proposals will not remove the violation identified by the Supreme Court.

We recommend amendment of the draft Order to (a) include a test to be applied on review, incorporating a proportionality exercise and (b) to introduce the impact on the individual offender as relevant factor to be considered on review.

24. The Government took the view that the initial proposal to make the remedial order contained implicit provision for the test to be applied by the police in reviewing an offender's indefinite notification requirements, expressly identifying the factors to be considered in that review, and which would involve balancing the risk posed by the offender against the effect of the notification requirements on him. Moreover, it was intended that this would be explicitly set out in the guidance to accompany the introduction of the review process. However, the Government accepts the Committee's recommendation that there should be express provision in the remedial order for the test to be applied by the police in determining a review, and that the test should involve balancing the risk posed by the offender against the extent of the interference caused to that offender by a continuation of the notification requirements. This would achieve more transparency and promote consistency in decision making. The draft *Sexual Offences Act 2003 (Remedial) Order 2012* therefore requires that the offender must satisfy the police that it is not necessary for the purpose of protecting the public or any particular members of the public from sexual harm for the offender to remain subject to the indefinite notification requirements.

25. The draft *Sexual Offences Act 2003 (Remedial) Order 2012* further requires that the police consider the risk of sexual harm posed by the qualifying relevant offender and the effect of a continuation of the indefinite notification requirements on the offender as a factor in determining an application for review.

Are the procedures sufficiently accessible, fair and transparent

26. The Committee stated¹³ that:

Without extraordinary provision for review of the proportionality and necessity in connection with any requirement to notify for a fixed period of time, there remains a risk of further challenges to the operation of the register. In individual cases where the circumstances of the relevant offence or offender are such that the risk of further reoffending are reduced significantly very early

¹³ At paragraph 44.

in the period of compulsory notification, continued registration may be unjustifiable.

27. The Government does not consider that the omission of such provision justifies revising its proposal. This point is, in effect, an objection which relates to the automatic nature of the application of the notification requirements; in other words, that the notification period is determined by section 82 of the Sexual Offences Act 2003 by the sentence imposed on an offender rather than as a result of an assessment of the risk posed by that offender. The automatic nature of the notification regime has been consistently upheld by the Strasbourg and domestic courts, and there is nothing in the judgments given by the Supreme Court or the lower courts in *F & Thompson* which raise an issue in respect of the automaticity of the notification requirements, or that there is any requirement for a review during the period of fixed term requirements.

28. The Committee stated¹⁴ that:

We welcome the Government's confirmation that guidance will be necessary to accompany the new review mechanism. We consider that this guidance will be essential to ensure procedural fairness and the effective involvement of victims and offenders in the decision making process. It will also enhance the likelihood of consistency in approach to the review process. However, we are concerned that the requirement for guidance (and its need to provide clarity on key procedural aspects of the review process) is not provided for in the draft Order.

29. The Government has previously expressed a commitment to issue detailed practitioner guidance, which is being developed in consultation with key partners. The Government is, therefore, content to address the Committee's concern and accept its recommendation¹⁵ in this respect and include provision in the draft *Sexual Offences Act 2003 (Remedial) Order 2012* which requires the Secretary of State to issue statutory guidance to this effect.

Treatment of child offenders

30. The Committee stated¹⁶ that:

We recommend that the Government consider amendment of the draft Order to introduce either (i) a discretionary opportunity for review of the proportionality of notification requirements imposed on child offenders or (ii) a shorter period for rolling reviews in the case of child offenders (perhaps providing for applications to be possible at two year intervals, rather than eight year periods). We consider that the Government is under a particular obligation to

¹⁴ At paragraph 48.

¹⁵ At paragraph 49.

¹⁶ At paragraph 54.

justify the review periods which it proposes to apply to offenders who were children at the time when they committed the relevant offence which led to the imposition of notification requirements.

31. The Government has considered but does not accept the Committee's recommendation in respect of the application of the proposals to child offenders.
32. Existing legislation treats child offenders differently from adult offenders. Section 82(2) of the Sexual Offences Act 2003 has the effect that fixed term notification requirements are halved in relation to offenders who are aged under 18 on the date of conviction, other finding or caution. This approach is reflected in the proposed review mechanism, whereby an offender who is aged under 18 on the date of conviction etc. is eligible to apply for a review of the indefinite notification requirements after the period of eight years, rather than 15 years, from the date of first notification. Moreover, it is material that the sentence triggering indefinite notification requirements is the same for both adult and child offenders (a person who, in respect of the offence, is or has been sentenced to imprisonment for life or for a term exceeding 30 months or more), because differences in the approach taken by the courts to the sentencing of adults and children has the effect that this threshold will only be met in respect of child offenders who have committed a significantly more serious offence than that committed by an adult.
33. Moreover, there is no suggestion that the existing five year fixed term notification requirement for a child who is sentenced to a custodial term exceeding six months but less than 30 months is a disproportionate interference with article 8 of the ECHR. Therefore, the availability of a right to apply for review after the period of eight years for those who have been sentenced to a custodial term of 30 months or more is proportionate, and accords with the scheme for fixed term notifications. On this basis, any provision for a discretionary right for an offender subject to indefinite notification requirements to apply for review prior to the date on which offenders subject to lesser notification requirements cease to be subject to such requirements would be unfair and introduce inconsistency into the entire notification regime.

Other matters arising:

Consistency across the UK

34. The Committee stated¹⁷

While it is clearly open to each of the constituent parts of the UK to adopt a different approach to the Supreme Court's judgment, we are concerned that if the Government proceeds with its minimalist response to the violation identified that further litigation in England and Wales is inevitable. In principle, we note that different approaches, each of which removed the violation, could be entirely appropriate for each of the administrations responding to adverse

¹⁷ At paragraph 57.

human rights judgments. Care must however be taken, when this discordant approach arises to ensure that the ECHR is respected across the UK and that mechanisms are in place to ensure that geography does not lead to significant disparities in the protection offered to individuals' rights.

35. The Government welcomes the Committee's recognition that different approaches may be appropriate for each of the administrations, whilst acknowledging the concerns it has highlighted. The Government considers that it has addressed the Committee's concerns fully in this respect in the Government's response to the Committee's 'call for evidence'¹⁸. The Government continues to work closely with its counterparts in Scotland and Northern Ireland to ensure that there is alignment in the systems, where possible, and continues to believe that the fundamental policy aim of public protection requires that sex offender notification be considered in the context of the United Kingdom as a whole. It is for this reason that there is consistent provision in relation to, for example, the review periods. There is a shared will to ensure that the review mechanisms operate alongside each other effectively and that there is no opportunity for offenders to exploit differences across borders, whilst ensuring the introduce of the most appropriate process possible for England and Wales.

Sexual Offences Prevention Orders (SOPOs)

36. The Committee stated¹⁹ that:

We draw the proposed relationship between Sexual Offences Prevention Orders and the review mechanism proposed by the Government to the attention of both Houses. Members may wish to ask the Government to provide fuller information on how this relationship will work in practice, clarify the distinct assessment of risk which will be applied by the Court discharging the SOPO and the Chief Officer considering review of notification requirements, and to explain any likely associated costs of requiring a second, separate risk assessment exercise.

37. The Government continues to believe that it is appropriate to require any individual who is the subject of a sexual offences prevention order (SOPO) to take reasonable steps to discharge this order, for which there is provision in section 108 of the Sexual Offences Act 2003, before being eligible to seek a review of indefinite notification requirements as they apply to that individual. The Government previously set out its position in its response to the Committee²⁰ but will, for completeness, set this out in full as follows:

¹⁸ See paragraphs 45 to 56 of the letter from the Home Secretary to the Chair of the Committee dated 19 July 2011.

¹⁹ At paragraph 58.

²⁰ On 19 July 2011.

A sexual offences prevention order (SOPO) is a bespoke civil preventative order available on specified grounds and which has the effect of prohibiting the person in relation to whom it is made from doing anything described in it, as well as making that person subject to the notification requirements until the SOPO ceases (in the case of a person not otherwise subject to the notification requirements).

A SOPO can be made by a court on the conviction of a person for a sexual or violent offence or on application by the police, but only if it is satisfied that the SOPO is necessary to protect the public or any particular members of the public from serious sexual harm from the person in relation to whom the application is made. As such, the basis on which a SOPO is obtained and its effect makes it markedly different from the basis on which notification requirements continue to apply to an offender. A SOPO is available for a wider spectrum of offending or behaviour than that which forms the basis of notification requirements²¹ but the threshold which must be met for making a SOPO is higher than the risk of sexual harm²² about which the police must be satisfied before determining that a person must remain subject to notification requirements.

Section 108 of the Sexual Offences Act 2003 makes it clear that a person must apply to the court to vary or discharge a SOPO; therefore, we do not believe that this should alternatively be a function conferred on the police.

38. The Government reiterates its position in this respect.

39. The Government is, therefore, satisfied that the draft *Sexual Offences Act 2003 (Remedial) Order 2012* remedies the ECHR incompatibility identified by the Supreme Court.

²¹ For example, a SOPO can be obtained on the basis of a person's conviction for an offence listed in Schedule 3 (sexual) or Schedule 5 (violent) to the 2003 Act, whereas the notification requirements imposed under section 82 are triggered by a conviction for only an offence listed in Schedule 3.

²² The concept of "risk of sexual harm" is defined in the proposed new section 91B(11)(b) of the 2003 Act.



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