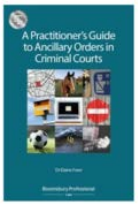

9 Sexual Harm Prevention Orders (on conviction)

> 'But although the SOPO may appear to be of comparatively less importance, each of its prohibitions creates for the defendant a new and personal criminal offence carrying up to five years' imprisonment for breach. It is likely to remain with the defendant for many years after the end of the principal sentence imposed, whether custodial or otherwise. The terms of the order are likely to have to be considered and applied by probation officers, policemen, defendants and courts for many years to come.' Hughes LJ in *Smith* [2011] EWCA Crim 1772, at [3]

9.01

The Anti-social Behaviour, Crime and Policing Act 2014, Sch 5, para 2 added s 103A to the Sexual Offences Act (SOA) 2003. Section 103A(1) brought in Sexual Harm Prevention Orders (SHPOs) from 8 March 2015.

9.02

For some years prior to this, there had been mechanisms for securing a similar effect – the restriction of certain behaviours by those convicted of sexual offences. From 1 May 2004 until 8 March 2015, the relevant order was a Sexual Offence Prevention Order (SOPO), which was drafted in similar terms, and found in SOA 2003, s 103(2)–(4). The minimum term of a SOPO was five years,[1] with no maximum period; they could be indefinite.[2] Therefore, the courts may be called upon to deal with breaches of SOPOs for many years yet.

9.03

Prior to SOPOs (and repealed by the SOA 2003) the Sexual Offences Act 1997 had given the courts power to make a restraining order. This power no longer exists since the repeal of the SOA 1997,[3] but the courts may still be called upon to deal with breaches of such orders.

1 SOA 2003, s 107(1).
2 SOA 2003, s 103C(2)(b).
3 *Monument* [2005] EWCA Crim 30.

9.04

There is also assistance to be gained from case law on SOPOs as the orders are similar in many ways. The principles therefore remain sound in relation to SHPOs.

The basic principle

9.05

- Always discretionary.
- No risk of 'serious sexual harm' needed – any level of 'sexual harm' sufficient.

9.06

These orders were intended to provide additional protection in cases where a person has been found to have done the actus reus of a sexual offence (whether admitted or proven).

9.07

It is worth noting that SHPOs are ALWAYS discretionary.[4] In other words, there are no circumstances in which it is mandatory for a court to impose an SHPO. This means that advocates should not be afraid to challenge the making or terms of these orders in appropriate situations. It is clear from the case law that they are applied for by the CPS, and made by some judges, as a matter of simple routine as if they are the automatic consequences of a sexual offence. This should not be so.

The legislation

9.08

SOA 2003 gives the court the power to make SHPOs in two situations:

(1) when the Crown applies to the court for an SHPO because the court is dealing with an offender for an offence (s 103A); and

(2) when the police apply to a court as they are concerned about the behaviour of someone with previous convictions (see Chapter 21 for detail on this second situation).

4 SOA 2003, s 103A(1).

9.09

Section 103A(1) allows a court the discretion to make an order. Section 103A(2) provides for the first circumstance in which this can happen. It requires that the conditions in s 103A(2)(a) and (b) are fulfilled:

(a) that the offence for which the defendant is being dealt with is contained in SOA 2004, Sch 3 or Sch 5. This covers cases in any of the following three situations:

- the offender is being dealt with by the court for an offence listed in SOA 2003, Sch 3 or Sch 5;[5]
- there is a finding that the offender is not guilty of a Sch 3 or 5 offence by reason of insanity;[6] or
- that the offender is under a disability and has done the act charged in respect of an offence found in Sch 3 or Sch 5;[7]

AND

(b) that the court is satisfied that it is *necessary* to make an SHPO *for the purpose of* either:[8]

- protecting the public or any particular member of the public from sexual harm from the defendant; or
- protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the defendant outside the UK.

For the second circumstance, see Chapter 21.

9.10

'Sexual harm' means physical or psychological harm caused:[9]

- by the person committing one or more offences listed in Sch 3; or
- (in the context of harm outside the UK) by the person doing, outside the UK, anything which would constitute an offence listed in Sch 3 if done in any part of the UK.

9.11

Before a court can consider imposing an SHPO, both conditions must be fulfilled. Even where they are fulfilled, the court 'may' make an SHPO – it is

5 SOA 2003, s 103A(2)(a)(i).
6 SOA 2003, s 103A(2)(a)(ii).
7 SOA 2003, s 103A(2)(a)(iii).
8 SOA 2003, s 103A(2)(a)(i) or (ii).
9 SOA 2003, s 103B(1).

not mandatory.[10] Therefore, a court should always have its attention directed to whether it is necessary for one to be made at all – they should not be made as a matter of routine where they do not fulfil any purpose that is not fulfilled by the sentence itself, or the notification requirements (see 9.18 and 9.61).

9.12

Schedules 3 and 5 are lengthy, and anyone who is dealing with an offence which has any sexual element is advised to check them to see if the offence they are dealing with is listed. The Schedules include offences under old legislation which has now been repealed, but under which it is not uncommon for historical offences to be prosecuted, a number of which are continuing to come through the courts.

9.13

Although the guidance in *Smith*[11] remains generally sound,[12] it has been updated, as it was a judgment under the SOPO regime (which could only be used to protect against 'serious' sexual harm). Thus, in *NC*, the Court of Appeal updated the guidance to:[13]

> '(i) is the making of an order necessary to protect the public from sexual harm through the commission of scheduled offences?
>
> (ii) if some order is necessary, are the terms imposed nevertheless oppressive? and
>
> (iii) overall, are the terms proportionate?'

Procedure

9.14

The Court of Appeal has expressed its frustration on many occasions with the prosecution's failure properly to serve draft SHPOs on the defence in advance of the hearing at which they will be considered, and in electronic form so that the fruit of discussions between counsel can be reflected in amendments without delay.[14] It has also made clear that judges should not simply 'rubber-stamp' these orders, but properly consider whether their content is appropriate and whether they are necessary.[15]

10 SOA 2003, s 103A(1).
11 [2011] EWCA Crim 1772.
12 *Parsons* [2017] EWCA Crim 2163, at [30].
13 [2016] EWCA Crim 1448, at [9].
14 *Smith* [2011] EWCA Crim 1772, at [26].
15 *Lewis* [2016] EWCA Crim 1020, at [7]–[9].

9.15

The Criminal Procedure Rules (CrimPR) require service at least two working days in advance.[16] Both prosecution and defence advocates are encouraged to be alert to situations where an SHPO is likely to be sought, and ensure that a draft is available, preferably uploaded to the digital case system (DCS) and with the defence explicitly notified of its presence. Defence advocates should not be afraid to ask for a matter to be adjourned or put down the list if they have an order 'sprung on them' at court, or if there are difficulties in taking instructions from their client due to mental health problems.[17]

9.16

Judges should support advocates in ensuring that proper time is given to ensuring that the order is workable by going through it in open court, even if there is a busy list.[18] To protect their client's best interests defence counsel will need to explain fully the ramifications of each term to the client, and consider themselves whether the order is proportionate in light of their client's personal and professional situation.

9.17

This is consistent with CrimPR, r 31.2(1), which sets out very clearly that:

> 'The court must not make a behaviour order unless the person to whom it is directed has had an opportunity—
>
> (a) to consider—
>
> (i) what order is proposed and why, and
>
> (ii) the evidence in support; and
>
> (b) to make representations at a hearing (whether or not that person in fact attends)'.

Is the order necessary?

9.18

The Court in *NC* (see 9.13) reiterated the three aspects which must be addressed when considering making an SHPO, derived from the judgment of Rose LJ in *Collard*.[19]

16 CrimPR, r 31.3(5)(a).
17 *Connor* [2019] EWCA Crim 234, at [5].
18 *Connor* [2019] EWCA Crim 234, at [32].
19 [2004] EWCA Crim 1664.

9.19

An SHPO should not be used to impose terms that duplicate those to which D will be subject under other regimes: namely notification,[20] disqualification from working with children, or terms of a licence.[21]

9.20

In only the most unusual cases will an SHPO be appropriate where D receives an indefinite sentence.[22] Equally, the availability of an SHPO, and the protection it offers, will not mean that an indefinite sentence will not be appropriate for serious contact sex offenders.[23] Its terms may, however, be able to place such restrictions on an offender that they do not need to be subject also to the dangerousness provisions of the Criminal Justice Act 2003 for the public to be properly protected, especially in cases of a non-contact offences.[24] This interplay is not dealt with at all in the statutes.

9.21

An SHPO should not be imposed simply as a matter of routine,[25] and consideration should be given in each case to whether it is necessary. If there is a factual matrix suggesting that the sexual offence was a true 'moment of madness' by someone of otherwise good character, in circumstances highly unlikely to ever be repeated, then it may be appropriate not to make an order.[26] Likewise, where the victim was an adult aged 25, a condition preventing contact with those under 18 was not justified.[27]

9.22

A court must also take care if the prosecution, in support of the making of the order, seek to rely on acquittals relating to previous alleged sexual offences – such should only be accepted as support where the court has been able to hear the full facts of the offences that led to acquittals, and only then use them in support of making an order after careful consideration.[28]

9.23

Where an offender suffers from learning or other mental disabilities such that they would not be able to understand the SOPO (or SHPO) and therefore be at constant risk of breach, it would seem appropriate that the same considerations

20 Under SOA 2003, s 82.
21 *Smith*, at [9].
22 *L* [2010] EWCA Crim 2046.
23 *N* [2010] EWCA Crim 1624, at [18].
24 *Terrell* [2007] EWCA Crim 3079.
25 *R & C* [2010] EWCA Crim 907, at [11].
26 *Ryan P* [2018] EWCA Crim 1076.
27 *Hughes* [2018] EWCA Crim 495, at [16] – and on the facts the Court held that no order at all was appropriate.
28 *Hughes*, at [15].

would apply as to the making of anti-social behaviour orders (ASBOs): that it is not proper to make an order where the offender is incapable of understanding it by reason of mental illness, but that the fact that an offender will, as a result of mental illness, be more likely to breach the order is not in itself a reason not to make such an order.[29]

9.24

In *MB*,[30] the appellant had been found unfit to plead under s 4 of the Criminal Procedure (Insanity) Act 1964, but was found to have committed the act of voyeurism. In addition to a two-year supervision order, the judge imposed a SOPO for five years. This was quashed, the Court of Appeal holding that there was no evidence before the judge that enabled him to conclude that the appellant was a risk from which the public needed to be protected – rather, psychiatrists concluded that he had no exaggerated sexual urges,[31] and that his offending came from a lack of understanding or insight resulting from his learning disabilities and being on the autistic spectrum. The necessity as required by the Act was therefore not made out.

9.25

However, in *Pashley*,[32] where a 23-year-old appellant had the broad functioning of a nine-year-old, and was unfit to plead, a SOPO, albeit in amended form, was upheld. The Court of Appeal accepted that the terms as drafted would not easily be understood, let alone by someone with the functioning equivalent to a nine-year-old. It consequently upheld the order, but made additions and re-wordings to aid understanding, and stated that it could be expected that those supervising the appellant assist him in understanding what was required of him.[33]

9.26

Assessing risk is the metier of the Probation Service. Where a pre-sentence report (PSR) has been produced that does not suggest that an SHPO is necessary, there should be extreme caution before one is imposed as a result of the freestanding assessment of the judge, or on a prosecution application that is not supported by evidence of risk from a probation officer.[34]

29 *R (Cooke) v DPP* [2008] EWHC 2703 (Admin), at [20], applied in *Fairweather v Commissioner of Police of the Metropolis* [2008] EWHC 3073.
30 [2012] EWCA Crim 770.
31 *MB*, at [73]–[75].
32 *Pashley* [2015] EWCA Crim 1540.
33 *Pashley*, at [13]–[20].
34 *MSS* [2018] EWCA Crim 266, as quoted in *Hughes*, at [10], commented on at [11]–[12].

Length of order

9.27

- Minimum duration of an SHPO is 5 years.[35]
- Maximum duration is indefinite.[36]

9.28

It has been recognised by the Court of Appeal that an SHPO's length should be commensurate with the notification period.[37] The notification period is determined by the type and length of sentence given, as set out under SOA 2003, s 82. Section 82 does not differentiate between sentences of immediate imprisonment and sentences of suspended imprisonment for the purposes of the length of the notification period.[38]

9.29

The Court has repeatedly warned judges against making SHPOs 'until further order'.[39] The oppressive effect of an order 'until further order' is such that it will rarely be compatible with a defendant's fundamental rights. In the recent case of *Coggins*,[40] the Court upheld an indefinite order having amended some of its terms, on the basis that, given D's previous serious offending, there was no way of knowing when he would stop being a danger. If that situation did arise, he could return to court to apply for a variation of the SHPO. It was not disproportionate having regard to the modifications to it made by the court.

9.30

Section 103C(3) allows different terms to be made for different fixed periods, or in the context of an indefinite order, some terms to be for a fixed period and others to be indefinite.

35 SOA 2003, s 103C(2)(a).
36 SOA 2003, s 103C(2)(b).
37 *JB* [2017] EWCA Crim 568; also *Moxham* [2016] EWCA Crim 182, at [14].
38 This is consistent with the fact that seriousness of the offence determines the length of the custodial sentence, and the decision to suspend is entirely a matter of judicial discretion.
39 *McLellan & Bingley* [2017] EWCA Crim 1464, at [25](iii).
40 [2019] 3 WLUK 77.

Terms of order

9.31

The only prohibitions that may be included in an SHPO are those necessary for the purpose of:[41]

- protecting the public or any particular members of the public from sexual harm from the defendant; or
- protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the defendant outside the UK.

Computing and internet

9.32

The Court of Appeal in *Roskams*[42] made clear that a prohibition on computer possession without notifying the police was likely to be inappropriate in the current day and age as so many people owned computer equipment, including smart phones. They quashed that paragraph. This is consistent with the earlier judgment in *Smith*, in which Hughes LJ (as he then was) stated that it would be hard to imagine a case in which a ban on the use of computer equipment could be justified.[43]

9.33

In *Connor*,[44] the Court of Appeal was deeply concerned by the lack of thought that had been given to the terms of the SOPO (as it was made in 2015) imposed:[45]

> '17. In *Smith*, Hughes LJ as he then was, made it clear that orders must be tailored to the circumstances of each case but there are some principles of broad application including that a blanket prohibition on computer use or internet access is not permissible. As was pointed out by this court in *R v Parsons* [2017] EWCA Crim 2163 the internet is a far greater feature of everyday life now than it was in 2012 and we have no doubt that this was true when the appellant's case was before the Crown Court. The failure to take into account the principles in *Smith* was an error which we must correct, as Mr Heptonstall who did not appear below, readily accepted. We are grateful to him for the helpful written

41 SOA 2003, s 103C(4).
42 [2018] EWCA Crim 1653, [2018] 6 WLUK 553
43 *Smith*, at [20](i).
44 [2019] EWCA Crim 234.
45 *Connor*, at [17]–[19].

submissions he provided at very short notice which were then developed orally.

18. The assertion by counsel for both sides at the time it was made that it was proportionate and workable was made without proper thought. Whilst the judge accepted their submissions we note that he said "one can always make an application for variation". No doubt it was upon that statement that the appellant later relied in his application to vary. The GMP [Greater Manchester Police] and the sex offender manager both agreed that the order was not workable.

19. As drafted, paragraph one of the order would probably have the effect of preventing the appellant from using the internet at all for any purposes since it permits use only of a desktop computer provided by his employer. Even were he to obtain employment it does not follow that he would be provided with a desktop computer. The prohibition is obviously oppressive and disproportionate.'

Contact

9.34

Concerning a non-contact requirement, the Court stated that there was no rule that a contact offence was required before a non-contact restriction could be imposed, but that there had to be an identifiable risk of contact offences occurring and the court had to consider whether there was such a risk so as to justify the imposition of such a paragraph.[46] In the instant case there was not and that paragraph was quashed.[47]

9.35

Care must be taken to ensure that the terms of the order do not effectively prevent a defendant from contacting their own children.[48] It is not enough for the Crown to assert that the prohibition is necessary on the 'safety first' principle in case the defendant might graduate to contact offences of that nature in the future. That does not make a prohibition on contact or requirement of supervised contact a necessary requirement for the protection of the public.[49]

46 *Roskams*, at [9]–[12].
47 *Roskams*, at [13].
48 *NC*, at [17].
49 *Lewis*, at [10].