



13KBW Internal Seminars 2007

Sexual Offences Prevention Orders

Section 104 of the Sexual Offences Act 2003

General Points

(Archbold 20-323)

- Replace old Restraining Orders and Sex Offender Orders (some of the old case law still relevant);
- Can be made for range of offences, not necessarily sexual;
- Age – lowest is 10 (age of criminal responsibility, but should be exceptional);
- Have effect for fixed period, but not less than 5 years;
- Breach – max 5 years prison;
- Proceedings civil in nature but criminal standard of proof;
- Can be made for someone only cautioned and based solely on alleged behaviour not resulting in any prosecution.

The Test - s.104 (1)

Court **may** make an order:

“If court is satisfied that [the defendant’s behaviour since the appropriate date makes] it is necessary to make an order for the purpose of protecting the public or any particular members of the public from serious sexual harm from the defendant”.

When can they be made? s.104

(2) On conviction of schedule 3 or 5 offence (Arch para 20-278 and para 20-336);

(3) Finding of not guilty by insanity or under a disability and done the act charged;

(4-5) on application to the Magistrates’ Court by Chief of Police, he is a ‘qualifying offender’ and ‘acted in such a way as to give reasonable cause to believe that it is necessary for such an order to be made’;

‘Qualifying offender’ defined in section 106(5) as person who before or after commencement of Act has been convicted of schedule 3 or 5 offence, not guilty by insanity, disability and done act charged, or cautioned of such an offence.

‘Appropriate date’ for behaviour defined in s.106(8); usually date of conviction/caution.

Procedure by way of complaint - therefore section 127 MCA 1980 applies and must have at least one incident in previous 6 months.

‘Harm’ - section 106 (3)

Protecting from ‘serious physical or psychological harm, caused by the defendant committing one or more offences listed in schedule 3’.

Court thereby has to conduct its own **risk assessment** which may include the involvement of other agencies, probation, MAPPA, experts etc.

Risk assess:

- the sexual offence(s) to be committed;
- potential harm;
- date, nature and circumstances of the previous conviction(s) and any emerging pattern;
- current circumstances of an offender and how they may change;
- disclosure implications of an order being made;
- assessment of accuracy and relevance of information about offender;
- nature and pattern of behaviour giving rise for concern, including predatory behaviour and likelihood of reoffending;
- extent of compliance with previous sentences or orders;
- compliance of therapeutic help and outcome.

“While the harm envisaged has to be caused by the defendant, it did not seem to the court that the Sch.3 offence had necessarily to be directed against the person specified in the order, provided that they might suffer some harm, including psychological harm, as a result. The offence could, for example, be directed at another member of the household in which he resided or an outsider introduced or brought to the household” (*R v D* [2005] see below).

Effect – s.107(1)

- Prohibitions – similar drafting to ASBOs, but only those **necessary** s.107(2) for protecting public.
- Drawn up on form attached to Magistrates Courts (SOPO) Rules 2004.
- Fixed period, not less than 5 years.
- Can vary, renew and discharge – section 108 if court considers it appropriate.
- Appeals – section 110.

Interim SOPOs – s.109

If the court considers it ‘just to do so’ (s. 3).

Breach – s.113

Summary conviction – 6 mths or max fine or both;

Indictment – 5 years imprisonment, (but potential for community penalties, see *R v Fenton* below; N.B. no conditional discharges).

Defendant/Respondent Points

- Likelihood of commission, imminence, seriousness of harm?
- Is the order necessary, or just desirable?
- Are prohibitions necessary – would an order minimise the risk, is it proportionate? Can it be policed effectively?
- Can the restriction of liberty be justified?

Criminal Justice System website notes on SOPOs (link details below) state that “if an offender is prepared to receive some kind of support to help him avoid committing a sexual offence, and appropriate support can be identified and made available, this may be considered as an alternative to an application for a SOPO or could run alongside such an order”.

Prosecution/Applicant Points

- Be satisfied he is a qualifying offender (e.g. if caution goes missing!) and the appropriate date is the first date;
- Be clear if identifying groups and/or individuals;
- Intended to prevent, therefore designed to bite on concerning conduct before it actually happens;
- Intended to be Draconian; but be clear in drafting prohibitions;
- Don't need much; hearsay will do from child to an adult, without calling the child!

SOPO - Case Law

- ***B v Chief Constable of Avon & Somerset Constabulary*** [2001] 1 All ER 562 – proceedings are civil, their purpose is preventive not punitive. A bare balance of probability is not to be applied in relation to the relevant section and the civil standard to apply should, for all practical purposes, be indistinguishable from the criminal standard.
- All evidence relevant to the issues and raised by the application is admissible and hearsay is admissible (Magistrates' Courts Hearsay Evidence in Civil Proceedings Rules 1999 and Civil Evidence Act 1995 – needs hearsay notices though).
- Conduct, both past and recent, must be evidenced to the criminal standard of proof – ***Clingham v Kensington & Chelsea London Borough Council: R v Manchester Crown Court, ex parte McCann & Ors*** [2002] 3 WLR 1313.
- ***R (on application of McCann) v Manchester Crown Court*** [2002] UK HL39 – whilst proceedings are civil in nature, the criminal standard of proof applies when court is considering defendant's behaviour since the qualifying date. When it comes to whether it is necessary to make an order the court is not required to apply a standard of proof, but to deal with the matter as an exercise of judgement or evaluation (case on ASBOs but relevant to SOPOs).
- ***Darren Hopson v The Chief Constable of North Wales*** [2002] EWHC 2430 – in exercising their judgement whether it is necessary to make an order, a court is entitled to take into account acts that occurred before the qualifying date, although any such acts have to be established to the criminal standard.
- ***R v D*** [2005] EWCA Crim 3660 – the word 'necessary' imported a higher threshold than it was desirable to make an order. And, a judge is entitled when considering whether to make a SOPO, to take into account hearsay provided he is careful about the weight he attaches to it.
- ***R v Halloren*** [2004] 2 Cr App R(S) 57 – must be material before the judge to show that the order was necessary as opposed to being desirable. The judge had to be satisfied of certain matters before making an order. It required the judge to consider expressly the statutory criteria for making an order and indicate the basis on which they had been met in the case before him.
- ***R v Beaney*** [2004] 2 Cr App R(S) 82 – terms of order should be no wider than is necessary to the achievement of its purpose.

Other Guidance: Criminal Justice System notes –
www.crimereduction.gov.uk/sexual/sexual027a.pdf

SOPO - Very Recent Case Law

R v Fenton [2007] 1 Cr App R (S) 97 – where breach of SOPO involves no real or obvious risk to the section of the public whom the order was intended to protect, the appropriate sentence may well be a community penalty which assists the offender to live within the terms of the order, but repeated breaches will necessarily require a custodial sentence if only to demonstrate that orders of the court are not to be ignored and cannot be breached with impunity.

Sexual Offences Orders and the Dangerous Offender Provisions CJA 2003

***R v Rampley* [2006] EWCA Crim 2203**

The Court took the view that there are a number of distinctions between the two provisions and that therefore it is possible to order a sexual offences prevention order notwithstanding a decision not to make an order under the dangerous offenders' legislation.

The courts reasoning was that there were 3 of important differences between the two provisions:

1. The first was that under the Criminal Justice Act the risk had to be shown to be "significant", whereas there was no corresponding requirement under the Sexual Offences Act.
2. Secondly, a sexual offences prevention order lasted for not less than five years whereas there was no such provision in s.229 of the Criminal Justice Act, which provided for the imposition of a life sentence in a case of an offender over 18.
3. The third and most material distinction between the two Acts was the difference in degree between the serious harm needed under respective Acts. Section 229 of the Criminal Justice Act 2003 defined "serious harm" to mean "death or serious personal injury whether physical or psychological", whereas "serious sexual harm" required under s.104 of the Sexual Offences Act 2003 was defined simply as including "serious physical or psychological harm". The court considered that there was a difference of degree. The court noted that s.229 was expressed in terms of "injury", whereas s.104 talked of "physical or psychological harm". The court considered that there was a qualitative difference between the concept of "injury" and the concept of "harm". The court recognised that the distinction between the two sections was a fine one.

See also: *R v Richards* [2006] EWCA Crim 2519

Other useful points:

R v D [2005] EWCA Crim 3660

1. In the court's view, if the prosecution invites the judge to make a sexual offences prevention order, it was incumbent upon the prosecution to be familiar with the relevant statutory provisions and to be in a position to place before the judge the material which showed that those statutory provisions had been met.
2. Parliament in the legislation has spelt out strong measures for the protection of the public and individual members of it from the actions of sex offenders and it was important that the courts should give effect to it.
3. Courts should be careful before making a sexual offences prevention order to ensure that the statutory criteria were met and that both the order and its ambit were necessary.
4. Where the court was considering making an order to protect from abuse within the family, particularly a sibling of the abused person, it might be desirable to draft the order in terms that provided a link with the court's family jurisdiction. This is because of the family court's focus on the welfare of the child and its additional flexibility could suit a possibly changing situation better.