

PROTECTION OF CHILDREN (SCOTLAND) ACT 2003

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Administration in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by the Parliament.
2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE ACT

3. The Act provides for a list of individuals considered unsuitable to work with children (“the list”) to be established and maintained by the Scottish Ministers and for those on the list to be banned from working with children. An individual who knows that he or she is listed commits an offence if he or she works in a child care position (within the meaning of schedule 2) whilst listed.
4. Organisations are required to refer people who are or have been working in child care positions for inclusion in the list if they harm a child or put a child at risk of harm and, as a consequence, are dismissed or transferred from those positions or where their employment is otherwise terminated in such circumstances. Individuals convicted of an offence against a child (within the meaning of section 10(9)(b)) may also be placed on the list at the discretion of the courts.
5. An organisation commits an offence if it offers work in a child care position to an individual whom it knows is listed or does not move such an individual from a child care position. The information that an individual is on the list will be released as part of a disclosure check carried out by Disclosure Scotland (part of the Scottish Criminal Record Office) under Part V of the Police Act 1997 (c.50).

Section 1 – Duty of Scottish Ministers to keep list

6. This section provides for the list to be set up and for individuals to be included in the list when the criteria and procedures set out later in the Act are satisfied. It also allows for the Scottish Ministers to remove an individual from the list but only when satisfied that the individual should not have been included in the list.

Section 2 – Reference following disciplinary action etc.

7. This section places a duty on organisations to refer individuals working in child care positions to the list.
8. Subsection (1) specifies that referrals can be made only when certain circumstances (listed in subsections (3) and (4)) have arisen. Subsection (2) sets out the criminal sanction which applies in relation to an organisation which fails to make a referral to the list when those circumstances have arisen.
9. Referrals can be made only when an individual is considered to have harmed a child or put a child at risk of harm and has, as a consequence, been dismissed, transferred, resigned, retired or made redundant or his or her contract has expired. No referral can be made unless the organisation has (or would, but for a resignation, retiral, redundancy or contract expiry, have) taken steps to remove the individual from his or her present position. Subsection (5) allows for referrals based on events which occurred before the commencement of the Act but provides that organisations are not under a duty to make referrals in relation to such events.

Section 3 – Reference by employment agency etc.

10. This section enables an employment agency or nursing supply agency to refer individuals to the list in circumstances similar to those in which other organisations are required to do so under section 2. It places a duty on employment businesses to do so in circumstances particular to them. This section applies in relation to child care workers employed through or supplied by employment agencies and businesses (for example, nannies recruited through an agency).

Section 4 – Reference by certain other persons

11. This enables the Scottish Commission for the Regulation of Care, the Scottish Social Services Council and the General Teaching Council for Scotland to refer individuals to the list. The Scottish Commission for the Regulation of Care regulates a range of care services for children in Scotland including daycare for children and childminders. This covers referrals for childminders and managers where there is no employing child care organisation to make a referral under section 2. The Scottish Social Services Council will maintain a register of social workers and other social service workers and the General Teaching Council for Scotland maintains a register of teachers.
12. This section also confers power on the Scottish Ministers to make an order extending the type of persons who may refer individuals under this section. This allows for other regulatory bodies to be added if and when it is considered appropriate to do so.

Section 5 – Inclusion in list following referral under section 2(1) or 4(1)

13. This section describes the procedures to be followed by the Scottish Ministers in considering a reference.

14. Subsections (1) and (2) require the Scottish Ministers to proceed to make a determination where they are satisfied that—
 - the referral is not vexatious or frivolous; and
 - the information submitted with the reference under section 2(1) or 4(1) indicates that it may be appropriate for the individual to which the reference relates to be listed.
15. Subsection (3) requires the Scottish Ministers to request the individual to submit observations on the information submitted with the reference; and the organisation will be invited to make observations on the individual's observations. It also allows, where the Scottish Ministers think it is appropriate, for further rounds of observations from both the referring organisation and the individual who has been referred for listing.
16. Subsection (4) requires the Scottish Ministers to make a determination as to whether or not to list an individual based on the reference, observations made and any other information submitted to them. Before making any determination the Scottish Ministers must be satisfied that the tests set out in subsection (5) are met. The tests are that the Scottish Ministers consider that the organisation which made the reference reasonably considered the individual to have harmed a child or placed a child at risk of harm and that the individual is unsuitable to work with children.
17. Subsection (6) requires the Scottish Ministers to notify the individual of the decision of whether to include him or her in the list. In addition, where the individual is, at the time the determination is made, working in a child care position and the present employer is known, a notice of the determination must also be served on that employer.

Section 6 – Individuals named in the findings of certain inquiries

18. This section allows for the Scottish Ministers to include individuals named in relevant inquiries, defined at subsection (6), in the list. Procedures similar to those outlined above for referrals under section 2(1) and 4(1) are to be followed. The Scottish Ministers must be satisfied that the person who held the inquiry reasonably considered that the individual had harmed a child or put a child at risk of harm whilst working in a child care position and that the individual is unsuitable to work with children. If both conditions are met the Scottish Ministers must add the individual to the list.

Section 7 – Provisional inclusion in list

19. Subsection (1) requires the Scottish Ministers to provisionally list the individual pending a determination under section 5 or 6.
20. Subsection (2) requires the list to show whether a listing is provisional.
21. Subsection (3) requires the individual to be notified of his or her provisional listing. The Scottish Ministers are also required to notify the individual's employer, where known, of the

provisional listing, if the Scottish Ministers are aware that the individual is working in a child care position.

22. Subsection (4) provides that an individual who is included in the list provisionally must be removed from the list if the Scottish Ministers have not made a determination during a particular period.
23. Subsection (5) provides that the period will, in most cases, end 6 months after the date of the provisional listing, unless a sheriff agrees under subsection (6) to extend that period. An exception is made in relation to referrals, where the circumstances or the act leading to the referral are subject to legal or disciplinary proceedings. In such a case the period is to end 6 months after the date of final determination of those proceedings (defined in subsections (7) and (8)).

Section 8 – Determination under section 5 or 6: power to regulate procedure

24. This section allows the Scottish Ministers to make regulations setting out in further detail the procedures that are to be followed in relation to a determination on whether to list an individual. These regulations may set out more detail on the procedure to be followed by the Scottish Ministers and those invited to submit observations.

Section 9 - Protection from actions of defamation

25. This section makes it clear that any information submitted with a reference under section 2(1) or 4(1) attracts qualified privilege (that is, it is privileged for the purposes of the law of defamation unless it is actuated by malice). It also makes it clear that qualified privilege applies to observations made in response to invitations made by the Scottish Ministers to comment on a reference or on the observations of others.

Section 10 – Individuals convicted of an offence against a child

26. This section provides for individuals who have been convicted of an offence against a child (or acquitted on grounds of insanity) to be referred by the sheriff or judge to the Scottish Ministers for inclusion in the list. The sheriff or judge is obliged (subject to being satisfied as required by subsections (3) and (4)) to make a reference if the offence is a relevant offence (within the meaning of schedule 1). The decision on whether to refer to the list is, in the case of any other offence against a child, to be at the discretion of the sheriff or judge.

27. Subsection (2) provides that the duty imposed, and the discretion conferred, by subsection (1) apply in relation to offences committed before the commencement of this section.

28. Subsections (3) and (4) prevent the sheriff or judge from referring an individual to the Scottish Ministers unless the test in the relevant subsection is satisfied. Subsection (3) deals with individuals under 18 when the offence was committed. In these cases, to make a referral, the sheriff or judge must be satisfied that the accused is likely to commit a further offence against a child. Subsection (4) deals with individuals over 18 when the offence was committed and allows a sheriff or judge not to make a referral only if satisfied that the individual is unlikely to commit a further offence against a child.

29. Subsections (5) and (6) provide that a reference is not to be made under this section until the appeals process is exhausted in relation to the offence in respect of which the reference is to be made.

30. Subsection (7) requires the Scottish Ministers to include individuals referred by the court in the list.

31. Subsection (8) requires the Scottish Ministers to inform the individual of the listing. If the Scottish Ministers are aware that the individual referred by the court is working in a child care position at the time of listing, they must also inform the employing organisation of the listing.

32. Subsection (9) defines the expressions “relevant offence” and “offence against a child”. Relevant offences are those listed in or falling within schedule 1. “Offence against a child” includes all relevant offences and any other offences committed in relation to children. Subsection (10) confers a regulation making power on the Scottish Ministers to amend the definitions of “offence against a child” and “relevant offence”.

33. Subsections (11) and (12) provide for individuals who have been acquitted on the grounds of insanity etc. to be considered for inclusion in the list on the same terms as if they had been convicted of the offence.

Section 11 – Offences relating to work in a child care position

34. This section creates two new offences both of which attract the same penalties (set out in subsection (7)). An individual disqualified from working with children (as defined in section 17) commits an offence if he or she applies for, offers to do, accepts or does any work in a child care position. It is a defence for an individual to prove that he or she did not know he or she was disqualified.

35. An organisation commits an offence if it offers child care work to a disqualified individual, fails to remove a disqualified individual from such work or moves the individual into a position involving such work. It is a defence for the organisation to prove that it could not reasonably have known that the individual was disqualified.

Section 12 – Searches of lists: amendment of Police Act 1997

36. This section provides for the fact that an individual is included in the list to be released as part of a check made under Part V of the Police Act 1997 (c.50) (“the 1997 Act”). It provides that criminal record certificates and enhanced criminal record certificates will reveal whether the individual is included in the list.

37. The amendments to Part V of the 1997 Act allow Disclosure Scotland to include information from the list and from equivalent lists kept in England and Wales on checks for a specified range of positions. Some corresponding changes are needed in relation to England, Wales and Northern Ireland if information in the list kept under this Act is to be disclosed in those jurisdictions.

38. Subsection (1) removes any doubt there may be as to whether amendments made to Part V of the 1997 Act by certain other enactments apply in Scotland.

39. Subsection (2) amends the 1997 Act so as to allow criminal record certificates and enhanced criminal record certificates to disclose whether an individual is included in the list.

40. Subsection (3) allows for future developments in sharing information with other countries and Crown Dependencies. It gives the Scottish Ministers power to modify Part V of the 1997 Act by order to allow Disclosure Scotland to reveal whether an individual is included in similar lists, or is otherwise disqualified from working with children, in those jurisdictions.

Section 13 - Amendment of Teaching Council (Scotland) Act 1965

41. This section removes an individual's entitlement to be, or to remain, registered as a teacher with the General Teaching Council for Scotland if their name is included other than provisionally, in the list.

Section 14 – Application for removal from list

42. This section allows an individual to apply to the sheriff for a review of their listing. It allows individuals to apply to be removed from the list. The sheriff must, on such an application, direct the Scottish Ministers to remove the applicant from the list if the sheriff is satisfied that the individual is not unsuitable to work with children.

43. The earliest opportunity for review is 5 years after listing for those under 18 years at the relevant time and 10 years after listing for those over 18 at the relevant time. Where listing follows a conviction and referral by the court, the earliest opportunity for review is the date of completion of the sentence or other release or 10 years after listing (5 years after listing for those under 18 at the time of the offence which led to the listing), whichever is later. The "relevant time" is defined in subsection (5) as the date on which the offence was committed or, as the case may be, the time when the referring organisation or person holding the inquiry considered that the individual harmed a child or placed the child at risk of harm.

44. In all cases the sheriff has discretion, under subsection (7), to allow a review at an earlier date if satisfied that there has been a change in the individual's circumstances.

Section 15 – Appeals: inclusion in list under section 5 or 6 etc.

45. This section allows for those included in the list under section 5 or 6 to appeal against such inclusion to a sheriff within 3 months of the listing. An individual who has unsuccessfully appealed may appeal the sheriff's decision to the sheriff principal. The Scottish Ministers also have a right of appeal against the sheriff's decision to the sheriff principal. A further appeal is in each case available, with the leave of the sheriff principal, to the Inner House of the Court of Session. Any decision made by the Inner House on such an appeal is final.

Section 16 – Appeals: inclusion in list following conviction of offence against a child

46. This section amends Parts VIII and X of the Criminal Procedure (Scotland) Act 1995 (c.46) to ensure that appeals against listing as a result of a criminal conviction are dealt with as part of the same process as appeals against that conviction. Individuals will be listed only when their time for appeal has expired or the appeal has been dismissed or abandoned.

Section 17– Meaning of “disqualified from working with children”

47. This section sets out the categories of individuals who are, for the purposes of the Act, “disqualified from working with children” and therefore prevented, by section 11, from working in a child care position. These include individuals included in the list and in the equivalent list kept, in England and Wales, under section 1 of the Protection of Children Act 1999 (c.14). It also includes individuals who are, in England and Wales, subject to certain directions under section 142 of the Education Act 2002 (c.32) prohibiting him or her from teaching or to a disqualification order under Part II of the Criminal Justice and Court Services Act 2000 (c.43). Subsection (2) allows the Scottish Ministers to extend the definition to provide that individuals disqualified from working with children in other jurisdictions are prevented, by section 11, from working in a child care position in Scotland.

Section 19 Notices

48. The Scottish Ministers are required to give notice of provisional and final listing and this section sets out the appropriate procedures to be followed in serving such notices.

Section 20 – Offences by bodies corporate etc.

49. This section allows for individuals who exercise control within an organisation, as well as the organisation itself, to be proceeded against and punished where the organisation commits an offence of offering child care work to disqualified individuals; failing to remove disqualified individuals; or moving them into positions involving such work.

PARLIAMENTARY HISTORY OF THE BILL FOR THIS ACT

50. The following table sets out, for each Stage of the proceedings in the Scottish Parliament on the Bill for this Act, the dates on which proceedings at that Stage took place, the references to the Official Report of those proceedings and the dates on which Committee Reports were published and the references to those Reports.

Proceedings and Reports

Reference

Introduction

6 September 2002

SP Bill 61 (Session 1)

*These notes refer to the Protection of Children (Scotland) Act 2003 (asp 5)
which received Royal Assent on 19 March 2003*

Stage 1	24 September 2002, cols 3702-3736
<i>(a) Education, Culture and Sport Committee</i>	1 October 2002, cols 3737-3772
24 th Meeting, 2002	8 October 2002, cols 3774-3800
25 th Meeting, 2002	SP Paper 689
26 th Meeting, 2002	
15 th Report 2002 (15 November 2002) Stage 1 Report on the Protection of Children (Scotland) Bill	
<i>(b) Consideration by the Parliament</i>	
20 November 2002	cols 15493-15541
Stage 2	
<i>Education, Culture and Sport Committee</i>	
31 st Meeting, 2002	3 December 2002, cols 3892-3919
32 nd Meeting, 2002	10 December 2002, cols 3313-3318
Stage 3	
<i>Consideration by the Parliament</i>	
12 February 2003	cols 18081-18102
Royal Assent	
19 March 2003	

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