

CRIMINAL JUSTICE AND COURT SERVICES ACT 2000

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part II: Protection of Children

Sections 26 and 27: Meaning of “offence against a child”

79. *Section 26* establishes the circumstances under which an individual will be deemed to have committed an offence against a child. *Subsection (1)* sets out those circumstances, according to the list of offences and circumstances in *Schedule 4*. *Subsection (2)* allows the Secretary of State to alter *Schedule 4*, subject to the agreement of Parliament by *affirmative resolution order*. The Secretary of State can thereby ensure that the legislation remains comprehensive in scope, covering all (and potentially new) circumstances in which an individual commits a serious offence against a child.
80. *Section 27* ensures that an individual charged with or convicted of an armed forces offence equivalent to an offence against a child is treated as an individual under *Section 26*, and that members of the armed forces serving overseas are also caught by the legislation.

Sections 28, 29 and 30: Disqualification from working with children

81. *Section 28* sets out the conditions under which a court is required to make an order disqualifying an adult from working with children. *Subsections (5) and (6)* state the circumstances when a court might not make such an order, and require a record of the reasons why no such order was made. Such disqualification orders are not available in a Magistrates’ Court.
82. *Section 29* makes similar provisions to those in *Section 28*, but for juveniles (those aged under 18 at the time when they commit the offence). However, *Subsection (5)* of *Section 28* allows the court not to make an order for an adult only when it is satisfied that further offences against children are unlikely. In contrast, in the case of a juvenile – *Subsection (4)* of *Section 29* – the court may make an order only if they deem it likely that the juvenile will re-offend against children. An adult must therefore be disqualified unless the court is satisfied that he is unlikely to re-offend, whereas a court must assume that a juvenile will not re-offend, unless they are satisfied that there is sufficient evidence to the contrary, in which case it is required to disqualify the juvenile.
83. *Section 30* establishes the meaning of a ‘qualifying sentence’, a ‘relevant order’, and other key phrases used in *Sections 28 and 29*. *Subsection (4)* also clarifies the issue of the determination of an offender’s age.

Section 31: Appeals

84. *Section 31* provides for appeal against the disqualification order.

Section 32: Review of disqualification

85. *Section 32* entitles an individual to apply for a review of the disqualification order by a Tribunal set up under *Section 9* of, and the Schedule to, the Protection of Children Act 1999. (Paragraphs in *Schedule 7* also provide for a review of those individuals listed by the Secretary of State).

Section 33: Conditions for application for review

86. *Section 33* sets out the circumstances and conditions under which a disqualified individual might apply to the Tribunal to have the disqualification lifted. *Subsections (3), (4) and (6)* set out how long either an adult or a juvenile who is disqualified must wait (ten and five years respectively) before he can apply to the Tribunal for the disqualification to be lifted. *Subsections (3)(b) and (4)(b)* require that the same period must pass after an unsuccessful application for review, before a further application can be made.
87. *Subsection (5)* of *Section 33* requires that the individual first prove to the Tribunal that his circumstances have changed sufficiently to warrant a review of the disqualification order. Thus someone who has successfully reared his own children, or once committed an act of violence towards a child when an alcoholic but can now demonstrate he is free of this addiction, might be entitled to a review. The individual must then demonstrate to the Tribunal that this change of circumstances is such that he is suitable to work with children, and therefore need no longer be subject to disqualification from working with children, before the Tribunal can lift the disqualification.

Section 34: Restoration of a disqualification order

88. Where a tribunal has reviewed a disqualification and has ordered that it should cease to have effect, *Section 34* allows for the disqualification order to be restored, and sets out the circumstances under which that might occur. Where an individual no longer subject to a disqualification order acts in a way which gives either a chief officer of police or a director of social services reasonable cause to believe that the individual's behaviour threatens the safety of children and that a further disqualification order is necessary to protect children from serious harm, the chief officer or director can apply to a High Court for a disqualification order to be made. The High Court, if satisfied that the conditions of *Subsection (2)* are met, can order the restoration of the order. (Paragraphs in *Schedule 7* also provide for the restoration of previously disqualified individuals to the lists maintained by the Secretary of State.)

Sections 35 and 36: Work in regulated positions

89. *Section 35* provides for the offence of seeking, offering, accepting, or continuing to, work with children while under a disqualification order. An individual commits an offence if he knowingly seeks etc. to work with children in a regulated position while disqualified:
- by inclusion (other than provisionally) on the list held by the Department of Health, of those considered unsuitable to work with children, under the Protection of Children Act 1999;
 - by inclusion on 'List 99', on the grounds of not being a fit person to be employed as a teacher or in certain other areas of education under the Education Reform Act 1988, as amended by the Protection of Children Act 1999;
 - by inclusion on any list kept by the Secretary of State or National Assembly of Wales of persons disqualified under *Section 470* or *471* of the Education Act 1996 (as being amended by the Care Standards Act 2000 on grounds that they are unsuitable to work with children);
 - by a disqualification order made under this Part.

90. An individual also commits an offence if he knowingly offers work in a regulated position to a disqualified person. This is intended to cover the individual who knows someone is disqualified, but nevertheless offers him work in a regulated position. It is also an offence for someone to fail to remove an individual he knows is disqualified from working with children (e.g. to hold open a position for a disqualified person).
91. *Subsection (3)* provides the defence for an individual who seeks to work with children that he neither knew, nor could be reasonably expected to know, that he was himself disqualified from such work. The provision ‘be reasonably expected to know’ is intended to ensure that an individual cannot escape liability by, for example, moving house to prevent the notification of a disqualification by the Secretary of State being served on him.
92. *Subsection (6)* sets out the penalty that will follow if an individual is convicted of either offence.
93. *Section 36* provides a definition of ‘working with children’ that encompasses all the positions and roles from which those subject to disqualification will be excluded. The definition is deliberately wide-ranging, in order to provide protection for children across as broad an area as possible. However it seeks to ensure that casual contact with children which does not form part of the normal duties of the position or where there is no element of care involved (for example, the supermarket assistant) is excluded, except in some particular areas identified in the Act. Under *Section 42* a child is defined as a person under 18. The only exception to this is in *Subsection (1)(e)* of *Section 36* in relation to children in work where the age limit is under 16. This is intended to ensure that those who, for example, supervise children who have left school and are in regular work, are not covered by the definition. *Subsection (1)* of *Section 36* identifies the eight main areas of ‘regulated positions’ to be covered by the disqualification. *Subsections (2) to (12)* of *Section 36* go on to clarify some of these areas:
- *Subsection (2)* clarifies *Subsection (1)(a)* by defining the nature of the establishment in which the regulated position is held; these are the areas of work in which it is considered right that all members of staff, whether carers or ancillary staff, should be included;
 - *Subsection (3)* clarifies *Subsection (1)(b)* by ensuring that it does not apply to any parts of the premises where children are not looked after, or at time when children are not present. This prevents, for example, the need to check workers in another part of a building in which a holiday crèche is held, or the cleaners who clean the premises when the children are not present;
 - *Subsections (4) and (5)* clarify *Subsections (1)(c) and (1)(d)* by ensuring that they do not apply where the contact is made in the course of a child’s employment;
 - *Subsection (6)* defines *Subsection (1)(g)*, listing positions or roles not otherwise caught by the definition, such as members of a school’s governing body and charitable trustees; these positions are ones which may provide privileged access to children and imply that the individual concerned is a person who can be properly trusted with children, and are therefore included even if contact with children is not a regular part of the position. *Subsection (7)* clarifies certain of these definitions as they relate to local government, and *Subsections (8) and (9)* further qualify *Subsection (6)* for the purposes of applying these measures to Northern Ireland;
 - *Subsection (10)* clarifies *Subsection (1)(h)* by explaining what is meant by the supervision or management of an individual; and
 - *Subsections (11) to (14)* provide further definition and clarification where necessary.
94. *Subsection (15)* gives the Secretary of State power to amend the definition of a ‘regulated position’ by *affirmative resolution order*, should it become apparent that -

perhaps because new positions are created or developed - there are positions or roles not covered by this legislation that should be caught.

Section 37: Disqualification in Scotland or Northern Ireland

95. *Section 37* provides a power for the Secretary of State to ensure that individuals who, under the law of Scotland or Northern Ireland are subject to a prohibition or disqualification which corresponds to the means of disqualification provided for by *Section 35*, are subject to this Part i.e. disqualified from working with children in England and Wales. Statutory provisions are not yet in place in Scotland or Northern Ireland. This Section is intended to allow the protections provided by the integrated system to be available on a UK basis in due course.

Section 38: Rehabilitation of offenders

96. *Section 38* is designed to ensure that an offender disqualified from working with children under this part is not unfairly disadvantaged in other spheres of work. This Section provides that a disqualification order is not considered a sentence for the purposes of the Rehabilitation of Offenders Act 1974. It will prevent the existence of the disqualification order stopping the normal rehabilitation period for the sentence it accompanies applying. However, information on such convictions and the disqualification order will be available to those able to ask exempted questions under Exceptions Orders made under the Rehabilitation of Offenders Act 1974.

Sections 39 and 40: Indecency with Children Act 1960

97. This Part of the Act raises the age of a child against whom the offence of indecency with a child can be committed to include children up to 16. This closes a loophole in the law and should improve the protection of children against those who abuse them. A similar amendment is made to the Children and Young Person's Act (Northern Ireland) 1968, although there a child up to 17 is protected to reflect their higher age of consent.

Section 41: Indecent photographs of children: increase of maximum penalties

98. The effect of this Section will be to increase the maximum penalties relating to indecent photographs of children. The maximum sentence, for the offences of taking, making, distributing, showing, publishing or possessing with a view to distribution, indecent photographs of children under sixteen, under *Section 6* of the Protection of Children Act 1978 is increased from three years imprisonment and an unlimited fine, to ten years imprisonment and an unlimited fine. The maximum sentence for the simple possession of child pornography under *Section 160* of the Criminal Justice Act 1988 is increased from six months imprisonment and a level 5 fine to five years imprisonment and an unlimited fine. The Section will also amend the equivalent Northern Ireland legislation.