



Protection of Children (Scotland) Act 2003

2003 asp 5

Inclusion in list

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

- (1) The Scottish Ministers, on being satisfied as to the matters set out in subsection (2) below in relation to a reference to them under section 2(1) or 4(1) above, shall proceed in accordance with subsections (3) to (6) below.
- (2) Those matters are—
 - (a) that the reference is not vexatious or frivolous; and
 - (b) that the information submitted to the Scottish Ministers with the reference indicates that it may be appropriate for an individual to be included in the list kept under section 1(1) above.
- (3) The Scottish Ministers shall—
 - (a) invite observations from the individual—
 - (i) on the information submitted with the reference; and
 - (ii) if the Scottish Ministers think fit, on any observations made in response to an invitation under paragraph (b) below; and
 - (b) invite observations from the organisation which, or person who, made the reference—
 - (i) on any observations made by the individual on the information submitted with the reference; and
 - (ii) if the Scottish Ministers think fit, on any other observations made in response to an invitation under paragraph (a) above.
- (4) The Scottish Ministers, having considered the information submitted with the reference, any observations submitted to them and any other information which they consider relevant, shall—
 - (a) where they are satisfied as to the matters set out in subsection (5) below, include the individual in the list by—
 - (i) where the individual is provisionally included under section 7(1) below in the list, amending the list so as to indicate that the individual's inclusion is no longer provisional; or

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- (ii) where the individual has been removed under section 7(4) below from the list, restoring the individual to the list; or
 - (b) where they are not so satisfied, remove or, as the case may be, confirm the removal of the individual from the list.
- (5) Those matters are—
- (a) that the organisation which, or person who, made the reference reasonably considered the individual to have (whether or not in the course of the individual's work) harmed a child or placed a child at risk of harm; and
 - (b) that the individual is unsuitable to work with children.
- (6) Where the Scottish Ministers have made a determination under subsection (4)(a) above they shall—
- (a) provide the individual in respect of whom the determination is made with notice specifying whether the individual is to be included in the list; and
 - (b) if they are aware that the individual is working in a child care position for an organisation at the time of the determination, provide the organisation with such notice.

6 Individuals named in the findings of certain inquiries

- (1) Where—
- (a) a relevant inquiry has been held;
 - (b) the report of the person who held the inquiry names an individual who is or has been working in a child care position; and
 - (c) it appears to the Scottish Ministers from the report—
 - (i) that the person who held the inquiry found that the individual has, at a time when the individual was working in a child care position (whether or not in the course of the individual's work and whether before or after this section comes into force), harmed a child or placed a child at risk of harm; and
 - (ii) that the individual is unsuitable to work with children,
 the Scottish Ministers may proceed in accordance with subsections (2) to (4) below in order to determine whether the individual should be included in the list kept under section 1(1) above.
- (2) The Scottish Ministers shall—
- (a) invite observations from the individual—
 - (i) on the report, so far as relating to the individual; and
 - (ii) if the Scottish Ministers think fit, on any observations submitted under paragraph (b) below; and
 - (b) invite observations from the person for whom the individual, at the time of the act or omission which gave rise to the finding that the individual harmed a child or placed a child at risk of harm, worked—
 - (i) on any observations made by the individual on the report; and
 - (ii) if the Scottish Ministers think fit, on any other observations made in response to the invitation under paragraph (a) above.
- (3) The Scottish Ministers, having considered the report, any observations submitted to them and any other information which they consider relevant, shall—

- (a) where they are satisfied as to the matters set out in subsection (4) below, include the individual in the list by—
 - (i) where the individual is provisionally included under section 7(1) below in the list, amending the list so as to indicate that the individual's inclusion is no longer provisional; or
 - (ii) where the individual has been removed under section 7(4) below from the list, restoring the individual to the list; or
 - (b) where they are not so satisfied, remove or, as the case may be, confirm the removal of the individual from the list.
- (4) Those matters are—
- (a) that the person who held the inquiry reasonably considered that the individual has, at a time when the individual was working in a child care position (whether or not in the course of the individual's work), harmed a child or placed a child at risk of harm; and
 - (b) that the individual is unsuitable to work with children.
- (5) Where the Scottish Ministers have made a determination under subsection (3)(a) above they shall—
- (a) provide the individual in respect of whom the determination is made with notice specifying whether the individual is to be included in the list; and
 - (b) if they are aware that the individual is working in a child care position for an organisation at the time of the determination, provide the organisation with such notice.
- (6) In this section “relevant inquiry” means any of the following—
- (a) an inquiry held—
 - (i) by the Scottish Ministers;
 - (ii) by the Scottish Parliament (including an inquiry held by a committee or sub-committee of the Parliament);
 - (b) an inquiry held by a tribunal appointed under the Tribunals of Inquiry (Evidence) Act 1921 (c. 7);
 - (c) any other inquiry or hearing designated for the purposes of this section by an order made by the Scottish Ministers.

7 Provisional inclusion in list

- (1) Where the Scottish Ministers—
- (a) are to determine, under section 5(4) above, a reference under section 2(1) or 4(1) above; or
 - (b) decide to make a determination under section 6 above,
- they shall provisionally include the individual in respect of whom the determination is to be made in the list kept under section 1(1) above.
- (2) The list shall indicate whether an individual's inclusion in it is provisional upon such a determination.
- (3) The Scottish Ministers shall—
- (a) provide an individual who is provisionally included in the list with notice of that fact; and

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- (b) if they are aware that the individual is working in a child care position for an organisation at the time when the individual is provisionally included in the list, provide the organisation with such notice.
- (4) If the Scottish Ministers have not made a determination under section 5 or 6 above within the relevant period they shall remove the individual from the list pending their determination.
- (5) The “relevant period” is—
- (a) where the circumstance or, as the case may be, act in respect of which a reference under section 2(1) or 4(1) above is made is the subject of legal or disciplinary proceedings, the period of six months which begins on the date on which the proceedings are finally determined;
 - (b) in any other case, the period of six months which begins on the date on which the individual is provisionally included in the list; or
 - (c) where either of the periods mentioned in paragraphs (a) and (b) above is extended under subsection (6) below, the extended period.
- (6) The sheriff may, on an application by the Scottish Ministers and on cause shown, extend the period mentioned in paragraph (a) or (b) of subsection (5) above by such period of up to six months as the sheriff may specify.
- (7) For the purposes of subsection (5)(a) above, proceedings are finally determined when—
- (a) the proceedings are terminated without a decision being made;
 - (b) a decision is made against which no appeal (other than an appeal which need not be timeous) lies;
 - (c) in a case where an appeal lies with leave against a decision, the time limit for applications for leave expires without leave being granted; or
 - (d) in a case where leave to appeal against a decision is granted or is not required, the time limit for appeal expires without an appeal being brought.
- (8) For the purposes of subsection (7) above, an appeal which need not be timeous is—
- (a) an appeal under Part VIII (appeals from solemn proceedings) of the Criminal Procedure (Scotland) Act 1995 (c. 46) in relation to which the High Court must, if the appeal is to be competent, extend the time within which intimation of intention to appeal or note of appeal or both may be given; or
 - (b) an appeal under section 191 (appeal by suspension on ground of miscarriage of justice) of that Act.

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

- (1) The Scottish Ministers may, by regulations, make such further provision as to the procedure which is to apply in relation to a determination under section 5 or 6 above as they think fit.
- (2) The regulations may, in particular, make provision in relation to—
- (a) the procedure to be followed by the Scottish Ministers before making their determination; and
 - (b) the procedure to be followed by an individual, organisation or other person invited, under section 5(3) or 6(2) above, to make observations.

9 Protection from actions of defamation

It is declared for the purposes of the law of defamation that—

- (a) any information submitted with a reference under section 2(1) or 4(1) above;
- (b) any observation made in response to an invitation given under section 5(3) or 6(2) above,

is privileged unless it is shown to have been submitted or, as the case may be, made with malice.

10 Individuals convicted of an offence against a child

- (1) Subject to subsections (3) and (4) below, on convicting an individual of an offence against a child the court—
 - (a) where the offence is a relevant offence, shall; or
 - (b) where the offence is not a relevant offence, may (if it thinks fit), propose to refer the case of the individual to the Scottish Ministers.
- (2) Subsection (1) above applies in relation to offences committed before and after this section comes into force.
- (3) Where an individual convicted of an offence against a child was under 18 years of age when the offence was committed, the court may propose to refer the case only if it is satisfied that the individual is likely to commit a further offence against a child.
- (4) Where an individual convicted of an offence against a child was 18 years of age or over when the offence was committed, the court shall not propose to refer the case if it is satisfied that the individual is unlikely to commit a further offence against a child.
- (5) The court shall, subject to subsection (6) below, make the proposed reference to the Scottish Ministers.
- (6) The court shall not make the proposed reference unless—
 - (a) the time limit for applications for leave to appeal against the proposed reference expires without leave being granted; or
 - (b) in a case where leave to appeal against a proposed reference is granted, the appeal is dismissed or abandoned.
- (7) The Scottish Ministers shall include an individual referred to them under subsection (5) above in the list kept under section 1(1) above.
- (8) On so including an individual in the list the Scottish Ministers shall—
 - (a) provide the individual who is so included with notice of that fact; and
 - (b) if they are aware that the individual is working in a child care position for an organisation at the time of the determination, provide the organisation with such notice.
- (9) For the purposes of this section—
 - (a) an individual commits a relevant offence if the individual—
 - (i) commits any offence mentioned in paragraph 1 of schedule 1 to this Act; or
 - (ii) falls within paragraph 2 of that schedule; and
 - (b) an individual commits an offence against a child if the individual—
 - (i) commits a relevant offence;

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- (ii) commits any other offence in respect of which the person in relation to whom the offence was committed was a child,
and references to being convicted of, or charged with, a relevant offence or, as the case may be, an offence against a child are to be read accordingly.
- (10) The Scottish Ministers may by order amend subsection (9)(b) above or schedule 1 to this Act so as to modify, for the purposes of this section, the meaning of “offence against a child” or “relevant offence” by—
- (a) adding offences to or, as the case may be, removing them from those referred to in that subsection or, as the case may be, schedule; or
 - (b) varying any of the descriptions of the offences there referred to.
- (11) Subsection (12) below applies to an individual charged with an offence against a child—
- (a) if—
 - (i) the individual is acquitted on the ground of insanity; or
 - (ii) the court, following an examination of facts under subsection (1) of section 55 (examination of facts) of the Criminal Procedure (Scotland) Act 1995 (c. 46), makes a finding under subsection (2) of that section in respect of the individual; and
 - (b) the court makes any order mentioned in section 57(2)(a) to (d) of that Act of 1995 in relation to the acquittal or finding.
- (12) An individual to whom this subsection applies is—
- (a) to be treated, for the purposes of this section, as having been convicted of the offence; and
 - (b) entitled to appeal, under section 106(1)(db) (right of appeal in solemn proceedings) or, as the case may be, 175(2)(cb) (right of appeal in summary proceedings) of that Act of 1995, against a reference made under subsection (1) above as if the individual had been convicted of the offence.