



# Protection of Children (Scotland) Act 2003

## 2003 asp 5

**The Bill for this Act of the Scottish Parliament was passed by the Parliament on 12th February 2003 and received Royal Assent on 19th March 2003**

An Act of the Scottish Parliament to require the Scottish Ministers to keep a list of individuals whom they consider to be unsuitable to work with children; to prohibit individuals included in the list, and individuals who are similarly regarded in other jurisdictions, from doing certain work relating to children; to make further provision in relation to that list; and for connected purposes.

VALID FROM 10/01/2005

### *Duty to keep list*

#### **1 Duty of Scottish Ministers to keep list**

- (1) The Scottish Ministers shall keep a list of individuals whom they consider to be unsuitable to work with children.
- (2) An individual may be included in the list only in accordance with section 5, 6 or 10 below.
- (3) The Scottish Ministers may at any time remove an individual from the list if they are satisfied that the individual should not have been included in it.

VALID FROM 10/01/2005

### *Referrals*

#### **2 Reference following disciplinary action etc.**

- (1) An organisation shall refer to the Scottish Ministers the case of an individual who is or has been working in a child care position if—
  - (a) any of the circumstances mentioned in subsection (3) below; or
  - (b) the circumstance mentioned in subsection (4) below,

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has arisen.

- (2) An organisation which fails to comply with the duty imposed by subsection (1) above is, subject to subsection (5) below, guilty of an offence and liable—
- (a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both;
  - (b) on a conviction on indictment, to imprisonment for a term not exceeding five years or to a fine, or to both.
- (3) The circumstances referred to in subsection (1)(a) above are—
- (a) that the organisation has dismissed the individual on the ground that the individual has (whether or not in the course of the individual's work) harmed a child or placed a child at risk of harm;
  - (b) that the individual has resigned, retired or been made redundant in circumstances such that the organisation would have dismissed the individual, or would have considered dismissing the individual, on such ground if the individual had not resigned, retired or been made redundant;
  - (c) that the organisation has, on such ground, transferred the individual to a position within the organisation which is not a child care position;
  - (d) that the individual is, or was, employed by the organisation for a fixed term and the organisation has formed the opinion that—
    - (i) if the individual's employment was not due to expire at the end of the fixed term, the organisation would dismiss the individual, or would consider dismissing the individual, on such ground; or
    - (ii) if the individual's employment has expired at the end of the fixed term, the organisation, if the individual were still employed by the organisation, would have dismissed the individual, or would have considered dismissing the individual, on such ground.
- (4) The circumstance referred to in subsection (1)(b) above is that—
- (a) the individual has, in circumstances not falling within subsection (3) above—
    - (i) been dismissed by the organisation;
    - (ii) resigned, retired or been made redundant; or
    - (iii) been transferred by the organisation to a position within the organisation which is not a child care position;
  - (b) information not available to the organisation at the time of the dismissal, resignation, retirement, redundancy or transfer has since become available; and
  - (c) the organisation has formed the opinion that, if that information had been available at that time and if (where applicable) the individual had not resigned, retired or been made redundant, the organisation would have dismissed the individual, or would have considered dismissing the individual, on such ground as is mentioned in subsection (3)(a) above.
- (5) An organisation may (but, despite subsection (1) above, need not) refer the case of an individual to the Scottish Ministers under this section where the dismissal, resignation, retirement, redundancy, transfer or suspension took place or, as the case may be, the organisation's opinion was formed before the date on which this section comes into force.

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### **3 Reference by employment agency etc.**

- (1) Section 2 above has effect in relation to an organisation which carries on an employment agency or an agency for the supply of nurses as if—
- (a) in subsection (1), for “shall” there were substituted “ may ”;
  - (b) for paragraphs (a) and (b) of subsection (1) and the words “has arisen” which follow those paragraphs there were substituted—
    - “(a) the organisation has decided not to do any further business with the individual on the ground that the individual has (whether or not in the course of the individual’s work) harmed a child or placed a child at risk of harm; or
    - (b) the organisation has decided on such ground not to find the individual further work, or to offer or supply the individual for further work, in a child care position.”; and
  - (c) subsections (2), (3) and (4) were omitted.
- (2) Section 2 above has effect in relation to an organisation which carries on an employment business as if—
- (a) in subsection (1)—
    - (i) for “is or has been working” there were substituted “ has been offered or supplied by the organisation for work ”; and
    - (ii) paragraph (b) and the word “or” preceding it were omitted;
  - (b) for paragraphs (c) and (d) of subsection (3) there were substituted—
    - “(c) that the organisation has, on such ground, decided not to offer or supply the individual for further work in a child care position.”; and
  - (c) subsection (4) were omitted.

### **4 Reference by certain other persons**

- (1) A person to whom this section applies may refer to the Scottish Ministers the case of an individual who is or has been working in a child care position if—
- (a) on the basis of evidence obtained by the person in the exercise of relevant functions, the person considers that the individual has (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
  - (b) that case has not been referred to the Scottish Ministers under section 2 above in respect of the act which harmed a child or placed a child at risk of harm.
- (2) This section applies to—
- (a) the Scottish Commission for the Regulation of Care;
  - (b) the Scottish Social Services Council;
  - (c) the General Teaching Council for Scotland; and
  - (d) any other person specified for the purposes of this section in an order made by the Scottish Ministers.
- (3) For the purposes of subsection (1)(a) above, “relevant functions” means—
- (a) in relation to the Scottish Commission for the Regulation of Care and the Scottish Social Services Council, such functions as are conferred on the Commission or, as the case may be, the Council by the 2001 Act or any other enactment;

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- (b) in relation to the General Teaching Council for Scotland, such functions as are conferred on it by or under the Teaching Council (Scotland) Act 1965 (c. 19); and
- (c) in relation to a person specified in an order made under subsection (2)(d) above, such functions as are specified for the purposes of this section by the order.

VALID FROM 10/01/2005

*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
    - (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—

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- (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

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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.
- (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
  - (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.



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- (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,

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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 [<sup>F1</sup>reference proposed under subsection (1) above] to the Scottish Ministers.
- (6) The court shall not make the [<sup>F2</sup>reference proposed under subsection (1) above] unless—
  - [<sup>F3</sup>(a) the period during which an appeal against the proposed reference may be brought has expired without an appeal being brought; or
  - (b) where an appeal is brought within that period, it 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;
    - (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.



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- (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.

#### Textual Amendments

- F1** Words in s. 10(5) substituted (4.10.2004) by [Criminal Procedure \(Amendment\) \(Scotland\) Act 2004 \(asp 5\)](#), **ss. 24(1)(a)**, 27(1); S.S.I. 2004/405, art. 2(1), Sch. 1 (with arts. 3-5)
- F2** Words in s. 10(6) substituted (4.10.2004) by [Criminal Procedure \(Amendment\) \(Scotland\) Act 2004 \(asp 5\)](#), **ss. 24(1)(a)**, 27(1); S.S.I. 2004/405, art. 2(1), Sch. 1 (with arts. 3-5)
- F3** S. 10(6)(a)(b) substituted (4.10.2004) by [Criminal Procedure \(Amendment\) \(Scotland\) Act 2004 \(asp 5\)](#), **ss. 24(1)(b)**, 27(1); S.S.I. 2004/405, art. 2(1), Sch. 1 (with arts. 3-5)

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#### *Effect of inclusion in list*

### **11 Offences relating to work in a child care position**

- (1) It is an offence for an individual who is disqualified from working with children to apply for, offer to do, accept or do any work in a child care position.
- (2) It is a defence for an individual charged with an offence under subsection (1) above to prove that the individual did not know, and could not reasonably be expected to have known, that the individual was, at the time of the offence, disqualified from working with children.

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- (3) It is an offence for an organisation to—
- (a) offer work in a child care position to, or procure such work for, an individual who is disqualified from working with children; or
  - (b) fail to remove an individual who is so disqualified from such work.
- (4) An organisation commits an offence under subsection (3) above if the organisation offers work in a child care position to, or procures work in a child care position for, an individual who is already working for the organisation.
- (5) It is a defence for an organisation charged with an offence under subsection (3) above to prove that the organisation did not know, and could not reasonably be expected to have known, that the individual was, at the time of the offence, disqualified from working with children.
- (6) An act which would, but for this subsection, be an offence under subsection (1) or (3) above is not an offence if—
- (a) the individual who commits the act or, as the case may be, the individual in relation to whom the organisation commits the act, is disqualified from working with children by virtue only of paragraph (c) of section 17(1) below;
  - (b) that individual is, by virtue of subsection (1)(b) or (c) of section 142 (prohibition from teaching etc.) of the Education Act 2002 (c. 32), allowed to carry out work to which that section applies only—
    - (i) in circumstances specified in a direction under that section; or
    - (ii) if conditions specified in such a direction are satisfied; and
  - (c) the act relates to such work or to any other work in a child care position being carried out in such circumstances or, as the case may be, in satisfaction of such conditions.
- (7) A person guilty of an offence under subsection (1) or (3) above is liable—
- (a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both;
  - (b) on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine, or to both.

## 12 Searches of lists: amendment of Police Act 1997

- (1) The amendments made to sections 113 (criminal record certificates) and 115 (enhanced criminal record certificates) of the Police Act 1997 (c. 50) (“the 1997 Act”) by—
- (a) section 8 of the Protection of Children Act 1999 (c. 14);
  - (b) sections 102 and 104 of, and paragraph 25 of Schedule 4 to, the Care Standards Act 2000 (c. 14); and
  - (c) paragraphs 13 to 15 of Schedule 12, paragraph 7 of Schedule 13 and paragraphs 72 and 73 of Schedule 21 to the Education Act 2002 (c. 32),
- extend, in so far as they do not already do so, to Scotland.
- (2) Those sections of the 1997 Act are further amended as follows—
- (a) in subsection (3A)(a) of section 113, after sub-paragraph (i) there is inserted—
 

“(ia) the list kept under section 1(1) of the Protection of Children (Scotland) Act 2003 (asp 5);”;

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- (b) in subsection (3B) of that section, after paragraph (a) there is inserted—
    - “(aa) a child care position within the meaning of the Protection of Children (Scotland) Act 2003 (asp 5);”;
  - (c) in subsection (3E) of that section—
    - (i) after “to”, where it first occurs, there is inserted “ considering the applicant's ”;
    - (ii) after “to”, where it fourth occurs, there is inserted “—
      - (a) considering the applicant's”;
    - (iii) paragraphs (a), (b) and (c) are renumbered as sub-paragraphs (i), (ii) and (iv) respectively;
    - (iv) the word “or”, at the end of sub-paragraph (ii) (as re-numbered above) is repealed;
    - (v) after that sub-paragraph there is inserted—
      - “(iii) under Part 3 of the Regulation of Care (Scotland) Act 2001 (asp 8) (social workers); or”;
    - (vi) at the end, there is inserted; and
      - “(b) considering the applicant’s application to have a care service, consisting of the provision of child minding or the day care of children, registered under Part 1 of the Regulation of Care (Scotland) Act 2001 (asp 8) (care services)”;
  - (d) in subsection (6A)(a) of section 115, after sub-paragraph (i) there is inserted—
    - “(ia) the list kept under section 1(1) of the Protection of Children (Scotland) Act 2003 (asp 5);”.
- (3) The Scottish Ministers may by order modify sections 113(3A)(a) and 115(6A)(a) of the 1997 Act by adding to each of them provision which describes any list kept under the law of Northern Ireland, the Channel Islands, the Isle of Man, any British overseas territory or any other territory or country outwith the United Kingdom which, in the opinion of the Scottish Ministers, corresponds to any of the lists mentioned in paragraphs (a), (b), (ba) and (ca) of section 17(1) below.

### **13 Amendment of Teaching Council (Scotland) Act 1965**

In section 6 (register of teachers) of the Teaching Council (Scotland) Act 1965 (c. 19), after subsection (2B) there is inserted—

- “(2C) A person shall not be entitled to be registered if he is included (otherwise than provisionally) in the list kept under section 1(1) of the Protection of Children (Scotland) Act 2003 (asp 5).
- (2D) Any person who is registered and is, at any time after being registered, included (otherwise than provisionally) in that list shall be removed from the register.”.

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VALID FROM 10/01/2005

### *Removal from list and appeals*

#### **14 Applications for removal from list**

- (1) An individual who is included in the list kept under section 1(1) above may, with the leave of the sheriff, apply to the sheriff for a determination as to whether or not the individual should continue to be included in the list.
- (2) On an application under subsection (1) above, the sheriff, if satisfied that the individual is not unsuitable to work with children, shall by order direct the removal of the individual from the list; otherwise the sheriff shall dismiss the application.
- (3) An application for leave to make an application under subsection (1) above may not be made unless—
  - (a) subject to subsection (7)(a) below, the condition set out in subsection (4) below is fulfilled; and
  - (b) the individual has made no other such application for leave—
    - (i) in the period of ten (or, in the case of an individual who was a child at the relevant time, five) years ending with the date on which the individual makes the application for leave; or, as the case may be
    - (ii) in any other period specified in an order made under section 15(8) below.
- (4) That condition is—
  - (a) in the case of an individual included in the list under section 10(7) above, that—
    - (i) at least ten (or, in the case of an individual who was a child at the relevant time, five) years have elapsed since the day on which the individual was so included; and
    - (ii) in the case of an individual—
      - (A) whose sentence is a term of imprisonment or a term of detention; or
      - (B) detained in a hospital pursuant to an order of the court, the individual has been released or, as the case may be, ceases to be liable to be detained in the hospital; and
  - (b) in the case of any other individual, that the individual has been included (otherwise than provisionally) in the list for a continuous period of at least ten (or, in the case of an individual who was a child at the relevant time, five) years.
- (5) For the purposes of subsections (3) and (4) above, the “relevant time” is—
  - (a) the time at which the offence in relation to which the individual was referred, under section 10(1) above, to the Scottish Ministers was committed; or, as the case may be
  - (b) the time at which the individual is considered by the person—
    - (i) who referred the individual, under section 2(1) or 4(1) above, to the Scottish Ministers; or, as the case may be

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- (ii) who held the inquiry in respect of which the individual was included, under section 6 above, in the list,  
to have harmed a child or placed a child at risk of harm.
- (6) Where—
- (a) an individual is released on licence under Part I (detention, transfer and release of prisoners) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (c. 9); or
  - (b) a supervised release order is, in relation to the release of an individual, granted under section 209 (supervised release orders) of the Criminal Procedure (Scotland) Act 1995 (c. 46),
- the individual is, for the purposes of subsection (4)(a)(ii) above, to be treated as being released on the day on which the licence expires (otherwise than by being revoked) or, as the case may be, the order expires.
- (7) The sheriff may—
- (a) on being satisfied as to the matters set out in subsection (8) below, consider an application for leave to make an application under subsection (1) above despite the fact that it does not fulfil one or both of the conditions set out in subsection (3) above;
  - (b) grant such an application for leave only if the sheriff is satisfied as to those matters.
- (8) Those matters are—
- (a) that the individual's circumstances have changed since the individual was included (otherwise than provisionally) in the list, or, as the case may be, since the individual last made such an application for leave; and
  - (b) that the change is such that the application should be considered or, as the case may be, leave should be granted.

## **15 Appeals: inclusion in list under section 5 or 6 etc.**

- (1) An individual who is included (otherwise than provisionally) in the list kept under section 1(1) above may appeal to the sheriff against a determination, under section 5 or 6 above, of the Scottish Ministers to include the individual in the list.
- (2) An appeal under subsection (1) above may not be lodged later than three months after the date on which the Scottish Ministers made the determination or decision being appealed unless the sheriff, on cause shown, so allows.
- (3) The sheriff, unless satisfied—
- (a) that the individual has harmed a child or placed a child at risk of harm; and
  - (b) that the individual is unsuitable to work with children,
- shall allow an appeal under subsection (1) above and direct the removal of the individual from the list; otherwise the sheriff shall dismiss the appeal.
- (4) A party to an appeal under subsection (1) above may appeal to the sheriff principal against any decision of the sheriff to allow or dismiss the appeal.
- (5) An appeal may be made by—
- (a) an individual who has made an application under section 14(1) above; or
  - (b) the Scottish Ministers,

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to the sheriff principal against the decision of the sheriff on the application.

- (6) An appeal may, with the leave of the sheriff principal, be made by—
- (a) the individual who is included in the list kept under section 1(1) above; or
  - (b) the Scottish Ministers,
- to the Inner House of the Court of Session against any decision of the sheriff principal to allow or dismiss an appeal under subsection (4) or (5) above.
- (7) The decision of—
- (a) the sheriff principal; or
  - (b) if leave is granted to appeal to the Inner House, that House,
- on any appeal shall be final.
- (8) In allowing or dismissing an appeal, under subsection (6) above, of the decision of a sheriff principal on an appeal under subsection (5) above, the Inner House may by order specify a period other than the period specified in section 14(3)(b) above as the period during which the individual may not make an application to the sheriff for leave to make a further application for an order under section 14(2) above.
- (9) Where an individual has been convicted of an offence involving conduct (whether or not in the course of the individual's work) which harmed a child or placed a child at risk of harm, no finding of fact on which the conviction is based may be challenged on an appeal under subsection (1) or (4) above.

## **16 Appeals: inclusion in list following conviction of offence against a child**

- (1) The Criminal Procedure (Scotland) Act 1995 (c. 46) is amended as follows.
- (2) In section 106(1) (right of appeal in solemn proceedings)—
- (a) after paragraph (da), there is inserted—
    - “(db) against any reference proposed under section 10(1) of the Protection of Children (Scotland) Act 2003 (asp 5) in respect of the conviction;
    - (dc) against such reference and, subject to subsection (2) below, such sentence, disposal or order or any order deferring sentence.”;
  - (b) in paragraph (f), the words after “against” become sub-paragraph (i); and
  - (c) at the end of that paragraph there is inserted—
    - “(ii) both such a conviction and such a reference; or
    - (iii) such a conviction, such a reference and, subject to subsection (2) below, such sentence, disposal or order.”.
- (3) In section 116 (abandonment of appeal in solemn proceedings), for subsection (2) there is substituted—
- “(2) A person who has appealed under section 116(1)(dc) or (f) of this Act may abandon the appeal in so far as it is against conviction, reference or sentence, decision, disposal or order and may proceed with it against—
- (a) both reference and sentence, decision, disposal or order; or
  - (b) reference alone; or, as the case may be
  - (c) sentence, decision, disposal or order alone.”.



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- (4) In section 118 (disposal of appeals in solemn proceedings)—
- (a) after subsection (4), there is inserted—
- “(4AA) The High Court may dispose of an appeal against a reference proposed under subsection (1) of section 10 of the Protection of Children (Scotland) Act 2003 (asp 5)—
- (a) by dismissing the appeal and affirming such reference; or
- (b) if it thinks—
- (i) in a case to which subsection (3) of that section applies, that the court which is proposing to make the reference should not have been satisfied as to the condition mentioned in that subsection;
- (ii) in a case to which subsection (4) of that section applies, that the court which is proposing to make the reference should have been satisfied as to the condition mentioned in that subsection,
- by directing the court not to make the reference.”;
- (b) in subsection (7), the words after “on” become paragraph (a); and
- (c) at the end of that subsection there is inserted “; or, as the case may be,
- (b) whether a reference is appropriate in any similar case.”.
- (5) In section 121A(1) (suspension of certain sentences pending appeal), after “(e)” there is inserted “ (other than an appeal under section 106(1)(db) or (dc)) ”.
- (6) In section 173(2) (quorum of High Court for appeals in summary proceedings), after “(c)” there is inserted “ or (cb) ”.
- (7) In section 175 (right of appeal in summary proceedings)—
- (a) the word “or” which precedes paragraph (ca) of subsection (2) is repealed;
- (b) after that paragraph, there is inserted—
- “(cb) against any reference proposed under section 10(1) of the Protection of Children (Scotland) Act 2003 (asp 5) in respect of the conviction or, as the case may be, against such reference and such sentence, disposal or order; or”;
- (c) in paragraph (d) of that subsection, the words after “against” become subparagraph (i);
- (d) at the end of that paragraph there is inserted—
- “(ii) both such a conviction and such a reference; or
- (iii) such a conviction, such a reference and such sentence, disposal or order.”;
- (e) in subsection (8), for the words from “against”, where first occurring, to “alone,” there is substituted “under subsection (2)(cb) or (d) above may abandon the appeal in so far as it is against conviction, reference or sentence and may proceed with it against—
- (a) both reference and sentence; or
- (b) reference alone; or, as the case may be
- (c) sentence alone.”; and
- (f) in subsection (9), after “(c)” there is inserted “ or (cb) ”.

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- (8) In section 186 (appeals against sentence in summary proceedings), after “(c)”, where it appears in subsections (1), (2), (9) and (10), there is in each case inserted “or (cb)”.
- (9) In section 187(1) (leave to appeal in summary proceedings), after “(c)” there is inserted “or (cb)”.
- (10) In section 189 (disposal of appeals in summary proceedings)—
- (a) after subsection (2), there is inserted—
- “(2A) The High Court may dispose of an appeal against a reference proposed under subsection (1) of section 10 of the Protection of Children (Scotland) Act 2003 (asp 5) by—
- (a) dismissing the appeal and affirming such reference; or
- (b) if it thinks—
- (i) in a case to which subsection (3) of that section applies, that the court which is proposing to make the reference should not have been satisfied as to the condition mentioned in that subsection;
- (ii) in a case to which subsection (4) of that section applies, that the court which is proposing to make the reference should have been satisfied as to the condition mentioned in that subsection,
- by directing the court not to make the reference.”;
- (b) in subsection (7), the words after “on” become paragraph (a); and
- (c) at the end of that subsection there is inserted “; or, as the case may be,
- (b) whether a reference is appropriate in any similar case.”.
- (11) In section 193A(1) (suspension of certain sentences pending appeal), after “Act” there is inserted “ (other than by way of an appeal under section 175(2)(cb) of this Act against a reference only) ”.

### *Interpretation and general*

VALID FROM 10/01/2005

#### **17 Meaning of “disqualified from working with children”**

- (1) References in this Act to being disqualified from working with children are to be treated as references to being—
- (a) included (otherwise than provisionally) in the list kept under section 1(1) above;
- (b) included (otherwise than provisionally) in the list kept under section 1 (duty of Secretary of State to keep list of individuals considered unsuitable to work with children) of the Protection of Children Act 1999 (c. 14);
- (c) subject to a direction under subsection (1)(a) of section 142 (prohibition from teaching etc.) of the Education Act 2002 (c. 32), given on the grounds mentioned in subsection (4)(b) of that section, not to carry on work to which that section applies;

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- (d) subject to a disqualification order (within the meaning of Part II (protection of children) of the Criminal Justice and Court Services Act 2000 (c. 43)); or
  - (e) an individual falling within subsection (2) below.
- (2) An individual falls within this subsection if, under the law of Northern Ireland, the Channel Islands, the Isle of Man, any British overseas territory or any other territory or country outwith the United Kingdom, the individual is subject to a prohibition or disqualification which the Scottish Ministers by order provide corresponds to disqualification (by virtue of any of paragraphs (a) to (d) of subsection (1) above) from working with children.

VALID FROM 10/01/2005

## 18 Interpretation

### (1) In this Act—

- “the 2001 Act” means the Regulation of Care (Scotland) Act 2001 (asp 8);
- “agency for the supply of nurses” has the meaning given by section 32 of the Nurses (Scotland) Act 1951 (c. 55);
- “child” means a person under the age of 18;
- “child care position” has the meaning given by schedule 2 to this Act;
- “disciplinary proceedings” means proceedings in which the regulatory body for a profession is to decide whether disciplinary action should be taken against an individual carrying on that profession;
- “disqualified from working with children” is to be construed in accordance with section 17 above;
- “employment agency” and “employment business” have the same meanings as in the Employment Agencies Act 1973 (c. 35);
- “harm” includes harm which is not physical harm;
- “legal proceedings” means civil or criminal proceedings in or before any court or tribunal;
- “local authority” means a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 (c. 39);
- “managers of an educational establishment” has the same meaning as in the Education (Scotland) Act 1980 (c. 44);
- “organisation” means—
  - (a) a body corporate or unincorporate;
  - (b) an individual who, in the course of a business, employs or otherwise gives work to other persons;
  - (c) the managers of an educational establishment;
- “prescribed” means prescribed by regulations made by the Scottish Ministers;
- “term of detention” means a term of detention—
  - (a) in a young offenders institution; or
  - (b) by virtue of section 208 of the Criminal Procedure (Scotland) 1995 Act (c.46), in some other place;
- “work” includes—

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- (a) work of any kind, whether paid or unpaid and whether under a contract of service or apprenticeship, under a contract for services, or otherwise than under a contract;
- (b) an office established by or by virtue of a prescribed enactment, and
- (c) caring for, or supervising, children whilst participating in any other organised activity,

and references to an individual “working” are to be construed accordingly.

(2) For the purposes of this Act, an individual is made redundant if—

- (a) the individual is dismissed; and
- (b) for the purposes of the Employment Rights Act 1996 (c. 18) the dismissal is by reason of redundancy.

VALID FROM 10/01/2005

## 19 Notices

- (1) A notice required by section 5(6)(a), 6(5)(a), 7(3)(a) or 10(8)(a) above to be given by the Scottish Ministers to an individual may be given—
- (a) by delivering it to the individual,
  - (b) by leaving it at the individual’s proper address, or
  - (c) by sending it to the individual at that address.
- (2) For the purposes of subsection (1) above and of paragraph 4 of Schedule 1 to the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 (S.I.1999/1379), a person’s proper address is that person’s last known address.

VALID FROM 10/01/2005

## 20 Offences by bodies corporate etc.

- (1) Where an offence under this Act committed—
- (a) by a body corporate other than a local authority, is committed with the consent or connivance of, or is attributable to any neglect on the part of, a person who—
    - (i) is a director, manager or secretary of the body corporate; or
    - (ii) purports to act in any such capacity;
  - (b) by a local authority, is committed with the consent or connivance of, or is attributable to any neglect on the part of, a person who—
    - (i) is an officer or member of the authority; or
    - (ii) purports to act in any such capacity;
  - (c) by a Scottish partnership, is committed with the consent or connivance of, or is attributable to any neglect on the part of, a person who—
    - (i) is a partner; or
    - (ii) purports to act in that capacity;

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- (d) by an unincorporated association other than a Scottish partnership, is committed with the consent or connivance of, or is attributable to any neglect on the part of, a person who—
- (i) is concerned in the management or control of the association; or
  - (ii) purports to act in the capacity of a person so concerned;
- the individual (as well as the body corporate or, as the case may be, the local authority, Scottish partnership or unincorporated association) is guilty of the offence and is liable to be proceeded against and punished accordingly.
- (2) Where the affairs of a body corporate are managed by its members, subsection (1) above applies in relation to the acts and defaults of a member in connection with the member's functions of management as if the member were a director of the body corporate.

## 21 Orders and regulations

- (1) Any power of the Scottish Ministers under this Act to make an order or regulations is exercisable by statutory instrument.
- (2) Any such power includes power to make—
- (a) different provision for different cases and for different classes of case; and
  - (b) such incidental, supplementary, consequential, transitional, transitory or saving provision as the Scottish Ministers think necessary or expedient.
- (3) Subject to subsection (4) below, a statutory instrument containing an order (other than an order made under section 22(2) below) or regulations made under this Act is subject to annulment in pursuance of a resolution of the Scottish Parliament.
- (4) A statutory instrument containing an order made under section 10(10) or 12(3) above or paragraph 13 of schedule 2 to this Act shall not be made unless a draft of the instrument has been laid before, and approved by a resolution of, the Scottish Parliament.

## 22 Short title and commencement

- (1) This Act may be cited as the Protection of Children (Scotland) Act 2003.
- (2) This Act (except this section and section 21 above) comes into force on such day as the Scottish Ministers may by order appoint.
- (3) An order under subsection (2) above may appoint different days for different purposes.

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VALID FROM 10/01/2005

**SCHEDULE 1**

*(introduced by section 10(9))*

**OFFENCES AGAINST A CHILD**

.....

**SCHEDULE 2**

*(introduced by section 18(1))*

**CHILD CARE POSITIONS**

.....



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