

# **SUPPLEMENTARY INFORMATION AND GUIDANCE**

## **DISQUALIFIED FROM WORKING WITH CHILDREN LIST**



**safer  
scotland**  
SCOTTISH GOVERNMENT



# **SUPPLEMENTARY INFORMATION AND GUIDANCE**

## **DISQUALIFIED FROM WORKING WITH CHILDREN LIST**

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## CONTENTS

Part 1	
Introduction	Page 1
Part 2	
Information on the DWCL process and how decisions are reached	Page 4
Part 3	
Guidance on completion of the referral form and supporting information	Page 14
Part 4	
Guidance on Provisional Listing: Working whilst provisionally listed	Page 21
Annex: Referral form	Page 29



## Part 1

### Introduction

The Protection of Children (Scotland) Act 2003 ('the 2003 Act') provides for Scottish Ministers<sup>1</sup> to keep a list of individuals whom they consider unsuitable to work with children. This is the Disqualified from Working with Children List (DWCL). The DWCL, which was commenced on 10 January 2005, contributes to protecting children from harm or risk of harm and helps restrict the undetected movement of unsuitable adults between child care positions.

The Scottish Executive issued Guidance on the operation of the 2003 Act in December 2004 and in March 2005. This comprises:

- (i) Guidance for Organisations
- (ii) Guidance about the Determination Process
- (iii) Guidance for Individuals
- (iv) Guidance to the voluntary sector on who needs to be checked against the Disqualified from Working with Children List.

The body of guidance can be found at:

<http://www.scotland.gov.uk/Topics/People/Young-People/children-families/17834/12076>

The Guidance for Organisations covers many issues relating to the 2003 Act including:

- A summary of the Act
- When to make a referral
- Retrospective referrals
- How to make a referral

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<sup>1</sup> Scottish Ministers delegate their duties under the 2003 Act to civil servants

- The determination process
- The initial assessment
- Provisional listing
- Inviting observations on the evidence
- Decisions on referral
- Other proceedings
- The appeals procedures
- Application for removal from the DWCL
- Offences by organisations and individuals
- Definition of child care position.

The Guidance for Organisations, except Annex B – Form for Making a Referral - is still relevant. A new referral form is at the Annex to this Information and Guidance booklet. The other three Guidance booklets are still relevant.

In spring 2008 the Scottish Government will be issuing further guidance on the definition of “child care position” in schedule 2 to the 2003 Act. The Scottish Government is working with the statutory and voluntary sectors to produce this guidance.

In light of experience of the 2003 Act over the last 3 years by both the Scottish Government and by organisations making referrals including employers and regulatory bodies, there is a need to supplement the 2004-05 guidance. Following a review of referrals to the DWCL and discussions with organisations including regulatory bodies, local authorities and voluntary organisations, this supplementary Information and Guidance covers the following:

Part 2	Information on the DWCL process and how decisions are reached
Part 3	Guidance on completion of the referral form and supporting information
Part 4	Guidance on provisional listing: working whilst provisionally listed
Annex	New referral form to be used from February 2008

Before making a referral, the Guidance for Organisations 2004 booklet (except Annex B, Form for Making a Referral) should be read along with Part 3 of this booklet and the Annex. Part 2 of this booklet is for information to help people understand the DWCL process and how decisions are reached. Part 4 comprises guidance to employers who have people working for them (in a paid or voluntary capacity) who are provisionally listed. The new referral form at the Annex to this booklet substitutes the referral form in the 2004 guidance booklet and can also be downloaded in PDF format from the 2003 Act's web section on the Scottish Government website at:

[www.scotland.gov.uk/childprotection](http://www.scotland.gov.uk/childprotection)

Parts 2 and 3 of this booklet deal mainly with the decision-making processes in relation to organisational referrals. Under section 10 of the 2003 Act Scottish courts have a duty to make referrals where the offence is a relevant offence (a schedule 1 offence) and a power in relation to other offences. This Information and Guidance booklet does not extend to court referrals.

The 2003 Act will be almost entirely repealed when the Protection of Vulnerable Groups (Scotland) Act 2007<sup>2</sup> (the 2007 Act) is commenced in summer/autumn 2009. Although there will be new arrangements and new guidance under the 2007 Act, there is still a significant period for referrals under the 2003 Act. In addition, since the process for organisational referrals under the 2007 Act, once commenced, will be broadly similar to that in operation now, this Information and Guidance may be a useful basis for subsequent guidance under the 2007 Act.

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<sup>2</sup> The Protection of Vulnerable Groups (Scotland) Act 2007 was developed in response to recommendation 19 of the Bichard Inquiry Report published in June 2004 by Sir Michael Bichard following his inquiry into the murder of two schoolgirls in Soham in 2002. The 2007 Act will establish a vetting and barring scheme intended to afford better protection to children and protected adults.



## Part 2

### Information on the DWCL process and how decisions are reached

#### Principles

The 2003 Act strengthens the safeguards for children and is one measure to help improve child protection. It helps keep unsuitable people out of the child care workforce. Those on the DWCL (other than provisionally) are disqualified from working with children and commit a criminal offence if they apply for, offer to do, accept or do any work with children.

As set out in the Scottish Executive's 2004 Guidance to Organisations, subject to section 2(5) of the 2003 Act<sup>3</sup>, organisations have a duty to refer an individual who is or has been working in a child care position if the individual has (whether or not in the course of their work) harmed a child or placed a child at risk of harm. The referring organisation must also have dismissed the individual or moved him or her to a non-child care position or the individual has resigned, retired or been made redundant. There are other circumstances leading to referral as set out in the 2004 Guidance. It is a criminal offence for an organisation to fail to comply with the duty to make referrals to the DWCL.

All referrals to the DWCL have to meet the legislative criteria set out in the 2003 Act. Within the legal framework, all referrals must be considered on their individual merits. The individuality of each referral makes each case unique. Because each referral is considered on its individual merits it is not possible or desirable to have a tick-box approach to decisions on who is included on the DWCL. All cases involving a certain type of harm may not result in the referred individual being included on the List.

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<sup>3</sup> Under section 2(5) of the 2003 Act, organisations may, but need not, refer cases where the dismissal etc took place before the Act came into force

In reaching decisions about inclusion on the DWCL, the main concern of Scottish Ministers is to protect children. The age of children (under the age of 18 for the purposes of the 2003 Act) implies vulnerability in itself.

Also, in making listing decisions, Scottish Ministers are required to recognise, and take appropriate account of, the rights of the referred individual. The European Convention on Human Rights (ECHR) is relevant to all stages of the determination and appeal processes under the 2003 Act.

### **Roles and responsibilities of employer, regulatory body and DWCL**

It is also important to recognise that employers, regulatory bodies and Scottish Ministers have different roles and responsibilities in relation to their handling of incidents connected to harm or risk of harm to a child. So whilst, for example, it may be entirely appropriate for an employer to dismiss an individual for gross misconduct, including harm to a child, it may not always be appropriate for that person to be included on the DWCL. Scottish Ministers need to take account of the severity of the actual or potential harm to the child and whether the individual should be prevented from working with all children which may mean depriving the individuals of their livelihood. Thus a key consideration for Scottish Ministers is that of proportionality – taking decisions that are reasonable and proportionate.

The different roles and responsibilities are summarised as follows:

Organisation	Action of organisation	Consequence for individual
Employer	Can include disciplinary interviews, disciplinary action, suspension and dismissal, all in relation to misconduct including harm or risk of harm to a child.	On dismissal, individual can no longer work with that employer (unless reinstated, say after an Employment Tribunal hearing). But the

		individual might seek and obtain employment with another employer, for example, working with a different age of child/young person.
Regulatory body (for example, the Scottish Social Services Council (SSSC) and the General Teaching Council for Scotland (GTCS))	Can include removal from the Register because the individual is unsuitable to work in the particular sector (for example, as a social worker or as a teacher).	On removal from the Register, the individual will not gain employment in any position governed by that Register. But he or she might still work with children.
Scottish Ministers	Can list people if, on the balance of probabilities, the Panel is satisfied that the referring organisation reasonably considered the individual to have harmed a child or placed a child at risk of harm (first test) AND that he/she is unsuitable to work with children (second test). The two tests are not alternatives. It is only once the Panel is satisfied that the first test has been met that it can then go on to consider the second test. This is a non-judicial administrative decision by the Scottish Ministers and	Individual who is disqualified from working with children cannot apply for, offer to do, accept or do any work in a child care position (whether paid or unpaid). It is a criminal offence to do so under section 11(1) of the 2003 Act.

	they apply the civil standard of proof ('balance of probabilities') rather than the criminal standard of proof ('beyond reasonable doubt').	
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### Incompetent referrals

**Example reasons why referrals are incompetent and are therefore dismissed by the Scottish Government as no case to answer.**

There are a number of reasons why a referral may be classed as incompetent. These include:

- The young person is aged 18 or over at the time of the incident and is not therefore a child as defined by the 2003 Act
- The organisation is unable to confirm that they would have dismissed the individual, or would have considered dismissing the individual if the individual had not resigned etc – on the ground that the individual had harmed a child or placed a child at risk of harm
- The individual has not been working in a child care position.

### Tests for provisional inclusion in List

When there is information submitted with the referral to indicate that an individual's inclusion on the DWCL may be appropriate, that person's name will be put onto the DWCL provisionally while further consideration is given to the case.

There are two statutory tests for including an individual provisionally in the List once a referral has been made. These are:

- The reference is not vexatious or frivolous; (section 5(2)(a)) and

- 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 (section 5(2)(b))

### **Meaning of vexatious and frivolous**

The meaning of vexatious and frivolous is:

- Vexatious = instituted without sufficient grounds, for the purpose of causing annoyance or trouble to the person. The interpretation of vexatious verges on the malicious
- Frivolous = of little or no weight, value or importance; not worthy of serious attention; having no reasonable ground or purpose; manifestly insufficient.

### **Meaning of ‘it may be appropriate for an individual to be included in the list’**

The meaning of ‘it may be appropriate for an individual to be included in the list’ is:

- That it MAY be appropriate to include someone on the List. The standard is less than if the wording was stronger (i.e. if the provision said ‘it is appropriate’). The Scottish Ministers do not need proof of the allegations at this stage but there has to be sufficient merit in the allegations or a real prospect that, after the determination process, the Scottish Ministers will include the individual’s name in the List. The primacy of child protection concerns should be weighted against the rights of the individual.

### **Reasons for not provisionally listing**

#### **Example reasons why competent referrals may not result in provisional listing**

A few examples of why individuals may not be provisionally listed are:

- The allegations are too general in nature
- The referring organisation has not reasonably considered the individual to have harmed a child or placed a child at risk of harm in that the alleged harm is non-existent or there is no information to support allegations of harm
- The incident is low-level and has no impact on the child or any impact is negligible.

### **Legislative criteria for inclusion of an individual on the List**

The following sets out the legislative criteria for inclusion of an individual on the List. This decision is made on the civil standard of proof – that is, the balance of probabilities:

- Scottish Ministers are satisfied 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 (section 5(5) (a)); and
- The individual is unsuitable to work with children (section 5(5)(b))

### **Example nature of harm**

The 2003 Act does not define ‘harm’ other than to say that harm “*includes harm which is not physical harm*”. ‘Harm’ therefore bears its ordinary, dictionary meaning and will include harm of any kind including sexual, physical, and emotional or psychological harm and neglect. Account will also be taken of the context of, and the facts and circumstances surrounding, each referral. The harmful behaviour may have resulted in:

- criminal offences such as those listed at schedule 1 of the 2003 Act, for example, cruelty to children, incest, causing bodily harm to a child
- other offences
- other court proceedings
- police involvement

- no court or police involvement at all.

It may also be appropriate to make a referral on grounds of breach of professional conduct or betrayal of a position of trust where there has been a harmful impact on a child. A child may be placed at risk of harm through for example, negligence, unprofessional behaviour or neglect but without experiencing harm itself, perhaps because of good fortune rather than because of the actions or lack of actions of the referred individual.

### **Reasons for not listing**

#### **Example reasons why an individual may not be listed by a Determination Panel – not meeting one or both ‘tests’**

The following are examples of factors which have informed decisions not to list an individual, again taking account of the individual circumstances of each case. A key consideration is the need for a proportionate response:

- Placing the child at risk of potential harm, but a one-off incident where the neglect of the child is minimal and otherwise, the individual’s work performance has been satisfactory
- Unintentional behaviour, perhaps through lack of training, leading to minimal neglect and insufficient evidence of posing a risk of future harm
- No evidence of significant harm and no evidence of a history of misconduct
- Behaviour that is not indicative of grooming
- Actions that are ill-judged and impulsive, showing immaturity, but not being malicious or significantly harmful
- A lack of corroborating evidence and a general lack of information.

### **Reasons for listing**

#### **Example reasons why an individual may be listed by a Determination Panel – meeting both ‘tests’**

The following are examples of factors which have informed decisions to list individuals, again **taking account of the individual circumstances of each case and the body of information:**

- Physical abuse
- Inappropriate and potentially exploitative interest in children (downloading, accessing and distributing child pornography, sometimes without the distribution; voyeurism for sexual gratification; acting in a sexually inappropriate manner; indecent assault)
- Inappropriate relationships (including the use of text messages seeking sexual or close relationships)
- Use of confrontational, bullying and threatening behaviour and encouraging other staff to do likewise
- Failure to take appropriate steps to ensure harm does not occur
- Neglect of young children resulting in physical and emotional harm to them.

Some cases may be deemed to have exposed a child to more than one type of harm (potential or actual). Emotional harm can be a significant factor across many different types of behaviour. Also, because all cases are considered on their individual merits, but with regard to the listing 'tests' it is not possible to say that all cases in a certain category will result in listing.

### **Factors considered as part of the decision-making process**

The Determination Panel considers a range of factors in reaching a decision on whether or not to list an individual. These factors help inform the decision about harm or risk of harm and unsuitability to work with children. The factors are intertwined and the Panel's decision-making process will take account of each (where appropriate or relevant) and the interdependencies. It is not therefore possible to say that one factor is more important than another. The factors considered in reaching a determination include:



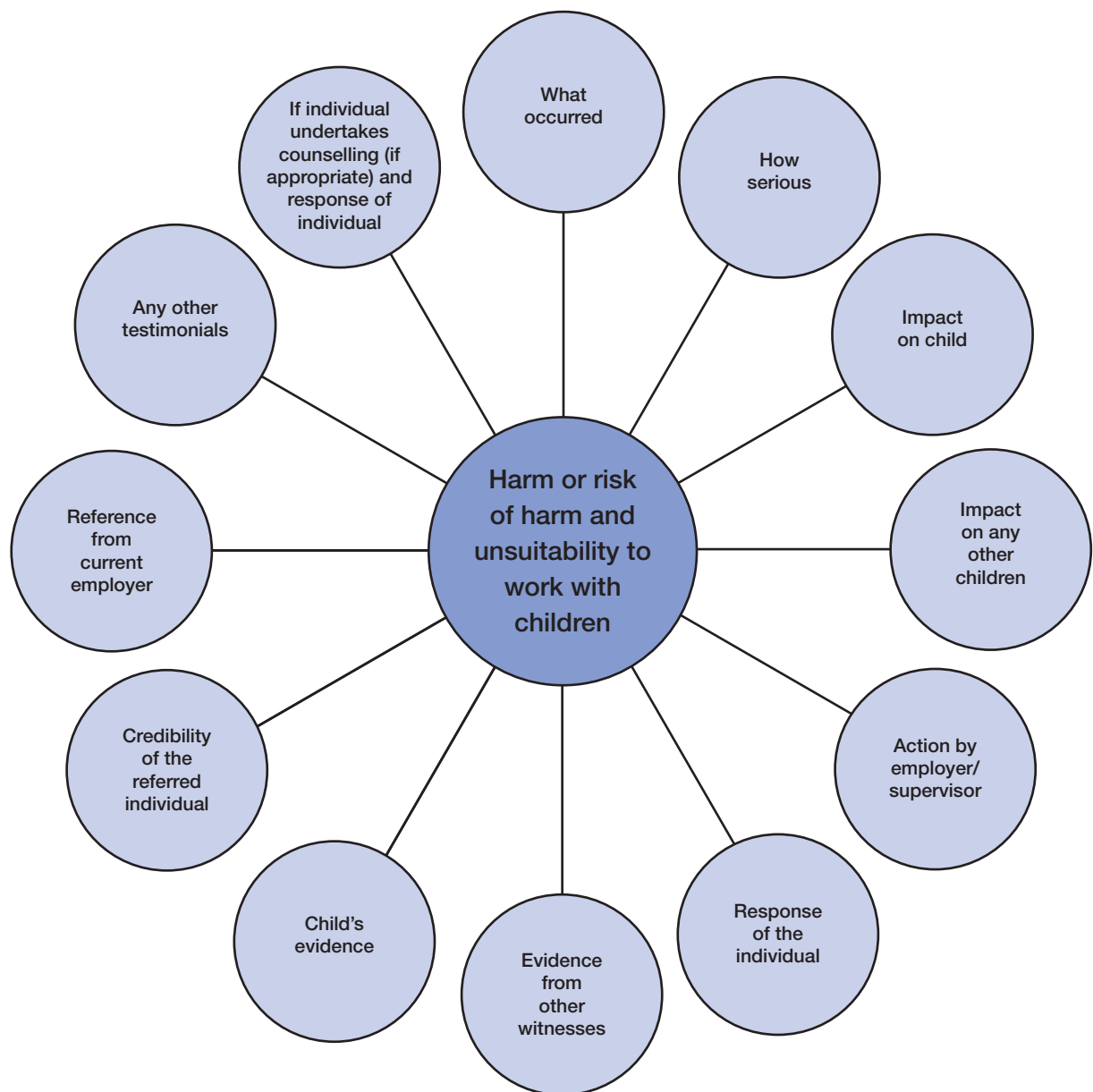
- A consideration of the incident(s) that occurred (including any police and court involvement and the nature of that involvement)
- An examination of the seriousness of the harm or risk of harm
- Whether there is a pattern of inappropriate behaviour over a period of time although one-off significant incidents can merit listing
- The nature of the actions whether pre-meditated and secretive, impulsive, ill-judged, intentional or unintentional
- Evidence about breaching professional boundaries and continuing the actions after being advised to stop
- Whether the individual's awareness of harm or risk of harm caused is limited or whether there is a full or partial acknowledgement of harm or risk of harm and the implication of either position in the considerations
- The impact of the behaviour on the child/children and on any other children involved or present
- The extent of training and support for the individual
- The child's evidence, the credibility of the individual, references and other testimonials
- Participation of the individual in counselling, behaviour programmes and response of the individual
- Likelihood of gaining another child care position due to, for example, youth or unlikelihood due to, for example, known infirmity
- Continuing risk to children.

The Panel will consider:

- any observations and supporting information submitted by the individual concerning the reference
- any observations by the referring organisation in response to the observations of the individual; and
- any other observations by the individual or the referring organisation.

The Panel will also take account of any other relevant information provided by other parties, for example, the police, former employers and regulatory bodies.

The range of factors considered can be summarised thus:



## Part 3

### Guidance on completion of the referral form and supporting information

#### Referrals under the 2003 Act – the legal basis

The law states that employing organisations **shall** make a referral when an individual has harmed a child or placed a child at risk of harm (whether or not in the course of the individual's work) **and** the circumstances set out at section 2(3) or (4) of the 2003 Act are met. This will include situations where: the organisation has dismissed the individual or permanently removed him or her from a child care position within the organisation; the individual has resigned or retired or been made redundant **and** the organisation would have dismissed or considered dismissing the individual on the grounds of harm or risk of harm to a child, had he or she not resigned, retired or been made redundant.

There is also provision in the legislation to allow referrals to be made in respect of harm or risk of harm to a child caused by an individual who was employed for a fixed term **and** the organisation would have dismissed or considered dismissing the individual had the individual's employment not been due to expire at the end of the fixed term or would have dismissed or considered dismissing the individual had he or she not left the organisation at the end of the fixed term.

The 2003 Act also provides for organisations to make referrals on the basis of information about harm or risk of harm to a child which has become available after the individual has left the organisation's employ, for example, due to resignation, retirement or redundancy. Organisations **may** make retrospective referrals i.e. in circumstances where they would have dismissed or considered dismissing an individual on grounds of harm or risk of harm to a child and that individual already has left the organisation's employ, for example, due to dismissal or resignation, prior to the commencement of the 2003 Act on 10 January 2005.

Referrals may also be made in terms of sections 3, 4 and 6 of the 2003 Act by employment agencies and businesses, regulatory bodies and following a relevant inquiry held by the Scottish Ministers or the Scottish Parliament. Further advice on these sections of the legislation is available on request.

Section 2(4) of the 2003 Act narrates circumstances for a referral that it would be useful to comment on. Where information has become available subsequent to an individual's dismissal, resignation, retirement, redundancy or transfer, the fact that an organisation has not carried out an investigation at the time of the alleged incident is irrelevant for consideration of the tests under section 2(4) of the 2003 Act. This is because the organisation could not carry out an investigation as the alleged incident had not come to light then. Therefore the organisation has to consider whether the alleged incident, if it had been investigated and proved, would have contained information about harm or risk of harm to a child. In any event, the interpretation of 'information available at the time' (section 2(4)(c)) does not have to be restricted to information emerging from a formal disciplinary hearing but could be on the basis of other more informal procedures.

### **Good quality referrals**

Schedule 1 to the Determination Regulations 2004 (Scottish Statutory Instrument No. 523) sets out the information to be submitted with a reference. Paragraph 1 of the schedule makes clear that the information is to be submitted if known or available to the referring body. This means that the information does not have to be submitted if it is not known or available. So, for example, if the referring body does not know all addresses at which the individual has lived in the past 10 years, the referral can still be made.

In light of the Scottish Government's experience of considering referrals, there is a need for more detailed advice on completion of the referral form and on the information to be submitted with a reference. The advice on information to be submitted with a reference does not seek different information from that set out in paragraph 1(a) to (j) of schedule 1 to the Determination Regulations but seeks greater depth of information.

All referrals are considered thoroughly. The DWCL case work team will request further information from the referring organisation if necessary before a decision is reached on provisional listing. Once a person is provisionally listed, the Scottish Government can seek further information from a range of sources including the police, local Procurator Fiscal offices and previous employers.

Efficient and effective decision-making in any situation depends heavily on good quality information. DWCL decisions are no different. Causing harm to a child or placing a child at risk of harm is a serious allegation against an individual working in a child care position. Therefore, it is important that decisions surrounding an individual's unsuitability to work with children should not be made on the basis of partial information. However, the case remains that the information should be submitted only if known or available to the referring body. Therefore, the information set out in the following paragraphs should be provided if known or available.

Elements of a referral which enhance robust decision-making include:

- Good procedures by the organisation in recording the issues effectively, for example, good quality evidence from a disciplinary hearing; identifying the specific role and identity of the individuals referred to in the referral information (unless identifying a person's identity would cause concern knowing that the referred individual will see the information); ensuring the individual has been made fully aware of the unacceptability of his or her actions; and getting statements from individuals who have witnessed the incident(s)
- Specific information on the harm or risk of harm, for example, about the nature or content of text messages; the nature of an assault; or the number and type of pornographic images involving children
- As much information as possible about the impact of the harm on the child, for example, if the child is old enough to have made a written statement or given an oral statement that is recorded; if the child has received counselling; observations from staff about the impact; speaking to parent(s)/carers and making a full record

- Clear details about the age and gender of the child involved and any special issues involving vulnerability through, for example, the child's additional support needs or the child being looked-after. Where it is inappropriate to provide the personal details of any child witnesses, a coded description will suffice
- Well-presented information summarising the case on the referral form and including any attachments.

It is important that the Scottish Government has as much as possible in the way of detailed, accurate, up-to-date information about a referred individual.

It is necessary to provide the following personal information:

- Full name of the individual including maiden name, any name previously known by, any aliases and nicknames
- Date and place of birth and any alternative dates of birth
- Last known address and date of last written communication with the individual there
- Any previous addresses and dates of occupancy
- National Insurance number.

It is essential that any decision to list an individual in the DWCL is made in respect of an individual who has been properly identified through authentic documentation certified by recognised sources.

It is necessary to provide the following information to confirm an individual's identity:

- Description of any identity and reference checks undertaken on the individual with applicable dates
- Information about the individual's registration with any regulatory body.

To enable the Scottish Government to understand the role of the individual within the organisation, the following information is helpful:

- The individual's job title and description of the nature of the work undertaken
- Career to date with the organisation
- Details on any professional qualifications or vocational training undertaken by the individual relating to child care
- Information about any previous child care positions (paid or unpaid)
- Information about any current child care position (paid or unpaid).

To enable the Scottish Government to fully understand the circumstances which led to the referral, it requires detailed information about the incident(s) and the impact on the child or children involved. This will include:

- Information about the nature of the harm or risk of harm to a child
- Information about how the harm or risk of harm to a child came to light
- Period of time during which the harm or risk of harm took place
- Frequency of the incidents of harm or risk of harm
- Information about the age, gender and vulnerability of the child
- Impact on the child and any other children involved in the incident
- Relationship between the referred individual and the child.

To enable the Scottish Government to understand the referring body's actions following the allegations of harm to a child by the individual, the following information is helpful:

- Explanation of the basis on which this referral has been made
- Details of investigations carried out by the organisation to date and their conclusions. This should include copies of all relevant papers including statements, notes of interviews, witness statements, minutes of meetings, minutes or notes of disciplinary hearings and letters of dismissal if appropriate
- A copy of any code of conduct relating to the individual's child care position; the organisation's disciplinary procedures and information indicating the individual's acknowledgement or understanding of these policy documents
- Information about other allegations against the individual relating to harm or risk of harm to a child, where the organisation has dealt with the matter internally

- Any information relevant to the harm or risk of harm to a child if no formal disciplinary action was taken by the organisation
- Where the harm or risk of harm took place historically, information on the child care practices in the organisation at the time of the incident and information on the child care practices now, if they have changed
- Contact details for the person or organisation who may hold information about the alleged harm or risk of harm if the referral is being made on the basis of alleged harm or risk of harm to a child which occurred outwith the course of the individual's employment, for example, criminal conviction for an offence against a child or harm in a voluntary position working with children.

It is for the organisation to satisfy itself that any information to be provided can be disclosed to the Scottish Ministers for the purpose of their determination of the reference, taking legal advice as appropriate. The organisation will wish to be aware that any information provided may be disclosed to the referred individual prior to the determination in accordance with the Determination Regulations 2004. It is open to the organisation to redact (ie score out, use Tipp-Ex on) any sensitive details prior to the submission of the information to the Scottish Ministers. To maintain the context of any information provided, the organisation may wish to substitute any details concerning identities with a coded reference, for example, Child A, pupil, year of birth.

In the interests of fairness, the Scottish Government will take account of other proceedings relevant to the matter which led to the individual being referred to the DWCL. This may include an organisation's internal appeal processes following dismissal. In circumstances where there are ongoing legal or disciplinary proceedings **relative to the referred incidents of harm or risk of harm to a child**, the Scottish Ministers will normally defer a decision on a case until these other proceedings have been finally concluded (including any appeal process). The 2003 Act defines legal proceedings as meaning civil or criminal proceedings in or before any court or tribunal (including an Employment Tribunal). Disciplinary proceedings are proceedings in which the regulatory body for a profession is to decide whether disciplinary action should be taken against an individual carrying out that profession,



for example, General Teaching Council for Scotland in respect of registered teachers. The following information in respect of any ongoing proceedings is helpful:

- Type of proceedings
- If internal proceedings, the current stage, any future stages, expected date of conclusion (including appeal process)
- If external proceedings, details of the organisations involved with contact details
- Description of matters being considered
- Current stage of these proceedings, any future stages and expected date of conclusion
- Conclusion of any external proceedings.

The Disqualified from Working with Children List is not a public document. The fact of an individual's inclusion on the DWCL is only accessible through a standard or enhanced disclosure check undertaken by Disclosure Scotland in respect of an application for a child care position.

Information containing sensitive personal details about the referred individual or children will be shared amongst the parties involved in the referral process (but not with any children). All correspondence issued by the DWCL case team is marked as **Restricted-Personal**. All key correspondence to individuals is sent by recorded delivery. The correspondence should only be opened and read by the person to whom it is addressed.

The DWCL case team may require further information from organisations. Therefore, the authorised signatory and other interested parties should provide contact details for personnel nominated for that purpose.

## **Part 4**

### **Guidance on provisional listing: working whilst provisionally listed**

#### **Provisional listing – background**

As the existing guidance booklets make clear, where there is information to indicate that inclusion on the DWCL may be appropriate, an individual's name will be put on the DWCL provisionally whilst further consideration is given to the case. Provisional inclusion on the DWCL is provided for in section 7 of the 2003 Act.

Provisional listing does not normally last for any more than 6 months unless there are ongoing legal or disciplinary proceedings in relation to the same incident. In these circumstances the period of provisional listing runs on until after the legal or disciplinary proceedings have been finally determined and only then is a decision made by the determination panel.

In circumstances other than ongoing legal or disciplinary proceedings where a decision on the case is not reached by the end of the 6 months, the Scottish Ministers can apply to the sheriff court for an extension which would only be granted if there is good reason for the delay. On those few occasions where the Scottish Ministers have applied for such an extension and been granted an extension, the good reasons for the delay have included the need to put consideration of the case on hold until the outcome of inquiries with the police have concluded or difficulties in finding out the referred individual's up-to-date home address. If an extension is not granted by the court then the individual's name has to be removed from the DWCL at the end of the 6 month period. However, although the provisional listing lapses at this point and provisional listing will no longer appear on enhanced disclosure certificates, the Scottish Government can continue to consider the case and come to a final determination of the matter.

Provisional listing does not disqualify people from working in child care positions. Therefore provisional listing does not result in provisional barring which would

prevent such people from working in a child care position. As well as notifying the individual if they are provisionally listed on the DWCL, the Scottish Government will also notify any organisations which it knows the individual is working for in a child care position.

The Scottish Government will only know if a referred individual is working in a child care position if:

- (i) the referring organisation itself knows and informs the Scottish Government; and /or
- (ii) the referred individual self-declares their employment in a paid and/or volunteer capacity on the form they are asked to complete to confirm the accuracy of their personal details.

Both these methods of notification are important but neither guarantees absolute completeness of information. The Scottish Government accepts that referring organisations may not know about an individual's employment after he or she has left that employment, especially if the person left some time previously. Moreover, regulatory bodies making referrals, such as the General Teaching Council for Scotland, will not have access to current employment information. In relation to the second method of notification mentioned above, individuals who are asked to self-declare might not do so in respect of some or all of the child care positions which they have (although in terms of the operation of the 2003 Act so far the Scottish Government has no evidence that this is the case).

The Scottish Government attaches considerable significance to knowing about those who are provisionally listed and currently working in child care positions. It is therefore important that referring organisations find out, where possible, whether an individual is so employed. This might involve keeping note of any request for a reference from a child care employer. Even tentative information can be helpful because the Scottish Government can then ask individuals to confirm that information.

The existing guidance states:

*An individual who is provisionally included on the DWCL is not banned from working in a child care position and an organisation will not be committing an offence if they employ a provisionally listed person in a child care position. The provisional listing will, however, be shown on a Disclosure check for a child care position to allow prospective employers to take the provisional listing into account when considering the appointment. Should an organisation decide to employ an individual in a child care position although they are on the DWCL provisionally, that organisation may wish to contact the case management team so that they are notified of the decision on final listing.*

This guidance remains relevant and the Scottish Government sees merit in supplementing it here.

There are two main scenarios arising in connection with provisional listing and working in a child care position:

- (i) an individual who is already working in a child care position when they are provisionally listed; or
- (ii) an individual who is already provisionally listed and then applies for a child care position.

The supplementary guidance is set out below.

### **Already working in a child care position - options available to organisations**

Individuals who are provisionally listed might already be working in child care positions either as a paid employee or as a volunteer. Where the referring organisation notifies the Scottish Government of this ongoing employment, the organisation(s) employing the individual will be alerted by the Scottish Government to the fact of provisional listing. The provisional listing flags up to the organisation(s) that the individual has been the subject of a referral to the DWCL and that the Scottish Government considers that:

- the referral is not vexatious or frivolous and
- on the basis of the referral, it *may* be appropriate for the individual to be included on the DWCL.

It is in effect a precautionary action pending determination of the reference and means that the individual is then under consideration for final listing on the DWCL.

About one-third of individuals who are provisionally listed are not fully listed by the Determination Panel. If they are not listed, their name is removed from the DWCL and the provisional listing will no longer appear on an enhanced disclosure certificate. Therefore, provisional listing status does not necessarily imply that an individual will be listed.

Child care organisations who are notified that their employee or worker is provisionally listed will wish to consider the options available to them for managing the situation. Employers are best placed to decide the most appropriate course of action in light of their knowledge of:

- the needs and functions of their own organisation
- the working circumstances of the provisionally-listed individual whom they had previously recruited and
- the potential for possible redeployment of the individual within the organisation.

It is important to note that the employer has recruited the individual prior to the provisional listing. Good practice for employment involves undertaking pre-employment checks including examining the competency, experience, qualifications and attitudes of potential staff in relation to work with vulnerable people. In March 2007 the Scottish Executive issued guidance, *Safer Recruitment through Better Recruitment: Guidance in Relation to Staff Working in Social Care and Social Work Settings*. The link is below:

<http://www.scotland.gov.uk/Publications/2007/03/13154149/1>

The Scottish Social Services Council Code of Practice for Employers and the National Care Standards also set out what is expected of social work and social care employers in terms of safer recruitment.

Voluntary and statutory organisations will also wish to consider undertaking similar checks when recruiting volunteers.

Some options which may be available to employers who are notified of an individual's provisional listing are set out below. These options are illustrative and not exhaustive, but they may assist employers in assessing the most appropriate course of action:

- (i) enhanced supervision of the individual in the workplace
- (ii) not permitting the individual to have one-to-one unsupervised contact with a child
- (iii) move the individual to a non-child care position in the organisation
- (iv) suspend the individual during the period of provisional listing.

It is recognised that small organisations in particular might find it difficult to implement any of the above options. However, organisations should recognise that child protection is paramount and consider whether to put in place any arrangements to manage any potential risk.

The Scottish Government is not recommending that organisations pursue any of the above options, but rather, is providing information and guidance about the range of potential options available. In particular, the Scottish Government cannot recommend or require that employers pursue any particular course of action since it is the employer that knows all the facts, circumstances and history of the individual's employment with that organisation. It is absolutely the legitimate and proper role of employers to make decisions in relation to their employees, whether that is suspension or any other course of action.

It is worth drawing out some issues concerning the suspension from employment option in particular, so that employers are familiar with the facts. Suspension from employment, even on full pay, engages and must take account of employment rights. The circumstances in which an employee may be lawfully suspended depend on the terms and conditions of the contract of employment and on statutory employment law considerations (particularly the law with regard to unfair constructive dismissal). The law is summarised in guidance produced by the Advisory, Conciliation and Arbitration Service (ACAS). The link is below:

[Advisory handbook - Discipline and grievances at work](#)

Employers may wish to take their own legal advice about particular situations. In particular, any action taken by an employer must be necessary and proportionate in all the circumstances of the particular situation. If considering whether to suspend an employee, the employer must consider and weigh in the balance:

- any risks to the organisation of the employee remaining at work
- any potential risk to children
- the needs of the employee
- alternatives to suspension, such as redeployment.

The employer needs to carefully evaluate all relevant issues for each situation. If an employer simply followed a route of automatically suspending provisionally listed employees without a thorough evaluation of the individual's circumstances, this might lead to the employee's resignation followed by a claim for unfair constructive dismissal. A particular point for the employer to consider is that, if the decision is taken to suspend the individual, the suspension should not be for longer than is necessary.

There is also another issue worth drawing to employers' attention with regard to suspension, arising out of provisional listing. The case of *Wright and others v Secretary of State for Health*, decided by the Court of Appeal (Civil Division) in England in October 2007 arose because four claimants were dismissed from their

current employment after they were provisionally listed on a statutory list of persons unsuitable to work with vulnerable adults on the basis of alleged misconduct that had occurred in their previous employment positions. Under the vulnerable adult legislation in England, they had to be dismissed or suspended or moved to a non-vulnerable adult care position. The Court of Appeal decided that Article 6 of the European Convention on Human Rights (ECHR) – right to fair determination of civil rights and obligations - was engaged and breached by what was in effect ‘provisional barring’. The Court held that individuals who are provisionally listed must have had an opportunity to make representations to the Secretary of State if the effect of their provisional listing is to prevent them working, unless the Secretary of State reasonably considers that any resultant delay in listing would place a vulnerable person at risk of harm. The 2003 Act has never provided for provisional barring so the read-across from the *Wright case* to Scotland is not direct. However this case does show that provisionally listed individuals should not be removed from their employment without good reason.

### **Applying for a child care position**

In 2004 the Scottish Executive commissioned a guidance and training pack on the DWCL for the voluntary sector. A link to the guidance is below:

<http://www.crbs.org.uk/pocsa/>

The guidance was produced by a consortium of voluntary bodies. The section on managing a job application from an individual who is provisionally listed is relevant across all sectors. It is reproduced below:

“Organisations could do two things to manage the situation where a person is provisionally listed. These are:

- agree not to appoint the person until the Scottish Ministers have made a final decision about whether or not to list the person; or



- appoint the person for a probationary period, with appropriate supervision, and review the appointment as soon as the Scottish Ministers have made a final decision.”

As with the situation of those who are already working in a child care position at the time of provisional listing, it is entirely a matter for employers to decide how they manage the situation of a provisionally listed person applying for a child care job.

## Annex

### **RESTRICTED – PERSONAL**

#### **PROTECTION OF CHILDREN (SCOTLAND) ACT 2003**

#### **REFERRAL TO THE DISQUALIFIED FROM WORKING WITH CHILDREN LIST**

Prior to completing this referral form, please read the “Checklist for Completing a Referral to the DWCL” guidance booklet available on the Scottish Government website [www.scotland.gov.uk/childprotection](http://www.scotland.gov.uk/childprotection). Please also read Part 3 of “Supplementary Information and Guidance – DWCL” published in January 2008 and available on the same website.

#### **Section 1**

##### **Referred Individual’s Personal Details**

**Full name of the individual including maiden name, any name previously known by, any aliases and nicknames, if known.**

**Date and place of birth and any alternative dates of birth used if known.**

**Last known address and date of last written communication with the individual there.**

**Any known previous addresses and dates of occupancy.**

**National Insurance Number**

## **Section 2**

**Recruitment Protocol**

**Details of any identity and reference checks which have been carried out to verify the personal details (with dates).**

## **Section 3**

**Confirmation that the person occupied a child care post within the meaning of Schedule 2 of the Act.**

- (i) Job Title:
  - (ii) Nature of work:
  - (iii) Registration with regulatory body (if relevant):
  - (iv) Professional and Academic Qualifications (if relevant):
  - (v) Vocational qualifications and training:

## Section 4

**Detailed explanation about the alleged misconduct and how the individual harmed a child or placed a child at risk of harm.**

- (i) Describe the incident or incidences of harm or risk of harm:
  
  
  
  
  
  
  
  
  
  
- (ii) The impact or likely impact of the harm on the child or children:
  
  
  
  
  
  
  
  
  
  
- (iii) The impact or likely impact of the harm or risk of harm on any other children who may have been affected by the alleged harm or risk of harm:

## Section 5

**Where no formal action was taken by the referring body.**

- (i) Any other relevant information for the purpose of enabling the panel to consider the full circumstances of the matter which led to this referral if no formal disciplinary action was taken by your organisation:
  
  
  
  
  
  
  
  
  
  
- (ii) Information in relation to previous harm or risk of harm to a child which was dealt with internally but which may be relevant to the determination panel's consideration of whether the referred individual is unsuitable to work with children:

## Section 6

**Details of action taken by the organisation against the individual, for example, has he or she been dismissed or transferred from a child care position?**

(i) Basis of referral (ie with reference to sections 2, 3, 4, or 6 of the 2003 Act):

(ii) If the referral is being made on the basis of alleged harm or risk of harm to a child which occurred outwith the course of the individual's employment, please provide contact details for the person or organisation who may hold information relating to the alleged harm or risk of harm:

## Section 7

**Details of any investigation undertaken by police or regulatory bodies related to the alleged harm or risk of harm to a child.**

(i) Information on any related police involvement:

(ii) Information on the involvement of any other agency e.g. General Teaching Council for Scotland:

NOTE: A referral to the DWCL should be made in addition to notifying the police and any relevant professional bodies as appropriate.

## **Section 8**

**Ongoing proceedings - please provide the current status of these proceedings. expected date for conclusion and what further stages they may go through.**

NOTE: In terms of the 2003 Act, the definition of “legal proceedings” is “civil or criminal proceedings in or before any court or tribunal”. “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.

## **Section 9**

### **Signature**

**I hereby refer the above named person to Scottish Ministers for consideration for inclusion on the Disqualified from Working with Children List.**

**Signed**

**Name in Block Capitals**

**Position in Organisation**

**Date**

**Address**

**Tel No**

**E-mail**

**Please send the completed form to: The Manager  
PO Box Number 23628  
Edinburgh  
EH6 6ZH**



**The Scottish  
Government**

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