

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

**Guidance: (Amendment of the Definition of  
Child Care Position) Order 2008**



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## Scottish Statutory Instruments 2008 No. 260

### The Protection of Children (Scotland) Act 2003 (Amendment of the Definition of Child Care Position) Order 2008

#### Purpose

This guidance is on an amendment to the Protection of Children (Scotland) Act 2003 (“the 2003 Act”) made through an Order – the Protection of Children (Scotland) Act 2003 (Amendment of the Definition of Child Care Position) Order 2008. It is written as a general guide. It is not a definitive guide to the 2003 Act or to the Order. Employers/individuals may still wish to seek legal advice on particular issues if they consider that appropriate. Disclosure Scotland and the Central Registered Body in Scotland (CRBS) are also able to offer advice. The contact details are:

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#### Background

An amendment has been made to Schedule 2<sup>1</sup> of the 2003 Act. The amendment came into force on 1 July 2008. Scottish Ministers made an Order to amend Schedule 2. This Order (Scottish Statutory Instrument 2008 No 260) with the Explanatory and Executive Notes can be found on the Office of Public Sector Information website at:

[http://www.opsi.gov.uk/legislation/scotland/ssi2008/ssi\\_20080260\\_en\\_1](http://www.opsi.gov.uk/legislation/scotland/ssi2008/ssi_20080260_en_1)

You may find it helpful to read this Guidance with the Order, Explanatory and Executive Notes and Schedule 2 of the 2003 Act. However, it is not essential.

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<sup>1</sup> Schedule 2 is introduced by section 18(1) of the 2003 Act.

This Guidance will be of interest, amongst others, to:

- Schools – Headteachers and other teaching staff
- Parent Councils, Combined Parent Councils and other parental bodies such as Parent Teacher Associations (PTAs) and those in the independent school sector
- Further education institutions – Principals, other Executive staff and academic staff
- The higher education sector
- Managers or co-ordinators of educational and other activities for adults (for example, in community learning and development).

## Schedule 2

Schedule 2 sets out child care positions. Although there is no requirement to have an enhanced disclosure for child care positions, it is an offence for any person who is disqualified from working with children (ie on the Disqualified from Working with Children List {DWCL}) to apply for, offer to do, accept or do any work in a child care position. It is also an offence for employers to offer work in child care positions to anyone disqualified from working with children.<sup>2</sup>

Before the amendment came into force, one child care position was a position whose normal duties included work in an educational establishment.<sup>3</sup> Educational establishments included schools, colleges and hostels.

This meant, among other things, that when Parent Councils routinely met and conducted their business in schools (and other educational establishments) then all members doing so were in a child care position. It also meant that the instructors or tutors of adult classes routinely meeting in schools were in a child care position. However, if the Parent Council or adult class occasionally or routinely met anywhere that was not an educational establishment (for example, in the local community hall

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<sup>2</sup> See section 11 of the 2003 Act for offences relating to work in a child care position

<sup>3</sup> Educational establishments had the same meaning as in the Education (Scotland) Act 1980

not part of the school) then Parent Council members and the instructor or tutor of the class were not in a child care position.

### Effect of amendment

The amendment removes from child care position:

- The work carried out by a member of a Parent Council, Combined Parent Council or other parental body in a school, further education institution or hostel (but does not override other provisions in the 2003 Act if the Parent Council member is in a child care position, working with children);
- The work involving an activity primarily intended for people aged 18 or over in a school or further education institution. However, the amendment keeps in child care position this work if it is done in a further education institution by a person who is employed by the further education institution (see question 3.2 below).

The amendment also removes from schedule 2 the reference to “an educational establishment” and replaces it with:

- school;
- a further education institution;
- a hostel used mainly by pupils attending a school or further education institution.

The effect of the amendment is summarised below:

### Work not now a child care position

Work	Where
Work of Parent Council, Combined Parent Council or other parental body	Work in a school, a further education institution and a hostel used mainly by pupils attending a school or further education institution
Work involving an activity which is primarily intended for persons aged 18 or over	In a school  In a further education institution providing the work is done by people who are not employed by that institution

It is against the law to obtain an enhanced disclosure inappropriately.<sup>4</sup> For an organisation to access an enhanced disclosure, they must be appointing a person into a prescribed post<sup>5</sup> such as a child care position.

### Questions and Answers

Here are some questions and answers about the change.

#### (1) WORK

1.1 Why were members of Parent Councils and instructors of adult classes thought to be working in any event? They volunteer, giving their time freely.

Yes, they volunteer. However, “work”<sup>6</sup> is defined in the 2003 Act and has a broad definition. It includes unpaid as well as paid work.

<sup>4</sup> See Part V of the Police Act 1997

<sup>5</sup> “Prescribed” is the term used in Police Act Regulations for access to the enhanced disclosure

<sup>6</sup> See section 18(1) of the 2003 Act

## (2) PARENT COUNCILS

### 2.1 Should Parent Council members involved in the appointment of Headteachers or Deputies<sup>7</sup> be in a child care position?

They are not in a child care position nor should they be. They do not make the appointment. Rather, they are involved in the appointment process. This does mean that a person who is on the DWCL could potentially be involved in the appointment process if they are already a member of the Parent Council. They have no contact with children as part of this process and it is rare for appointment panels to be convened in schools.

### 2.2 Will Parent Council members be in a child care position when Pupil Council members attend the Parent Council meetings?

There are two points. Firstly, the law<sup>8</sup> is that if the normal duties of the Parent Council members involve unsupervised contact with children under arrangements made by a “responsible person” – which includes the Headteacher of a school – then there might be a case for Parent Council members to have an enhanced disclosure. Secondly, as an alternative, the school might want to consider whether the attendance of the headteacher or another member of the teaching staff at meetings of the Parent Council attended by a Pupil Council member provides appropriate supervision. In fact the law<sup>9</sup> is that the headteacher has a duty and right either to attend or be represented at any meeting of the Parent Council (unless the headteacher and Parent Council agree otherwise).

### 2.3 Can Parent Councils meet at any time in the school even during the school day?

Yes. Most meet in the evening but they can meet during the day if they wish. They are not in a child care position whenever they meet.

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<sup>7</sup> See section 14(2) of the Scottish Schools (Parental Involvement) Act 2006 and Regulations made under section 14 (SSI 2007/132)

<sup>8</sup> See paragraphs 1(e) and 5 of schedule 2 to the 2003 Act

<sup>9</sup> See section 9 of the Scottish Schools (Parental Involvement) Act 2006



## 2.4 If a Parent Council member runs an after-school club or is a dining room supervisor or is the janitor, are they in a child care position?

Yes – if the Parent Council member running the after-school club has normal duties including caring for or supervising children; if the dining room supervisor has normal duties including supervising children. This is because the child care positions in schedule 2 (for example in paragraph 1(d) - whose normal duties include caring for, training, supervising or being in sole charge of children) are unaffected by the Order.

The janitor is in a child care position because he or she is working in a school. In all cases the individuals are not carrying out their work because they are members of the Parent Council. They just happen to be individuals working in the school and on the Parent Council too.

## 2.5 Why does the Order (at Article 4, inserting new paragraph 2A into schedule 2 of the 2003 Act) not state that work done by a member of a Parent Council is treated as not being done in a school “*in his or her capacity as a member of the Parent Council*”?

The extra wording is not required in new paragraph 2A. The legislation does not have to explain or set out every detail.

A school janitor or secretary who is a Parent Council member remains in a child care position in the role of janitor or secretary working in the school. As stated above in the answer to question 2.4, the individuals are not carrying out their work because they are members of the Parent Council. The school janitor or secretary or other person whose normal duties include work in a school remain in a child care position whether or not they are also members of a Parent Council.

### **(3) WORK DONE INVOLVING AN ACTIVITY PRIMARILY INTENDED FOR PERSONS AGED 18 OR OVER**

#### **3.1 What is meant by work done involving an activity primarily intended for persons aged 18 or over?**

“Activity” will encompass a range of situations such as an evening class for adults or a Councillor or MSP meeting his or her constituents in a school or college or a club or society such as a horticultural club or local history group.

The evening classes or activities might be academic, vocational or recreational.

It is not ad hoc activity but normal duties.

Much activity will be primarily intended for people aged 18 or over. Examples are the over 19s football team, the class for parents to help them deal with teenagers and the class for parents to teach them texting.

Other activity will attract mostly adults even though the classes are not specifically targeted at any particular age range. If the class or group over a period of time consistently attracts mostly adults, then it might be assumed to be primarily intended for adults.

The activity might include children as well as adults but whether or not the person who takes the activity is in a child care position will depend on whether the activity is primarily intended for adults.

#### **3.2 Why are people employed by the further education institution still in a child care position when they take adult classes?**

The majority of college classes are open to all potential learners. Colleges do not place staff without an enhanced disclosure in a position which involves regularly caring for, training, supervising or being in sole charge of pupils or students under 18 years of age or vulnerable adults.

College staff are often taking a class with children one day, an adult class the next and a composite class on another day. They can't be in and out of child care position on a daily or weekly basis.

### 3.3 Much adult learning takes place in community centres and in other places as well as in schools and colleges. If the adult class is held in a community centre, is the person taking the class in a child care position?

No. Before the amendment was made, the volunteer instructor of the IT class for adults who held his or her class in the school was in a child care position. However, if the same instructor held his or her class in a community hall or leisure centre, he or she was not in a child care position. The amendment means that he or she is not in a child care position if the class is held in a school, college, community centre, leisure centre and the like.

## (4) THE HIGHER EDUCATION SECTOR

### 4.1 Why does the amendment use the formulation in the Protection of Vulnerable Groups Act 2007 ("the PVG Act") of school, further education institution and hostel rather than educational establishment?

The definition of an educational establishment in schedule 2 to the 2003 Act includes some higher education institutions and excludes others. So, for example, under the Act, Napier University was an educational establishment but the University of St. Andrews was not. This was an anomaly and the amendment means that all institutions in the sector are treated in the same way.

## (5) NORMAL DUTIES

### 5.1 The phrase, "normal duties" is mentioned here. What does it mean?

The phrase, "normal duties" is used in schedule 2 to the 2003 Act listing child care positions.

The phrase, “normal duties” is not defined in the 2003 Act.

We can offer guidance but ultimately, it is a matter for organisations to assess according to the law if a position is a position whose normal duties include, for example, work in a school or caring for children. They know the duties of individual posts. They know the nature and description of people’s duties. Moreover, there cannot be detailed prescription.

The guidance is:

People will usually have a range of duties in their job. Some of the duties might be “normal” because they always carry out the duties. Equally, some of the duties might be “normal” because although they are not carried out frequently, there is an expectation that they are part of the job description. The phrase “normal duties” does not carry with it any reference to how frequently the duties are carried out. But someone’s normal duties might involve them in a caring role several times a year or a few times a year. Although the caring is not carried out every day of the year, what makes the duties “normal” is an element of pre-arranging. So the term “normal duties” can be associated with pre-arranging, rostering, planning, scheduling, expectation and anticipation.

We will provide examples in the further guidance to issue on child care positions in Autumn 2008 and in the guidance to issue in 2009 on regulated work with children and with adults under the PVG Act.

## **(6) THE FUTURE – THE PVG ACT**

### **6.1 Will changes be needed to the PVG Act?**

Yes. This change will also be made to the PVG Act through the secondary legislation programme.



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

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