

Chapter 7: Consideration for Listing

1. When Disclosure Scotland receives information which has a bearing on an individual's suitability to work with vulnerable groups, Disclosure Scotland will undertake a two stage assessment process. The first stage is an initial assessment of the information to see whether it may be appropriate for the individual to be included in the children's list and / or the adults' list.

Sometimes, the information will not meet the statutory tests for further consideration and will be dismissed at this stage.

2. If the initial tests are met, the second stage is a full assessment, called consideration for listing, in order to establish if the individual is unsuitable to work with vulnerable groups. This may take some months to resolve as information may need to be gathered from a number of sources and the individual must have the chance to comment on the information gathered. Whilst the individual is under consideration for listing, this information would appear on any disclosure record requested during that time. This chapter explains the triggers for consideration for listing, the process and the implications of this for individuals and employers.

7.1 – Triggers for consideration for listing

3. Disclosure Scotland can receive information about individuals who are doing or who have done regulated work from a variety of sources. Any one of these might be the trigger that causes the consideration for listing process to begin.

Disclosure Scotland may receive:

- o a referral from an organisation;
- o a referral from a court;
- o new vetting information (that is, conviction or non-conviction information) about a PVG Scheme member; or
- o be made aware of an individual being named in a relevant inquiry report.

4. Note that any individual who is doing or has done regulated work (and in some cases, is likely to do regulated work) can be considered for listing, not just PVG Scheme members. However, vetting information can only trigger a consideration for listing in respect of PVG Scheme members (or applicants for membership). Furthermore, an individual who is a PVG Scheme member in respect of one workforce only can be considered for listing in respect of both workforces, depending on the circumstances.

5. If Disclosure Scotland is already considering whether to list someone in one list, they can also decide to consider whether to list that person in the other list

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if they receive information during the consideration process which indicates that this may be appropriate⁵⁸.

Organisational referrals

6. The procedure to be followed by organisations in making a referral was explained in chapter 6. Organisational referrals lead to consideration for listing when the criteria set out at section 10 of the PVG Act are met:

- o Firstly, the organisation must have provided the required information to make a referral⁵⁹. This ensures that Disclosure Scotland have sufficient identity information to be sure of whom they are considering and also the basic facts of the case against the individual.
- o Secondly, Disclosure Scotland must be satisfied that the information

was not given for vexatious or frivolous purposes. For example, Disclosure Scotland will ensure that the referral was not made out of malice or spite (vexatious) or over a trivial incident where nothing untoward took place (frivolous).

7. A referral which passes these tests is said to be a competent referral. But before a competent referral leads to consideration for listing, Disclosure Scotland must also be satisfied that it may be appropriate for the individual to be included in the relevant list(s). Note that Disclosure Scotland may place the individual under consideration for listing for either or both lists, irrespective of what type of regulated work the individual was doing.

Court referrals

8. Where a court convicts an individual of a relevant offence (as set out in schedule 1 to the 2007 Act⁶⁰), the court must give Disclosure Scotland any prescribed information⁶¹ that it holds in relation to the convicted individual. Section 11 requires that Disclosure Scotland must consider listing an individual in the children's list where the individual has been referred by a court following a conviction for a relevant offence (relevant offences are applicable only to the children's list and not the adults' list). This duty to consider an individual for listing is referred to as “automatic consideration for listing”. The prescribed information to be provided by the court will be used for the purposes of consideration for listing by Disclosure Scotland. Automatic consideration for listing on the children’s list following conviction of a relevant offence only applies to convictions after the coming into force of the PVG Act.

⁵⁸ See section 12 of the PVG Act.

⁵⁹ The Protection of Vulnerable Groups (Scotland) Act 2007 (Referrals by Organisations and Other Bodies) (Prescribed Information) Regulations 2010 (SSI 2010/181) – Schedules 1 and 2.

⁶⁰ Schedule 1 as amended by the Protection of Vulnerable Groups (Scotland) Act 2007 (Relevant Offences) (Modification) Order 2010 (SSI 2010/246).

⁶¹ The information is set out in the Schedule to the Protection of Vulnerable Groups (Scotland) Act 2007 (Referrals by Courts) (Prescribed Information) Regulations 2010 (SSI 2010/182)

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9. There is no schedule of relevant offences committed against protected adults which would lead to automatic consideration for listing on the adults list.

10. The courts also have a power to refer an individual for consideration for listing where that individual commits any offence other than a relevant offence (a “discretionary referral”). The court is required to be satisfied that it may be appropriate for the individual to be listed in the children’s list or in the adults’ list or both. Disclosure Scotland will consider this type court referral as they would any other referral if they are satisfied that it may be appropriate for the individual to be listed in the children’s list or adults’ list or both and that the individual does, has done or is likely to do regulated work with children or adults.

11. In all cases, the individual can only be listed following a consideration process (c.f. automatic listing – see chapter 8). Court referrals lead to consideration for listing when the criteria set out at section 11 are met. Court referrals will always allow the full circumstances of the case to be considered by Disclosure Scotland before making a determination as to whether or not an individual should be listed.

Vetting information

12. Vetting information leads to consideration for listing where the criteria set out at section 12 are met. Vetting information is explained in chapter 1. It

includes: the details of convictions, any non-conviction information from the police, certain civil orders and whether the individual is a registered sex offender. Vetting information may trigger a consideration for listing when an individual applies to join the PVG Scheme or when new vetting information arises in respect of an existing PVG Scheme member.

13. The criteria for consideration for listing triggered by vetting information are that:

- o the vetting information indicates that it may be appropriate for the individual to be included on the children's list and / or adults' list; and
- o the individual does, has done or is likely to do the corresponding type of regulated work.

14. The first criterion filters out new vetting information (e.g. driving convictions) which has no bearing on unsuitability to do regulated work. The second criterion is met by being a PVG Scheme member for that type of work. But this criterion can also be met by the individual having been a PVG Scheme member in the past or by an individual with a current application to join the Scheme. This criterion can also be met where there is other evidence of involvement with that type of regulated work outside of PVG Scheme membership.

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Named in a relevant inquiry report

15. A relevant inquiry report leads to consideration for listing where the criteria set out at section 13 are met. The types of inquiry to which this section relates are set out at section 31 of the PVG Act. Firstly, the individual must be named in a relevant inquiry report. Secondly, it must appear to Disclosure Scotland from the report that the person who held the inquiry found that the referral ground (see chapter 6) was met when the individual was doing regulated work. Thirdly, the Scottish Ministers must apply the "may be appropriate" test before considering the individual for listing. It is expected that persons conducting relevant inquiries will highlight named individuals potentially within scope of this section to Disclosure Scotland at the earliest opportunity.

7.2 – The consideration process

16. The initial assessment following one of the four triggers for consideration may result in:

- o Either:
- o the individual being placed under consideration for listing on the children's list; and / or
- o the individual being placed under consideration for listing on the adults' list;
- o Or:
- o the case is dismissed and not progressed further.

17. If the case proceeds to under consideration for one or both lists, a Disclosure Scotland caseworker will examine the information it contains, request additional information from any relevant organisations as necessary, request information from the individual who has been referred, and if necessary seek specialist advice. The purpose of this is to assist Disclosure Scotland in its assessment of an individual's unsuitability to work with children or protected adults (or both groups).

18. An important principle enshrined in the PVG Act is that the individual who is under consideration for listing has the right to know the details of the referral

that has been made against them and to see all the information on which a decision will be based. They also have the right to make a full written representation to Disclosure Scotland, giving any information they believe will be relevant, including explanation or rebuttal of anything contained in the referral. When an individual has submitted information which contradicts that provided by another source, this information will be passed onto that organisation so they may review it and provide further information or

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clarification. The detailed determination procedure and time limits for making representations are set out in regulations⁶².

19. When the individual is first notified they are being considered for listing they will have 28 days to submit any representations and other information they wish Disclosure Scotland to consider. If Disclosure Scotland sends any additional information to the individual, it will inform the individual of the time limit for a response. The regulations allow Disclosure Scotland to grant extensions of time. The regulations also allow Disclosure Scotland to seek the views of experts on aspects of the case or to ask for the assessment by a group of suitably qualified individuals as to whether or not the individual is unsuitable to work with children or protected adults. The final step in the consideration process is to provide the individual with a copy of all of the information on which Disclosure Scotland intends to rely on in making its decision whether to list.

7.3 – Notifications

20. At the start and end of any consideration for listing (and this applies to each workforce separately), all interested parties will be notified of the decision in writing. The interested parties are:

- o the individual;
- o any organisation for which Disclosure Scotland knows the individual is doing regulated work; and
- o any relevant regulatory body.

21. For PVG Scheme members, any organisation which has requested a disclosure record in respect of the individual for the type of regulated work to which the consideration for listing relates will be notified⁶³. This is one reason why it is important for organisations to apply for Scheme Record Updates and Scheme Records in respect of their workers, to ensure that they are notified of any consideration for listing. The exception to this is where the individual has ceased doing regulated work for that organisation and Disclosure Scotland has been notified of this, see chapter 1.

22. For PVG Scheme members, any relevant regulatory body for which the individual has provided a registration number on a disclosure application would be notified. Any other relevant regulatory body which has requested a disclosure record would also be notified. Relevant regulatory bodies are –

- o The General Chiropractic Council

⁶² The Protection of Vulnerable Groups (Scotland) Act 2007 (Consideration for Listing) Regulations 2010 (SSI 2010/183).

⁶³ Section 30 and 97(2) of the PVG Act read together require Disclosure Scotland to do this.

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- o The General Dental Council
- o The General Medical Council
- o The General Optical Council

- o The General Osteopathic Council
- o The General Teaching Council for Scotland
- o The Health Professions Council
- o The Nursing and Midwifery Council
- o The Royal Pharmaceutical Society of Great Britain
- o The Scottish Commission for the Regulation of Care
- o The Scottish Social Services Council
- o The NHS Tribunal

23. In any consideration for listing case (whether or not the individual is a PVG Scheme member), it may be obvious from information provided at the start of the consideration case, or during the progress of it, that certain organisations have an interest in the individual. In these cases, these organisations would also be notified.

24. Organisations should be aware that a notification of consideration for listing could come without warning. For example, a consideration for listing could begin as a result of a referral by another organisation. Usually, there would be no way of knowing that that was about to happen.

25. Inevitably, some organisations will receive notifications about consideration for listing after the individual to whom the notification relates has already left the organisation. This will usually be because neither the individual nor organisation has notified Disclosure Scotland of the individual's departure. In such cases, the organisation should return the notification to Disclosure Scotland immediately with an explanation as to the circumstances. The organisation must not pass on the information to any other person. For example, the organisation must not pass on such a notification to the individual's current employer. But it would be helpful to advise Disclosure Scotland of the existence of such an employer.

26. Note that personal employers are not notified of listing decisions but the police have access to the barred lists and can take action to ensure the individual no longer does regulated work. This might include contacting personal employers in some cases.

7.4 – Consequences of a consideration for listing

27. Placing an individual under consideration for listing is a serious step but it only means that an assessment of whether the individual is unsuitable to do

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regulated work is underway; it is a temporary state of affairs. It may result in an individual being listed or it may not. One third of organisational referrals received under POCSA were dismissed prior to consideration for listing and, of those which proceeded, a further third were dismissed at final determination.

For individuals

28. A person who is under consideration for listing is not barred from continuing to do the corresponding regulated work and can continue to do regulated work. The individual should expect any organisational employer to be notified about the consideration for listing case and it is likely that the organisation will want to discuss it with them. The individual is under the same duty as a listed person to notify any changes to their name, address or gender (see chapter 8).

29. Where an individual is being considered for listing for one list only, this has no bearing on their status in respect of the other workforce. That is to say,

whether they are a PVG Scheme member or barred in respect of the other workforce is entirely unaffected by being under consideration for the other list. For example, an individual under consideration for listing on the children's list who is already on the adults' list, may continue to work with children during the consideration process but their status as barred from working with protected adults is unaffected and remains in force.

For organisations

30. Organisations will be notified about individuals doing regulated work for them who are placed under consideration for listing in respect of that type of regulated work, as described in section 7.3 above. As the individual is not barred during the consideration process, the organisation with whom she or he is doing regulated work can continue to employ that individual to do regulated work during the consideration process.

31. Organisations should consider how to respond appropriately if they are notified that an individual doing regulated work for them has been placed under consideration for listing. Organisations should consider discussing the case with the individual and carrying out a risk assessment which takes account of all the circumstances of the case and the individual's work. It may be appropriate to make some adjustments to the individual's duties until the consideration case is determined. For example, there may be more supervision of the individual's contact with vulnerable groups during this period.

32. Organisations may wish to seek advice on handling the case of a worker placed under consideration for listing. Organisations do not have any power

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under the PVG Act to share the fact that an individual is under consideration for listing with other persons. Therefore, they may seek advice provided that they do not reveal, directly or indirectly, the identity of the individual in respect of whom the advice is sought. The action required to ensure anonymity will vary depending on the circumstances.

33. Each organisation listed as an interested party will be informed of the outcome of the consideration process. If the outcome is that the individual is placed on one or both lists, and is therefore barred from one or both kinds of regulated work, then the organisation must remove the individual from that regulated work and will be committing an offence if they fail to do so⁶⁴.

34. If the outcome of the consideration process is that the individual is not barred, the organisation should not treat the individual any differently on the grounds of the consideration case than it did before. Any temporary change to the individual's duties resulting from a risk assessment following the notification of consideration for listing should cease, unless there are other reasons for maintaining the change.

35. Notification of dismissal of the consideration for listing case will include Disclosure Scotland's reason for this decision. However, the organisation may want to ask for a Scheme Record Update to see whether the consideration process has resulted in any new vetting information coming to light about the individual. The organisation is entitled to consider this information as part of its ongoing evaluation and management of those working for it.

For disclosure records

36. When an individual is placed under consideration for listing, this fact is added to their Scheme Record. If any disclosure records are issued while the

consideration process is ongoing, the fact that the individual is under consideration for listing will be included on them. Organisations can recruit individuals under consideration for listing to do regulated work and, provided they have made a disclosure application, will be notified of the outcome of the process. If an organisation does recruit such an individual, they should follow the guidance set out above for organisations who are notified of a consideration for listing in respect of an existing worker.

37. Once a consideration for listing case is concluded, the under consideration status will no longer appear on any disclosure record. Note that the fact of a referral or a previous consideration for listing case does not appear on any disclosure record. If an individual is listed, they can no longer be a PVG Scheme

⁶⁴ The Protection of Vulnerable Groups (Scotland) Act 2007 (Removal of Barred Individuals from Regulated Work) Regulations 2010 (SSI 2010/244).

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member for the type(s) of regulated work to which the listing relates and they will not be able to obtain corresponding disclosure records.

7.5 – The decision to list or dismiss the case

38. When Disclosure Scotland has gathered sufficient information on which to make a decision about the case, including any and all representations made by the individual, a decision will be made on whether or not to list the individual. Disclosure Scotland will follow a structured decision-making process which ensures that all the risk factors are identified and assessed appropriately and consistently. Sometimes, in particularly complicated or difficult cases, Disclosure Scotland will seek the views of experts on aspects of the case or ask for the assessment by a group of suitably qualified individuals as to whether or not the individual is unsuitable to work with children or protected adults. But the individual will have the opportunity to comment on any such report or assessment before any decision is made. The final decision rests with Disclosure Scotland.

39. Decisions as to whether to include the individual on the children's list and / or adults' list are made independently. So, where an individual is being considered for inclusion on both lists, the decision may be to include the individual on the children's list but not to include them on the adults' list, or vice versa. Normally, such decisions will be made at the same time, but they need not be.

40. Section 15 of the PVG Act deals with inclusion in the children's list and section 16 deals with inclusion in the adults' list. There is one test no matter what triggered consideration for listing. It is important to note that both tests rely on past conduct, i.e. an individual can only be listed on the basis of things they have done (evidenced through convictions, police intelligence, other vetting information, workplace incidents etc). No individual can be listed solely on the basis of anticipation of future conduct. The test applied at sections 15 and 16 is that used in civil proceedings, i.e. that *on the balance of probabilities* the individual is unsuitable.

41. All decisions will be notified as described in section 7.3 above. Notifications of listing or dismissal will include Disclosure Scotland's reasons for its decision and, in the case of listing, provide details of the individual's right to appeal or apply for removal from the list.