

Chapter 8: The Lists

1 The PVG Act requires two lists to be maintained: one which contains the names of all those individuals who are unsuitable to do regulated work with children; and another for those who are unsuitable to do regulated work with protected adults. This chapter explains how the lists are managed and how individuals may be added to, or removed, from them.

2 The lists are established by section 1 of the PVG Act, and the way in which they are operated runs right through the Act. An understanding of what the lists are and how they are managed is key to a full understanding of the PVG Act and how it affects people doing regulated work.

3 The PVG Act establishes two lists, as opposed to a single list for all work with vulnerable groups, in recognition of the differences in what makes an individual unsuitable to work with children or protected adults. Experience from elsewhere in the UK, where two lists have been operational for some time, is that there are significant numbers of individuals who should not be barred from both types of regulated work. Some types of case, such as those involving physical or sexual violence, indicate unsuitability to do either type of regulated work. But other cases, for example involving thefts from care home residents, may indicate unsuitability to work with protected adults but may not mean the individual should be barred from regulated work with children. A single list system would need to have a higher threshold for listing than a two list system, where the criteria can be tailored for each list. This would inevitably mean less protection for vulnerable groups.

8.1 – Meaning of “listed” and “barred”

1 Listing, in the context of the PVG Scheme, means the inclusion of an individual in the PVG children’s list or PVG adults’ list, maintained by Disclosure Scotland. Listing is the outcome of a consideration for listing process where it is determined that an individual is unsuitable to work with one or other vulnerable group or the result of automatic listing (see below). The Independent Safeguarding Authority maintains similar lists under the SVG Act for the rest of the UK.

2 Barring is the consequence of being listed. Normally, an individual will be listed by either Disclosure Scotland or the Independent Safeguarding Authority but barred across the UK. For example, an individual included on the SVG children's list by the Independent Safeguarding Authority is barred from doing regulated work with children in Scotland.

8.2 – What are the children’s and adults’ lists?

1 The lists simply provide a means of recording the details of those people who have been found unsuitable to work with children or protected adults. One list records those who are unsuitable to do regulated work with children (the children’s list). The other records those who are unsuitable to do regulated work with protected adults (the adults’ list). An individual can be added to, or removed from, either list independently.

2 Individuals included on one of these lists (or otherwise barred) must not do the corresponding type of regulated work and cannot participate in the PVG Scheme in respect of that type of regulated work. Not only would any application to join the PVG Scheme by such a person be rejected, it would also be treated as evidence in respect of committing the offence of attempting to do regulated work whilst barred.

8.3 – The listing process

8. An individual may be included on one or both lists as a result of a consideration for listing or automatic listing. (Automatic consideration for listing only ever results from court referrals and is explained in section 7.1. Once the consideration for listing has begun, the process followed is no different than for any other consideration for listing case.)

Consideration for listing

9. The consideration for listing process is explained in Chapter 7.

10. Once all the information has been gathered and the individual has had the opportunity to make representations on it, Disclosure Scotland will determine whether it is satisfied by information relating to an individual’s conduct that the individual is unsuitable to work with children and / or protected adults. Listing decisions are made ‘on the balance of probabilities’, which is the same standard of proof required in civil proceedings. It is important to note that the test relies 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.

11. While an individual is under consideration for listing or listed, they are obliged to keep Disclosure Scotland updated about a change to their name, address or gender within one month of the change happening. Failure to do this is an offence.

Automatic listing

12. A conviction on indictment for certain crimes, such as rape and certain other offences involving non-consensual penetration, is considered so serious that it merits automatic listing. The offences that result in automatic listing are set out in an Order⁶⁵ made under section 14 of the PVG Act. Automatic listing applies only to convictions after the coming into force of the PVG Act and leads to inclusion on both lists. An individual cannot make representations nor appeal the listing, when they are automatically listed.

8.4 – Consequences of being listed

13. It is an offence for someone placed on the children's list to do regulated work, or attempt to do regulated work, with children. It is an offence for someone placed on the adults' list to do regulated work, or attempt to do regulated work, with protected adults. However an individual included on only one list is free to continue to do regulated work with the group covered by the other list. Only those individuals who are placed on both the children's and the adults' lists are barred from regulated work with both groups.

14. All disclosure records issued by Disclosure Scotland will confirm that the individual concerned is not barred from the kind of regulated work they are applying for. If the disclosure application relates to only one workforce, the disclosure record will not reveal whether the individual is barred from working in the other workforce.

15. So, an organisation may apply to see an individual's Scheme Record prior to offering them regulated work exclusively with children and will not find out if that individual is barred from working with protected adults. However, if the individual is barred from regulated work with adults, the information that led to the decision to place them on the adults' list may still be included on the Scheme Record as vetting information (e.g. a conviction).

16. The organisation will be entitled to use that information as part of their recruitment process even though it did not result in the individual being considered unsuitable for work with children. The reverse is also true. An individual's barred status on the children's' list will not be revealed to an organisation considering them for work exclusively with protected adults, but the information that led to the barring decision may still be revealed on the Scheme Record.

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The Protection of Vulnerable Groups (Scotland) Act 2007 (Automatic Listing) (Specified Criteria) Order 2010 (SSI 2010/241).

Penalties for individuals doing regulated work when barred

17. Any individual doing, or attempting to do, work from which they have been barred is committing an offence. It is a defence for the individual to show that they did not know, and could not reasonably have known, that they were barred, or that the work concerned was regulated work. On conviction on indictment the penalty is up to 5 years imprisonment and/or an unlimited fine.

Penalties for organisations offering regulated work to a barred individual

18. Organisations that employ barred individuals in regulated work with children or protected adults are committing an offence. It is also an offence for a personnel supplier to offer or supply a barred individual to an organisation. It is a defence for the organisation or personnel supplier to show that they did not know that the individual was barred. On conviction on indictment the penalty is up to 5 years imprisonment and/or an unlimited fine.

19. The only way to establish that an individual is not barred is to confirm that they are a PVG Scheme member. If an offence is suspected, then the organisation would be prosecuted but a relevant individual in the organisation can also be prosecuted. The decision about how to handle the practicalities of being notified that a member of their staff is barred will be for the organisation to make.

8.5 – Appealing against a listing decision

20. Individuals will receive guidance about the appeals procedure when they are listed. Anybody planning to appeal against a listing decision should consider taking independent legal advice. There is no right of appeal against automatic listing. However, an individual barred following automatic listing may apply for removal from the list as described in section 8.7.

21. At all times during the appeal process, the individual concerned will remain listed and unable to do any regulated work from which they have been barred.

The time limit

22. Appeals must be lodged within three months of Disclosure Scotland making a listing decision. A sheriff may extend the deadline for appeals if there is a good reason for doing so.

Grounds for appeal

23. Appeals may be made to a sheriff against Disclosure Scotland's decision to list the individual on the children's list or the adults' list. An appeal is against the decision to list on the merits of the case. The sheriff has to be satisfied by information relating to the individual's conduct that the individual is unsuitable

to work with children/protected adults in order for the individual to continue to remain on the list(s). The appeal will be heard by a sheriff who may agree to allow the hearing to take place in private.

24. No finding of fact on which a conviction is based can be challenged under the appeals process set out in the PVG Act. If a person is listed following a criminal conviction, the correct route is to appeal first against that conviction. Only if that appeal is successful can the individual concerned apply to Disclosure Scotland for removal on the ground of a change of circumstances.

What the sheriff decides

25. A sheriff who hears an appeal from an individual who has been placed on one of the lists will review all the information on which Disclosure Scotland based their decision. The sheriff may also hear personal representations from the listed individual. Having reviewed all the information, the sheriff will either be satisfied that the individual is unsuitable to work with children or protected adults and will confirm Disclosure Scotland's decision to list the individual and the individual's name will remain on the list, or where the sheriff is not so satisfied, the sheriff will direct Disclosure Scotland to remove the individual from whichever list they are on.

Appeals where both lists are involved

26. If an individual is named on both lists, an appeal may be made against one or both listing decisions. The sheriff may rule that the individual must either remain on one or the other or both lists or that Disclosure Scotland must remove the individual from one or the other or both lists.

Further appeal against a listing decision

27. Individuals who are unhappy with the outcome of an appeal to a sheriff may make a further appeal to the sheriff principal. The sheriff principal will review the case in the same way as the sheriff. Disclosure Scotland may also appeal to the sheriff principal, if it is unhappy with a sheriff's decision. Individuals whose cases are further appealed in this way will remain listed throughout the process.

28. The decision of the sheriff principal is final, unless leave is granted to make a further appeal to the Inner House of the Court of Session on a point of law only. In such cases, the Court of Session's decision is final.

8.6 - Late representations

29. Where an individual could not engage with the consideration for listing process, discussed in chapter 7 above, for example because the individual concerned could not be contacted and was unavailable to make their own representations during the consideration process, Disclosure Scotland must consider late representations from that individual. The details of the procedure for late representations are set out in regulations⁶⁶.

8.7 – Applying to be removed from the list

30. An individual will be listed indefinitely. However, after 10 years, a listed individual may apply to Disclosure Scotland and ask to be removed from the list. If an individual was placed on the list(s) when they were aged under 18, they may apply to be removed after 5 years. Individuals may seek removal before the 5 or 10 year threshold is reached if they believe their circumstances have changed – for example, a conviction that led to their listing has been quashed.

31. Disclosure Scotland does not review cases automatically after they pass the 5 or 10 year threshold. It is up to the listed individual to make an application. When Disclosure Scotland receives an application for removal, it will launch a full consideration process that will result either in the individual being removed from the list, or else remaining on the list.

32. If Disclosure Scotland decides that the individual is not to be removed from the list, the individual can appeal to the sheriff against that decision. A sheriff who hears an appeal against a refusal to remove from one or both lists will review all the information on which Disclosure Scotland based their decision. The sheriff may also hear personal representations from the listed individual. Having reviewed all the information, the sheriff will either be satisfied that the individual is no longer unsuitable to work with children or protected adults and will direct Disclosure Scotland to remove the individual from the list, or where the sheriff is not so satisfied, the sheriff will refuse the individual's application for removal and the individual will remain listed.

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The Protection of Vulnerable Groups (Scotland) Act 2007 (Late Representations and Applications for Removal) Regulations 2010 (SSI 2010/184).

Further appeal against a decision to refuse to remove from the list

33. Individuals who are unhappy with the outcome of an appeal to a sheriff may make a further appeal to the sheriff principal. The sheriff principal will review the case in the same way as the sheriff. Disclosure Scotland may also appeal to the sheriff principal, if it is unhappy with a sheriff's decision. Individuals whose cases are further appealed in this way will remain listed throughout the process.

34. The decision of the sheriff principal is final, unless leave is granted to make a further appeal to the Inner House of the Court of Session on a point of law only. In such cases, the Court of Session's decision is final.

35. If the individual is removed from the list, the fact that they have previously been listed will not be disclosed on their Scheme Record. However, the information that led to them being listed could remain on their scheme record as vetting information such as a conviction and employers will continue to be able to use that information as part of their recruitment procedures. Information about a conviction that had been quashed would not be retained.