

PROTECTION OF VULNERABLE GROUPS (SCOTLAND) ACT 2007

EXPLANATORY NOTES

OVERVIEW

Part 1 – the Lists

Sections 10 – 13. Consideration whether to list

29. There are four triggers for consideration for listing by the Central Barring Unit. These are an organisational referral or court referral being received, new relevant vetting information coming to light (usually under arrangements made under section 42(2)) and the individual being named in a relevant inquiry report.
30. The Act establishes two lists and provides flexibility for triggers in respect of an individual's conduct in one workforce to lead to consideration in respect of listing on the other. For example, a referral in respect of a health worker undertaking regulated work with protected adults could, depending on the facts and circumstances of the case, result in consideration for listing in the children's list.
31. Organisational referrals lead to consideration for listing where the criteria set out at section 10 are met. Firstly, the organisation must have provided the requisite information (as prescribed under sections 3 to 6 and 8). The reason for this is to ensure that the Scottish Ministers have sufficient identity information to be sure of whom they are considering for listing and also the basic facts of a *prima facie* case against that individual. Secondly, the Scottish Ministers must be satisfied that the information was not given for vexatious or frivolous purposes. For example, the referral was not made out of malice or spite (vexatious) or over a trivial incident where nothing really untoward took place (frivolous).
32. A referral which passes these tests is said to be a competent referral. But before a competent referral leads to consideration for listing, the Scottish Ministers must be satisfied that it may be appropriate for the individual to be included in the relevant list. This will normally be the case, but depends on a caseworker assessment of the information provided by the organisation. The "may be appropriate" test is more easily met than the test for inclusion on the lists at sections 15 and 16.
33. Court referrals lead to consideration for listing where the criteria set out at section 11 are met. Section 11(2) means that Ministers must consider listing an individual convicted of a relevant offence (relevant offences are set out in schedule 1). This duty to consider an individual for listing is commonly referred to as "automatic consideration for listing", although there is no such wording in the Act. There is no schedule of relevant offences for protected adults nor any corresponding automatic consideration for listing for that list.
34. [Section 11\(3\)](#) links back to a court referral under section 7(3). Note that the Scottish Ministers must be satisfied as to the same matter as the court (compare section 7(2)(b) with sections 11(3)(a) and 11(4)(a)) and, additionally, that the individual does, has done

*These notes relate to the Protection of Vulnerable Groups (Scotland)
Act 2007 (asp 14) which received Royal Assent on 18 April 2007*

or is likely to do regulated work. This latter element of the test before consideration for listing brings the focus onto the workforce but allows the Scottish Ministers to consider for listing individuals who are not scheme members.

35. The process following a court referral is independent of any appeal against conviction. If the appeal against conviction is successful, it does not follow that the individual will be removed from the list, although the individual could make an application for removal under section 25 on the basis of change of circumstances. Where the individual had been a scheme member prior to conviction, there may be other information on the retained scheme record (retained by the Scottish Ministers using their power at section 61) which should be taken into account.
36. Vetting information leads to consideration for listing where the criteria set out at section 12 are met. When new vetting information (as defined at section 49) about scheme members comes to light through arrangements made under section 47(2), it will be assessed against the criteria in section 12. That is to say, vetting information gathered by the Scottish Ministers in their capacity as the Vetting and Disclosure Unit (under Part 2), will be considered by them in their capacity as the Central Barring Unit (under Part 1). The tests at section 12(1)(b) and 12(2)(b) are met by the individual having had, having or applying for scheme membership in respect of that type of regulated work. They can also be met where there is other evidence of involvement with that type of regulated work outside of scheme membership. The “may be appropriate” test filters out new vetting information (e.g. driving convictions) which have no bearing on unsuitability to do regulated work.
37. [Section 12](#) also makes provision for a determination relating to one list (whether or not the individual was listed) to lead to consideration for listing in relation to the other list, provided that there is evidence of involvement in regulated work in that workforce. A case may be referred for consideration in relation to the other list at any stage in the consideration process from the beginning of the process (sections 10 to 13) to the final determination (section 15 or 16). It is expected that information which would lead to consideration for both lists would be identified early in the process but, in some cases, information may only emerge at a late stage or the need for referral to the other list may only become apparent when the determination panel considers specific information or aggregate vetting information.
38. 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 in section 31. Firstly, the individual must be named in a relevant inquiry report. Secondly, it must appear to the Scottish Ministers from the report that the person who held the inquiry found that the referral ground was met when the individual was doing regulated work. Note that the test centres on the view of the person who held the inquiry, rather than the Scottish Ministers, in respect of the referral ground being met. 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 the Central Barring Unit at the earliest opportunity.
39. A listed individual must not undertake regulated work (see section 34). But an individual under consideration for listing (i.e. in the period between a competent trigger under sections 10 to 13 and a determination under sections 15 or 16) may continue to do regulated work without committing any offence. Section 30 provides for organisational employers and relevant regulatory bodies to be notified of an individual being placed under consideration for listing and it is expected that they will take any appropriate action to mitigate any risk.