



Independent Safeguarding Authority

**Guidance Notes  
for the  
Barring Decision Making Process**

**The Board of  
The Independent Safeguarding Authority**

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# Guidance Notes for the Barring Decision Making Process

## 1. Introduction

1.1 These notes are intended to be used by case workers in the determination of barring decisions within the context of the Safeguarding Vulnerable Groups Act, 2006 ('the Act') and the Safeguarding Vulnerable Groups (Northern Ireland) Order, 2007 ('the Order'). The guidance contained in this document will be subject to regular review and updating.

## 2. Overview

2.1. The purpose of the Barring Decision Making Process – or 'the Process' for short - is to ensure that all barring decisions follow a standard process which affords a fair, rigorous, consistent, transparent and legitimate assessment of whether an individual should be prevented from working with children and/or vulnerable adults as defined within the Act and the Order.

2.2. The Process is applied to any decision that may result in someone being put on or remaining on a barred list where information has been received by the ISA which needs to be assessed; so, for example, it would be used for auto-bar with representations cases, other types of external referrals that are not in relation to someone presently subject to monitoring, or reviews of barred cases.

2.3. The information can take the form of convictions or cautions; competent body findings; referrals from organisations, including employers; and other or further information from any source, e.g. stories in the press (which could trigger the ISA to request further information from a variety of sources).

2.4. The Process is not used in 'auto-bar' cases since individuals who are convicted or cautioned for such offences are automatically included in the list(s). There may, however, be circumstances where an individual is conviction/cautioned for an offence which is an 'auto-bar' in relation to the children's list but is an 'auto-bar with representation' in relation to the adults' list. In these circumstances the individual (who would be included in both lists) would need to be given the right to make representations in relation to the adults' list. Therefore, the Process would be used in relation to the adults' list only.

## 3. The Barring Decision Process

3.1. The Barring Decision Process is used in cases where the individual has a right to make representations and has 5 distinct stages:

- Initial assessment
- Evidence evaluation
- Case assessment
- Representations
- Barring decision (Appropriate to bar?)

3.2. The divisions between the stages are not barriers but decision points. That is, before progressing through the Process from one stage to the next or terminating the Process at any point, the decision has to be justified. This gives transparency and an audit trail of the decision.

3.3. The Process is shown at *Appendix A*'.

### 3.4 Initial assessment

3.4.1 The initial action is to determine, on the face of it, whether the case indicates that a person has, at any time, engaged in ‘relevant conduct’<sup>1</sup> or, if there is no suggestion of relevant conduct, whether there is anything to suggest that a person may harm or in any way cause or put at risk of harm a child or vulnerable adult<sup>2</sup>. At this very early point, it is not necessary to determine whether any event happened but simply that it involved or likely involved such conduct or that the person poses or may pose a risk of harm; and which limb or limbs of the legislation is most appropriate. The initial legislative decision may be reviewed before representations are sought but at the point they are sought it must be clear which power to bar is being used.

### 3.5 Evidence evaluation

3.5.1 The next stage in the Process is deciding whether the event (or events) happened, bearing in mind that an event (if found to have happened on the balance of probabilities) may be relevant because it is “relevant conduct” or, if not “relevant conduct”, an indication nevertheless that the person poses a risk of harm to children or vulnerable adults<sup>3</sup>.

3.5.2 It can be taken as a matter of fact that, in some circumstances such as the notification of convictions, cautions and decisions by competent bodies, the event happened. However, in all other circumstances, including allegations, it is the assessment of all the available evidence that will assist in the determination of whether or not, on the balance of probabilities, the event happened. A conclusion that an event happened on the balance of probabilities at this decision point will be regarded as a ‘finding of fact’ for the purpose of the Act and the Order.

### 3.6 Case assessment

3.6.1 The purpose of the case assessment process is to determine, on the available facts, whether the person presents definite concerns with respect to their risk to children and/or vulnerable adults and whether those concerns constitute an unacceptable risk of harm to either or both groups.

3.6.2 All available, pertinent information on which the barring decision is to be made is assessed at this stage including, where appropriate, advice from specialists. The actual barring decision is made later, after the assessment of an individual’s risk of harm to vulnerable groups.

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<sup>1</sup> Para 3, Part 1 (children) and Para 9, Part 2 (adults), Schedule 3, Safeguarding Vulnerable Groups Act 2006 and Para 3, Part 1 (children) and Para 9, Part 2 (adults), Schedule 1, Safeguarding Vulnerable Groups (Northern Ireland) Order 2007

<sup>2</sup> Para 5, Part 1 (children) and Para 11, Part 2 (adults), Schedule 3, Safeguarding Vulnerable Groups Act 2006 and Para 5, Part 1 (children) and Para 11, Part 2 (adults), Schedule 1, Safeguarding Vulnerable Groups (Northern Ireland) Order 2007

<sup>3</sup> For the purposes of para 5(4), Part 1 (Children) or para 11, Part 2 (Vulnerable Adults), Schedule 3, Safeguarding Vulnerable Groups Act 2006 and para 5(4), Part 1 (Children) or para 11, Part 2 (Vulnerable Adults), Schedule 1, Safeguarding Vulnerable Groups (Northern Ireland) Order 2007.

3.6.3 The method used in this case assessment stage is the Structured Judgement Procedure (SJP) which is focused on risk factors linked to future harm.

### 3.7 Representations

3.7.1 Where, after the case has been assessed and you feel minded to bar, the person concerned must (except in the case of auto-bar offences<sup>4</sup>) as the case may be, be given the opportunity to make representations as to why they should not be included in the children's or adults' lists<sup>5</sup> or both, or, in the case of auto-bar with reps offences or review cases, be given the opportunity to make representations as to why they should be removed from the children's and/or adults' lists<sup>6</sup>.

### 3.8 Appropriate to bar? (Barring decision)

3.8.1 The decision at the end of the Case Assessment relates to the level of potential future risk of harm to children and/or vulnerable adults taking into consideration, where applicable, any representations that have been made and all pertinent facts and any specialist opinions. The guiding principle is that the assessment of the case is based on a structured judgement regarding an individual's risk of harm to vulnerable groups and is separated from the consideration as to whether it is appropriate to include any such individual in the list(s) (to bar).

3.8.2 In the case of cautions/convictions concerning Automatic Inclusion and Inclusion subject to consideration of representations, there is a presumption that it is appropriate to include on the list(s).

3.8.3 The decision to include in the list is not a punitive sanction but is a protective measure to safeguard children and vulnerable adults.

## 4 Initial Assessment

### 4.1 Relevant powers

4.1.1 The initial assessment needs to determine which limb of the relevant part of the Act or the Order is applicable to the case.

4.1.2 The relevant parts of the Act and the Order are contained at '*Appendix B*'

4.1.3 Part 1 of Schedule 3 (Schedule 1 in Northern Ireland) relates to the Children's Barred List and Part 2 relates to the Adults' Barred List. Both Parts essentially contain three similar ways in which a person can be entered on the appropriate barred list.

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<sup>4</sup> Para 1, Part 1 and Para 7, Part 2 Schedule 3, Safeguarding Vulnerable Groups Act 2006 and Para 1, Part 1 and Para 7, Part 2 Schedule 1, Safeguarding Vulnerable Groups (Northern Ireland) Order 2007

<sup>5</sup> Paras 3(2) and 5(2), Part 1 and Paras 9(2) and 11(2), Part 2 Schedule 3 Safeguarding Vulnerable Groups Act 2006 and Paras 3(2) and 5(2), Part 1 and Paras 9(2) and 11(2), Part 2 Schedule 1 Safeguarding Vulnerable Groups (Northern Ireland) Order 2007

<sup>6</sup> Para 2 (3)(b), Part 1 and Para 8(3)(b), Part 2 Schedule 3, Safeguarding Vulnerable Groups Act 2006 and Para 2 (3)(b), Part 1 and Para 8(3)(b), Part 2 Schedule 1, Safeguarding Vulnerable Groups (Northern Ireland) Order 2007

## 4.2 Automatic Inclusion

- 4.2.1 This is commonly referred to as ‘auto-bar’ and requires the ISA, on receipt of information (convictions and cautions, risk of sexual harm orders etc.) which indicates that a person satisfies any of the prescribed criteria, to include the person on the appropriate list. The criteria, which are prescribed in the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria) Regulations 2008 and Miscellaneous Amendments) Regulations 2008 and The Safeguarding Vulnerable Groups (Prescribed Criteria and Miscellaneous Amendment) Regulations (Northern Ireland) 2008, consist of the most serious sexual and violent offences. For some of these cases the individual concerned will have a right to make representations on being automatically included in the list as to their removal from the list (see below).
- 4.2.2 The Automatic Inclusion offences relating to children are not identical to those relating to vulnerable adults. Where an offence is not included in both the ‘auto-bar lists’ the issue of cross-consideration is addressed through the procedure outlined at paragraph 13 of Part 3<sup>7</sup>. This means that if, for example, an offence is deemed an ‘auto-bar’ offence in respect of the Children’s List but is not similarly deemed an ‘auto-bar’ offence for the Adults’ List, the ISA must still consider whether the powers in paragraphs 9 and 11 of Schedule 3 (Schedule 1 in Northern Ireland)(i.e. the discretionary barring powers for vulnerable adults) should be used.

## 4.3 Inclusion subject to consideration of representations

- 4.3.1 This is commonly referred to as ‘auto-bar with reps’ and requires the ISA, on receipt of information (convictions and cautions) which indicates that a person satisfies any of the prescribed criteria, to include the person on the appropriate list and to give the person the opportunity to make representations as to why they should be removed from the relevant list. If it appears that it is not appropriate for the person to be included in the list, they must be removed.
- 4.3.2 In these cases the structured judgment procedure will be applied once the representations have been received, after which the decision must be made whether it is still appropriate for the person to be included in the list.
- 4.3.3 The representations may raise issues which require further information to be gathered. If any further information is gathered upon which the ISA proposes to rely in making its final decision, the person must be given a further opportunity to make representations in relation to this.

## 4.4 Discretionary Barring

- 4.4.1 The Act and the Order provide two further limbs which prescribe the circumstances in which a person may be included on the children’s and/or adults’ lists.

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<sup>7</sup> Schedule 3, Safeguarding Vulnerable Groups Act 2006 and Schedule 1, Safeguarding Vulnerable Groups (Northern Ireland) Order 2007

**4.4.2 Behaviour** - If it appears that the person has (at any time) engaged in relevant conduct and it is proposed to include that person on the children's or adults' list, then the person must be given the opportunity to make representations as to why they should not be included on the list(s). If, after considering the representations, it is determined that the person has engaged in relevant conduct and it is appropriate to include the person on the list(s), the person will be placed on the list(s).<sup>8</sup>

**4.4.3 Risk of Harm** - If it appears that a person may harm a child or vulnerable adult; or may cause a child or vulnerable adult to be harmed; or put a child or vulnerable adult at risk of harm; or attempt to harm a child or vulnerable adult; or incite another to harm a child or vulnerable adult and it is proposed to include that person on the children's and/or adults' list(s), the person must be given the opportunity to make representations as to why they should not be included on the list(s). If, after considering the representations, it is determined that the person has fulfilled one of the above and it is appropriate to include the person on the list(s), the person will be placed on the list(s).<sup>9</sup>

**4.4.4 Where representations are sought from the person but none are made, then the person will be included on the list(s).**

## 4.5 Relevant Conduct

### Vulnerable Adults

4.5.1 In relation to vulnerable adults, 'Relevant Conduct' is defined in the Act and the Order<sup>10</sup> as:

- (a) conduct which endangers a vulnerable adult or is likely to endanger a vulnerable adult;
- (b) conduct which, if repeated against or in relation to a vulnerable adult, would endanger that adult or would be likely to endanger him;
- (c) conduct involving sexual material relating to children (including possession of such material);
- (d) conduct involving sexually explicit images depicting violence against human beings (including possession of such images), if it appears to IBB that the conduct is inappropriate;
- (e) conduct of a sexual nature involving a vulnerable adult, if it appears to IBB that the conduct is inappropriate.

4.5.2 A person's conduct endangers a vulnerable adult if he –

- (a) harms a vulnerable adult,
- (b) causes a vulnerable adult to be harmed,
- (c) puts a vulnerable adult at risk of harm,
- (d) attempts to harm a vulnerable adult, or
- (e) incites another to harm a vulnerable adult.'

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<sup>8</sup> Para 3-4 and 9-10 Parts 1&2 Schedule 3 Safeguarding Vulnerable Groups Act 2006 and Para 3-4 and 9-10 Parts 1&2 Schedule 1 Safeguarding Vulnerable Groups (Northern Ireland) Order 2007

<sup>9</sup> Para 5 and 11 Parts 1&2 Schedule 3 Safeguarding Vulnerable Groups Act 2006 and Para 5 and 11 Parts 1&2 Schedule 1 Safeguarding Vulnerable Groups (Northern Ireland) Order 2007

<sup>10</sup> Para 10 Part 2 Schedule 3 Safeguarding Vulnerable Groups Act 2006 and Para 10 Part 2 Schedule 1 Safeguarding Vulnerable Groups (Northern Ireland) Order 2007

4.5.3 Within the Act and the Order <sup>11</sup>, a vulnerable adult is defined as follows:

A person is a vulnerable adult if he has attained the age of 18 and:

- (a) he is in residential accommodation,
- (b) he is in sheltered housing,
- (c) he receives domiciliary care,
- (d) he receives any form of health care,
- (e) he is detained in lawful custody,
- (f) he is by virtue of an order of a court under supervision by [a person exercising functions for the purposes of Part 1 of the Criminal Justice and Court Services Act 2000 (c.43) (in the Act)] [a probation officer (in the Order)],
- (g) he receives a welfare service of a prescribed description,
- (h) he receives any service or participates in any activity provided specifically for persons who fall within subsection (9)),
- (i) payments are made to him (or to another on his behalf) in pursuance of arrangements under [section 57 of the Health and Social Care Act 2001 (c.15) (in the Act)][section 8 of the Carers and Direct Payments Act (Northern Ireland) 2002 (in the Order)], or
- (j) he requires assistance in the conduct of his own affairs.

4.5.4 Where the legislation can be applied to the individual circumstances in the following examples, they may be regarded as 'relevant conduct'. However, it must be noted that because a particular behaviour has previously been regarded as 'Relevant Conduct' in a particular case and resulted in a bar, it does not automatically mean that the repetition of similar behaviour in another case will always lead to the same conclusion. In fact, similar behaviours in the past have not always resulted in the same outcome, reinforcing the absolute need to ensure that all decisions are based on the merits of each individual case.

4.5.5 It is emphasised that the following are only examples of the type of behaviour which may be considered as relevant conduct and is dependant on the individual circumstances. This is not a definitive or exhaustive list.

Type of Harm to Vulnerable Adult	Meaning	Examples
Emotional/ Psychological	Action or inaction by others that causes mental anguish	Inflexible regimes and lack of choice. Mocking, coercing, denying privacy, threatening behaviour, bullying, intimidation, harassment, deliberate isolation, deprivation.
Financial	Usually associated with the misuse of money, valuables or property	Unauthorised withdrawals from vulnerable adult's account, theft, fraud, exploitation, pressure in connection with wills or inheritance.
Physical	Any physical contact	Hitting, slapping, pushing, shaking, bruising,

<sup>11</sup> s.59, Safeguarding Vulnerable Groups Act 2006 and Article 3, Safeguarding Vulnerable Groups (Northern Ireland) Order 2007

	that results in discomfort, pain or injury	failing to treat sores or wounds, under or overuse of medication, un-prescribed or inappropriate medication, use of restraint or inappropriate restraint, inappropriate sanctions.
Sexual	Coercion or force to take part in sexual acts	Inappropriate touching. Causing bruising or injury to the anal, genital or abdominal area. Transmission of STD.
Neglect	Failure to identify and/or meet care needs	Untreated weight loss, failing to administer reasonable care resulting in pressure sores or uncharacteristic problems with continence. Poor hygiene, soiled clothes not changed, insufficient food or drink, ignoring resident's requests, unmet social or care needs.
Verbal	Any remark or comment by others that causes distress	Demeaning, disrespectful, humiliating, racist, sexist or sarcastic comments. Excessive or unwanted familiarity, shouting, swearing, name-calling.

4.5.6 Experience indicates that it is unusual for abuse to manifest itself in only one harm category. It can be expected that evidence of a combination of these behaviours will be apparent in more serious cases.

4.5.7 The Act and the Order bring into the 'Vulnerable Adult' definition many more categories of vulnerable adult than previous legislation, including, for example, those receiving any form of healthcare and those detained in prisons. Referrals will be received regarding these groups which have not been made before and if any doubt exists about these cases, seek advice from a senior manager. These cases will be closely monitored to ensure a consistent approach.

## Children

4.5.8 In relation to children, 'Relevant Conduct' is defined in the Act and the Order<sup>12</sup> as:

- (a) conduct which endangers a child or is likely to endanger a child;
- (b) conduct which, if repeated against or in relation to a child, would endanger that child or would be likely to endanger him;
- (c) conduct involving sexual material relating to children (including possession of such material);
- (d) conduct involving sexually explicit images depicting violence against human beings (including possession of such images), if it appears to IBB that the conduct is inappropriate;
- (e) conduct of a sexual nature involving a child, if it appears to IBB that the conduct is inappropriate.

4.5.9 'A person's conduct endangers a child if he –

- (a) harms a child,
- (b) puts a child at risk of harm,

<sup>12</sup> Para 4 Part 1 Schedule 3 Safeguarding Vulnerable Groups Act 2006 and Para 4 Part 1 Schedule 1 Safeguarding Vulnerable Groups (Northern Ireland) Order 2007

- (c) attempts to harm a child, or
- (d) incites another to harm a child.’

4.5.10 The Act and the Order<sup>13</sup> define a child as:  
 ‘A person who has not attained the age of 18’.

4.5.11 Where the legislation can be applied to the individual circumstances in the following examples, they may be regarded as ‘relevant conduct’. However, because a particular behaviour has been regarded as ‘Relevant Conduct’ in a particular case in the past which resulted in a bar, it does not automatically mean that the repetition of similar behaviour in another case will always lead to the same conclusion. In fact, similar behaviours in the past have not always resulted in the same outcome, reinforcing the absolute need to ensure that all decisions are based on the merits of each individual case.

4.5.12 It is emphasised that the following are only examples of the type of behaviour which may be considered as relevant conduct and is dependant on the individual circumstances. This is not a definitive or exhaustive list.

Type of Harm to Children	Meaning	Examples
Emotional/ Psychological	Action or inaction by others that causes mental anguish	Emotional harm is the emotional ill-treatment of a child such as to cause severe and persistent adverse effects on the child’s emotional development. It may involve conveying to children that they are worthless or unloved, inadequate, or valued only insofar as they meet the needs of another person. It may feature age or developmentally inappropriate expectations being imposed on children. It may involve causing children frequently to feel frightened or in danger, or the exploitation or corruption of children. It may involve children witnessing aggressive, violent or harmful behaviour such as domestic violence. Some level of emotional harm is involved in all types of ill-treatment of a child, though it may occur alone. Grooming. Harassment. Inappropriate emotional involvement.
Physical	Any intentional physical contact that results in discomfort, pain or injury	Physical harm may involve assaults including hitting, shaking, throwing, poisoning, burning or scalding, drowning, suffocating, or otherwise causing physical harm to a child. Physical harm may also be caused when a parent or carer feigns the symptoms of, or deliberately causes ill health to a child whom they are looking after. This situation is commonly described using terms such as factitious illness by proxy or Munchausen syndrome by proxy. Supply drugs to children. Inappropriate/unauthorised methods of restraint
Sexual	Any form of	Sexual harm involves forcing or enticing a child or young

<sup>13</sup> s.60, Safeguarding Vulnerable Groups Act 2006 and Article 2, Safeguarding Vulnerable Groups (Northern Ireland) Order 2007

	sexual activity with a child under the age of consent	person to take part in sexual activities, whether or not the child is aware of what is happening. The activities may involve physical contact, including penetrative (e.g. rape or buggery) or non-penetrative acts. They may include non-contact activities, such as involving children in looking at, or in the production of, pornographic material or watching sexual activities, or encouraging children to behave in sexually inappropriate ways. Downloading child pornography. Taking indecent photographs of children. Sexualised texting.
Neglect	Failure to identify and/or meet care needs	Neglect is the failure to meet a child's basic physical and/or psychological needs, likely to result in the serious impairment of the child's health or development. It may involve a parent or carer failing to provide adequate food, shelter and clothing, failing to protect a child from physical harm or danger, or the failure to ensure access to appropriate medical care or treatment. It may also include neglect of, or unresponsiveness to, a child's basic emotional needs.

## 4.6 Convictions/Cautions

- 4.6.1 The ISA has determined the offences that are required to be referred by the Criminal Records Bureau ('CRB') for consideration. The CRB<sup>14</sup> is responsible for ensuring that the convictions/cautions<sup>15</sup> relate to an individual and this process is not reviewed, as a matter of course, by the ISA. However, where there is doubt surrounding the identity match, the case can be reviewed and referred back to the CRB for clarification.
- 4.6.2 The responsibility for establishing an applicant's identity lies with Registered Bodies.
- 4.6.3 The presence of convictions/cautions is regarded by the ISA as findings of fact in relation to the events which lead to the conviction or caution.
- 4.6.4 The list of all offences that appear on the PNC has been considered and, by building on the past experience, judicial judgements and behaviours that underlie potential risk, divided into two categories.
- 4.6.5 **Trigger convictions and cautions** – In general, the offences (including attempts, conspiracy etc.) that are regarded as 'relevant' include (though are not restricted to) those that indicate there may be evidence of risk of harm, for example those which;
- are directed towards children and/or vulnerable adults;
  - involve sexual behaviour;

<sup>14</sup> AccessNI will process all applications for ISA registration in Northern Ireland. However, the interface between AccessNI and ISA will be via CRB. All references to CRB throughout this document are, therefore, relevant for England, Wales and Northern Ireland.

<sup>15</sup> References to convictions/cautions should be regarded to include reprimands and final warnings

- involve violence or potential for violence against people and property, especially where such conduct is intentional or a weapon is used, and animal cruelty;
- involve acquisitive behaviour and fraud;
- indicate that the person holds/held a position of authority and breached a trust;
- relate to addictive behaviour or persistent offending.

4.6.6 **Not initially relevant convictions and cautions** – All other convictions and cautions falling outside the above are regarded as ‘not initially relevant’.

4.6.7 Conviction and caution details may in a small number of cases be the only factors to consider in the barring process; however, where other information is considered, for example a referral, all conviction and caution information is also taken into account when deciding whether or not to include a person on the barred list(s) to enable a full picture of a person’s behaviour. Where the ISA is considering a referral where relevant information is disclosed which suggests a risk of harm, the CRB will provide ISA with all offence information.

4.6.8 It is again important to stress that each case is dealt with on its merits. It is, therefore, not possible to specify which offences would lead to a bar (other than auto-bar offences) and which offences would not.

4.6.9 **The ISA cannot and will not use its powers in such a way so as to discriminate against any person on the grounds of their sexual orientation.**

4.6.10 The general rule is that homosexual and heterosexual behaviour is treated in the same way for the purposes of making a barring decision. It is unlikely that you will receive a referral purely focussing on the homosexual nature of alleged sexual behaviour, but you should be aware that you may come across old offences that arose in circumstances that today would not lead to a prosecution or conviction. Offences specifically to bear in mind are old gross-indecency convictions where the facts that gave rise to the offence focussed solely on consensual adult homosexual sex, and where there are no other significant or relevant factors for risk assessment purposes. In such cases the general rule means that the case should not be proceeded with. What constitutes “other significant or relevant factors for risk assessment purposes” will obviously depend on the facts of each case, but this must be considered no differently whether the facts or allegations involve homosexual or heterosexual behaviour. Obvious examples of such factors (and this is not a closed list) would include the status of the other participant (i.e. child or vulnerable adult), whether there was any coercion or violence, whether there was a relationship of trust for the purposes of the law, whether the act was deliberately committed in front of children or vulnerable adults or to entice children or vulnerable adults etc.

## 4.7 **Initial assessment of convictions/cautions**

- 4.7.1 As from ‘Go-live’ the ISA will consider cases where;
- a new application reveals a trigger caution or conviction; or

- a trigger conviction or caution is recorded against an individual who is subject to monitoring.
- 4.7.2 The purpose of the initial assessment is to evaluate the information (the PNC data) to determine whether, on the face of it:
- the matter should be concluded without the need for further consideration or referral;
  - further primary information should be requested from the police; or
  - the case should be escalated for consideration of a full/further assessment.
- 4.7.3 Without exception, offences that are in the 'inclusion subject to consideration of representations' list (auto-bar with reps) go directly to the 'Representation' stage.
- 4.7.4 The National Policing Improvement Agency (NPIA) will (continue to) forward lists to the ISA of individuals who have been convicted/cautioned of 'automatic inclusion' (auto-bar) offences and 'inclusion subject to consideration of representations' offences (auto-bar with reps). Before including these in the list(s), the ISA will reconfirm that the convictions/cautions do relate to the relevant offences as some offences have restrictions. As already indicated, there may be occasions where the conviction/caution relates to an 'auto-bar' offence concerning the children's list but which is an 'auto-bar with representations' offence on the adults' list. After confirming the validity of the offences, the individuals will be included in the relevant lists and where the inclusion of the individual is subject to representations, will be included in the Process.
- 4.7.5 Where the initial assessment indicates any of the following, you should consider seeking further information from the relevant police force:
- the offence is sex related;
  - the offence involves violence including criminal damage, animal cruelty and/or weapon possession;
  - the offence involves, in any way, a child or vulnerable adult;
  - there are potential child protection issues;
  - the offence is drugs-related;
  - an order or licence is in force;
  - there is a breach of an order or licence;
  - the offence is robbery, burglary, fraud or other serious acquisitive crime;
  - the offence involves harassment;
  - there is a pattern of alcohol-related and/or drug-related crime or an indication of addiction;
  - there is a pattern of offending that gives cause for concern;
  - there is an issue of breach of trust;
  - any of the above offences that involves aiding and abetting, counselling or procuring, or conspiracy to commit.
- 4.7.5 You should be selective about which convictions/cautions you seek further information for. In general, the more recent the conviction/caution, the more likely the information is to be relevant; also, the more serious the conviction/caution, the more likely it is that the information will be relevant. However, this is not always the case and you should exercise discretion in

selecting those convictions/cautions that you believe will help identify potential risk factors. So, for example, where several convictions/cautions are revealed over a long period of time, you may select the three or four that are the most serious and the latest (violent, sexual etc).

- 4.7.6 The matter will **not** normally be further considered if the last trigger offence (conviction/caution date) is more than 10 years old providing that:
- there are no 'auto-bar' or 'auto-bar with reps' offences in the offending history; **and**
  - the 'offence-free' period does not contain either any period in custody or under supervision; **and**
  - the 'offence-free' period does not contain any period where an order of the court was active; **and**
  - the last offence does not form part of an offence history which gives cause for concern; **and**
  - the offence history does not include any offences against the person or other serious offence(s); **and**
  - there is no other information to consider.

## 4.8 Overseas convictions/cautions

- 4.8.1 Secondary legislation<sup>16</sup> makes provision to the effect that any offence under the law of a country or territory outside the UK, which if committed in the UK, would constitute an 'autobar' offence under British law, will be treated as such.

## 4.9 Competent Body Findings

- 4.9.1 The findings of fact made by competent bodies are made on a balance of probabilities. The Act and the Order<sup>17</sup> provide that "the opportunity to make representations does not include the opportunity to make representations that findings of fact made by a competent body were wrongly made." The focus, therefore, is on the concerned individual's right to make representations. He or she cannot make representations to the effect that a competent body's findings of fact, on the balance of probabilities, were wrongly made.
- 4.9.2 There may be, in extremely rare cases, the possibility of looking at the same evidence and disagreeing with the competent body's findings on the facts and, in effect, review their findings in cases where a competent body has decided that an event did not happen. Few such cases can be envisaged, nevertheless, if such circumstances were to develop, you must escalate the matter so that legal advice can be considered.
- 4.9.3 The position may be different where new evidence has come to light that was not considered by the competent body when it made its findings of fact, depending on the circumstances. It would be straightforward where a body

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<sup>16</sup> The Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria) (Foreign Offences) Order 2008 and The Safeguarding Vulnerable Groups (Prescribed Criteria) (Foreign Offences) Order (Northern Ireland) 2008.

<sup>17</sup> Paragraph 16(3) of Part 3, Schedule 3, Safeguarding Vulnerable Groups Act 2006 and Paragraph 16(3) of Part 3, Schedule 1, Safeguarding Vulnerable Groups (Northern Ireland) Order 2007

has found someone *didn't* do something and ISA comes into possession of evidence, through its own inquiries, which calls this into question. Clearly the findings must be made on the basis of the new evidence.

4.9.4 A more difficult situation would emerge where the competent body has found that someone *did* do something and then the person concerned attempts to put new evidence before the ISA in representations which calls this into question. Here the person concerned cannot do this because of the prohibition in the Act and the Order<sup>18</sup>. In such cases, the individual concerned is advised to raise the new evidence with the competent body through their appeal mechanisms. [If the appeal for some reason cannot happen or is not allowed, this doesn't alter the position that the ISA cannot consider the new information. The intention in the legislation is to leave the findings of fact in the preserve of the competent body.] This may require a suspension of the case until the outcome of that appeal process; you should consult your line manager in such instances.

4.9.5 Additionally, there is a need to distinguish between a finding of fact by a competent body and a finding of 'guilt' by a competent body. A competent body may make a finding of fact that an individual did a particular thing and, on the basis of this finding, that the individual is guilty of 'misconduct' under their professional code. What the individual cannot do is challenge the finding of the body that he/she did those things; however, he/she can still say that having done those things it doesn't mean he/she should be placed on the children's or adults' barred lists (or both).

4.9.6 There are many other formal bodies that influence the safeguarding of children and vulnerable adults; however, findings of fact by those other bodies cannot be afforded the same presumption as that stipulated in the legislation. In the determination of whether an event happened which is dealt with by such other bodies, the test that, on a balance of probability, it happened needs to be satisfied.

4.9.7 The list of Competent Bodies is contained at '*Appendix C*'.

#### 4.10 Cumulative behaviour

4.10.1 You must look out for instances of behaviour which, although not "relevant conduct" or otherwise in themselves determinative of the potential for risk, give rise to concerns when looked at cumulatively that someone may pose a risk of harm to children or vulnerable adults. As "relevant conduct" has not happened, the powers in paragraphs 5 and 11 of Schedule 3 of the Act (Schedule 1 of the Order) will be relevant.

4.10.2 The evidence of the cumulative behaviour must be cogent before it can be relied on as the basis of a decision. If an allegation has been made you will need to be satisfied that it is proved on the balance of probabilities before relying on it. By way of example, you may find, on investigation, evidence that an individual abuses drugs and alcohol and it is alleged that he has

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<sup>18</sup> Para 16(3), Part 3, Schedule 3, Safeguarding Vulnerable Groups Act 2006 and <sup>18</sup> Para 16(3), Part 3, Schedule 1, Safeguarding Vulnerable Groups (Northern Ireland) Order 2007

assaulted his wife. The evidence in relation to drinking and drugs would need to be cogent, for example medical records or papers from social services. In relation to the allegation of assault, you would need to be satisfied on the balance of probabilities that it actually happened. Assuming the evidence in relation to the drug problem was cogent, and you are satisfied on the balance of probabilities that the incident of assault happened, these factors may, taken cumulatively, point to risk for the purposes of paragraphs 5(4) or 11(4) of the Act or Order, or both. The risk of course would need to be assessed through the structured judgment procedure.

## 5. Evidence Evaluation

### 5.1. Referral Information

5.1.1. Referral information is received from employers which have dealt with individuals through their internal disciplinary procedures, whether or not an individual has been dismissed. The conclusions reached by employers are reviewed to establish, on a balance of probability, the facts. It is the facts of the case that determine whether the case requires further consideration and not the conclusions that the employer reached. There may, furthermore, be other evidence in the referral which although not relevant to the question of whether a particular incident happened is nevertheless potentially relevant for the purposes of the Structured Judgement Procedure.

### 5.2. Sources of information

5.2.1. The ISA is entitled to receive information from any source; however, it 'must ensure that in respect of any information it receives in relation to an individual from whatever source or of whatever nature it considers whether the information is relevant to its consideration as to whether the individual should be included in each barred list.'<sup>19</sup>

5.2.2. In practice, this means that a referral received in the context of potential inclusion in the children's barred list under either the "behaviour" or "risk of harm" powers must also be considered in the context of potential inclusion in the adults' barred list under the equivalent powers (or the other way round). As mentioned previously this would also apply to 'autobar' offences which are not 'autobar' offences for both lists.

5.2.3. Referrals may be received relating to incidents that would have amounted to 'auto-bar' offences or 'auto-bar with reps' offences but, for whatever reason, a conviction did not materialise. Here you must still fully examine the evidence for yourself on the basis of the "balance of probabilities" despite the lack of a criminal conviction.

5.2.4. There may be occasions when an individual comes to the notice of the ISA from an informal source. For example, a newspaper article which gives cause for concern relating to a person who is in, or is applying to be in, the

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<sup>19</sup> Para 13, Part 3, Schedule 3, Safeguarding Vulnerable Groups Act 2006 and Para 13, Part 3, Schedule 1 Safeguarding Vulnerable Groups (Northern Ireland) Order 2007

scheme. In such circumstances, it is open to the ISA to look into the circumstances surrounding the matter without the need for formal referral.

5.2.5. While the ISA does not have an investigatory function, relevant information held by other organisations, agencies and bodies may be sought. There is no general right to demand information from any body, however, in some circumstances there is legislation detailing what information the ISA can demand and from who. If in doubt, you should consult your line manager.

5.2.6. The CRB is responsible for establishing whether any information is held by the police in relation to the applicant and arranging for the initial collection of relevant information from the police and forwarding it to the ISA. The CRB does not, in this process, make any judgments regarding the information but acts as a conduit between forces and the ISA.

5.2.7. It is not unusual for there to be some form of dialogue with the individual throughout the whole process but you must be careful to ensure that contacts are properly noted; and that any such contacts are not misinterpreted as meeting the representations requirements of this Process.

### **5.3. Information disclosed to ISA on the basis that it should not be further disclosed**

5.3.1. There may be occasions when concerns are raised regarding the ability to retain confidentiality of information; that is to say, to receive information without informing an applicant of that information.

5.3.2. Under paragraph 19(5) Schedule 3 of the Act and paragraph 19(5) Schedule 1 of the Order there are circumstances when the police can say that information it is providing should not be passed to the person being considered for barring because this would not be in the interests of the prevention or detection of crime. In these instances the ISA legally cannot consider this information in the determination of whether an individual should be included in the children's or adults' lists.

5.3.3. The Act and the Order<sup>20</sup> state that:  
'A person who is, by virtue of any provision of this Schedule, given an opportunity to make representations must have the opportunity to make representations in relation to all of the information on which IBB intends to rely in taking a decision under this Schedule.'

5.3.4. Therefore, if there is an intention to rely on the information, it must be disclosed. Information sent in confidence cannot be accepted - and then relied upon as part of any decision without having given the person concerned an opportunity to make representations in relation to it.

5.3.5. However, information only has to be disclosed to someone if it is used as a basis for the barring decision; simply receiving information does not trigger a

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<sup>20</sup> Para 16(1), Part 3, Schedule 3, Safeguarding Vulnerable Groups Act 2006 and Para 16(1), Part 3, Schedule 1 Safeguarding Vulnerable Groups (Northern Ireland) Order 2007

requirement to disclose it and seek representations. There is scope, therefore, to consider and filter out evidence that is not relied on, for whatever reason, before disclosure and seeking representations.

#### 5.4. Further Information

5.4.1. The acquisition of as much relevant information as is necessary and reasonably sufficient to make a defensible barring decision is all that is required. So, where sufficient information is available to make a decision but further information may possibly be obtained to reinforce that decision, it may not be necessary to secure that further information depending on the circumstances. A practical, common sense approach is desirable. Additionally, avoid entering into time-consuming searches where the existence of relevant information is unlikely.

5.4.2. In cases which are initiated other than from convictions/cautions, a PNC extract is obtained in order that a full picture is made available for consideration. Where applicable, forces will also be asked to provide any relevant information.

#### 5.5. Personal connections

5.5.1. There may be very exceptional occasions when the ISA is notified that an applicant (or someone who is subject to monitoring) has some form of association with another who is (or if they applied, would be) barred from working with children and/or vulnerable adults.

5.5.2. The principal aim of the ISA is to minimise the risk of harm to children and vulnerable adults from those that might harm or seek to harm them.

5.5.3. It follows, therefore, that in these circumstances, the ISA is entitled to review all the attendant circumstances both of the applicant (or person subject to monitoring) and the person associated with him/her together with their relationship to ensure that the applicant (or person who is subject to monitoring) does not pose a risk of harm to a child (or children) or vulnerable adult(s), having regard to the rights of the individuals involved.

5.5.4. If it is viewed that the applicant (or person subject to monitoring) may put a child or vulnerable adult at risk of being harmed, the matter is referred to the Board to determine what steps need to be taken.

#### 5.6. **Acquittals**

5.6.1. There could be any number of reasons why a person charged with an offence is acquitted: perhaps the victim decided not to testify and the CPS had to withdraw the case; perhaps the acquittal was based on a technicality; and even where a jury has found someone not guilty of having done something, you must always remember that, at most, this means is that the court did not find that someone did something “beyond a reasonable doubt” (the criminal standard of proof). The test applied by the ISA in relation to barring considerations is ‘on the balance of probability’ (the civil standard of proof). Therefore, even if there has been an acquittal, the ISA must still

consider the case for itself on the basis of the balance of probabilities. A barring decision can, therefore, be made, having regard to all the circumstances, if the ISA is satisfied that the events concerned happened, on the balance of probabilities, notwithstanding an acquittal at court. This could become even more relevant where the substance of the offence or the attendant circumstances give cause for concern.

5.6.2. The consideration of acquittals not only applies to the most serious offences contained in the prescribed offences for 'Automatic inclusion' (auto-bar offences) and 'Inclusion subject to consideration of representations' (auto-bar with reps) but also all other offences/alleged behaviours which would normally be referred for consideration.

## 5.7. **Discontinuances**

5.7.1. The Crown Prosecution Service (CPS) is the prosecution authority for criminal offences in England and Wales. It is responsible for determining whether there is sufficient evidence to charge an individual and, if so, what charge(s) should be preferred.

5.7.2. In doing so, it needs to be satisfied that there is sufficient evidence to provide a realistic prospect of conviction and that the case merits prosecution in the public interest. However, in minor matters, including common public order offences and motoring offences, the police need not refer the case to the CPS before commencing proceedings.

5.7.3. In more serious matters, as members of the Prosecution Team, the CPS and the police maintain close contact throughout the investigation process. The CPS gives the police written advice after they have reviewed the available evidence.

5.7.4. If, after a person has been charged, the CPS decides not to progress the prosecution, it discontinues the case by:

- giving notice to the magistrates' court, at any time during the preliminary stages of the proceedings, that it does not want the proceedings to continue<sup>21</sup>;
- giving notice to the Crown Court, at any time before the indictment is preferred, that it does not want the proceedings to continue<sup>22</sup>;
- withdrawing or offering no evidence in the magistrates' court;
- discontinuing cases sent to the Crown Court before service of the prosecution case;
- dropping the case before a jury is empanelled (Judge ordered acquittals).

5.7.5. In addition, there are occasions when committal cases do not proceed to a trial when no evidence is offered because the prosecution is not ready to proceed and an adjournment is refused, or the prosecution consider no adjournment will be granted and therefore do not apply (discharged committals).

5.7.6. The Public Prosecution Service for Northern Ireland (PPS) is the prosecuting

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<sup>21</sup> s.23 Prosecution of Offences Act 1985

<sup>22</sup> s23A Prosecution of Offences Act 1985

authority for criminal offences in Northern Ireland.

- 5.7.7. As with the CPS, if the Test for Prosecution is met, the PPS will decide on the appropriate offences for which the defendant will be prosecuted and the most appropriate mode of trial for cases which may be tried at either the Magistrates, or Crown Court. The Test for Prosecution is met if:
- (i) the evidence which can be adduced at court is sufficient to provide a reasonable prospect of conviction – The Evidential Test; and
  - (ii) prosecution is required in the public interest- the Public Interest Test.

Each aspect of the test must be considered separately and passed before a decision to prosecute can be taken. The evidential Test must be passed before the Public Interest Test is considered.

- 5.7.8. If the Test for Prosecution is passed and the suspect has admitted his guilt the PPS may decide that, if appropriate, the case may be disposed of by diversion rather than prosecution (i.e. informed warning; caution; driver improvement scheme; youth conference).
- 5.7.9. If the PPS decides that in any case being considered that there is insufficient evidence or that it is not in the public interest to prosecute, a decision for No Prosecution will be issued. If the defendant has already been charged and is appearing at court, the PPS discontinue the case by withdrawing the charge or offering no evidence in the magistrates' court.
- 5.7.10. There are essentially four categories of reasons for discontinuance by the CPS/PPS.
- 5.7.11. The first two categories relate to the two stages within the 'full-code' test/Test for Prosecution mentioned above – that is, there is insufficient evidence to provide a realistic/reasonable prospect of a conviction or the case does not merit/require prosecution in the public interest.
- 5.7.12. The third category relates to the inability of the CPS/PPS to proceed with the prosecution because, for example the CPS is not ready; the file is not available; the victim or witness refuses to give evidence or retracts; or the victim or witness fails to attend court unexpectedly.
- 5.7.13. The fourth category relates to other reasons for discontinuance, for example the defendant agreeing to be bound over to keep the peace or disposal of the case by diversion rather than prosecution (e.g. informed warning).
- 5.7.14. When considering a case that has been discontinued, it is important to identify the reason why the CPS/PPS has chosen to stop its progression because it will help to indicate whether the case needs to be given further consideration.
- 5.7.15. For example, if the CPS/PPS has determined that the case does not meet the first test because there is an insufficiency of evidence, then, without further or additional evidence, it is very unlikely that the evidence will be sufficient to conclude, on a balance of probability, the event occurred.

Similarly, where a witness has retracted a critical statement, it will be doubtful whether the evidence would be sufficient to show that the event occurred. Nevertheless, there may be other facts that need to be considered but which do not form part of the consideration in respect of the offence being considered.

- 5.7.16. On the other hand, where the Evidential Test is met but the CPS/PPS decided not to continue because of the public interest test or, for example, because of an administrative issue, then it is appropriate to consider reviewing the case against the Process.

## 5.8. Cautions, Reprimands and Final Warnings

### Adults (18 years or over)

- 5.8.1. 'Simple Caution' - The 'Simple Caution' was formally known as a 'Formal Caution' and was renamed with the introduction of Statutory Charging to distinguish it from a 'Conditional Caution'.
- 5.8.2. The police retain the authority to issue a Simple Caution in all cases except in relation to indictable offences which must be referred to the CPS. Simple Cautions are intended to deal with less serious offences quickly and simply, divert offenders from the courts and reduce the likelihood of re-offending.
- 5.8.3. Before issuing a Simple Caution, the police must ensure that:
- there is sufficient evidence of the suspect's guilt to meet the CPS Threshold Test;
  - the offence is not indictable or serious;
  - the suspect has made a clear and reliable admission;
  - it is in the public interest and an appropriate means of disposal;
  - the suspect has given informed consent to being cautioned.
- 5.8.4. Simple Cautions are generally administered by someone trained and authorised at the police station. Once the Simple Caution has been administered, the offender is asked to sign a form accepting the terms of the caution and is given a copy. The form usually contains the offender's personal details and the details of the offence(s). It explains the consequences of accepting the caution.
- 5.8.5. Indictable offences that are referred to the CPS are inherently serious and are, therefore, unlikely to be suitable for a Simple Caution. However, in cases where the CPS is of the view that it is not in the public interest to proceed with a prosecution, a Simple Caution may be considered suitable as an alternative to taking no action.
- 5.8.6. A Simple Caution is not a form of sentence nor is it a criminal conviction: it is an admission of guilt and forms part of an individual's criminal history. Simple Cautions that relate to recordable offences are entered on the PNC and, therefore, may be referred to in disclosure and cited in future proceedings. As a general rule, Simple Cautions for more serious offences are 'stepped down' after a clear period of 10 years and for less serious

offences, after a clear period of 5 years. However, as they are not covered by the Rehabilitation of Offenders Act, they never become spent. If asked, offenders will always need to disclose their existence.

5.8.7. 'Conditional Caution' - A 'Conditional Caution' is a caution which is administered in respect of an offence committed by an offender and which has conditions attached to it which the offender must comply. The conditions are usually either intended to facilitate the rehabilitation of the offender or ensure that the offender makes reparation for the offence (or both).

5.8.8. 'Conditional Cautions' can only be authorised by the CPS and are intended to be a swift and effective means of dealing with straightforward cases where the offender is willing to admit the offence and comply with specific conditions. It is only intended to be used where it provides an appropriate and proportionate response to offending behaviour and the CPS concludes that the public interest can be properly met.

5.8.9. Before authorising a 'Conditional Caution', the CPS must be satisfied that:

- there is sufficient evidence to charge the offender;
- a 'Conditional Caution' should be given to the offender in respect to the offence;
- the offender admits the offence;
- the offender has been told of the effect of the 'Conditional Caution' and warned regarding non-compliance;
- the offender has signed to confirm the details of the offence, an admission to the offence, informed consent to, and the conditions of, the 'Conditional Caution'.

5.8.10. The 'Conditional Caution' is, in effect a suspension of the prosecution while the offender is given the opportunity to comply with conditions. Where the conditions are complied with, the prosecution will not proceed. However, where there is no reasonable excuse for any non-compliance, a prosecution would normally go ahead.

### **Young Persons (Under 18 years)**

5.8.11. As from 1<sup>st</sup> June 2000, cautioning for young offenders was replaced by 'Reprimands' and 'Final Warnings' (Crime and Disorder Act 1998).

5.8.12. This is a formal procedure, but as with cautions, is not a sentence nor is it a criminal conviction. However, following a subsequent finding of guilt at court, a 'Reprimand' or 'Final Warning' may be quoted in a similar manner to a previous conviction, and, therefore, it is a form of entry into the criminal justice system.

5.8.13. The police and the CPS will review the seriousness of the offence and the offending history of the offender before deciding whether a 'Reprimand' or 'Final Warning' is appropriate.

5.8.14. The following criteria must then be met:

- there is sufficient evidence to give a realistic prospect of a conviction;
- the offender gives a clear and reliable admission to the offence;
- as a rule, the young person has not previously been convicted of an offence;
- it is not in the public interest to prosecute.

5.8.15. 'Reprimands' and 'Final Warnings' are normally given by the police at the station. It must be given in the presence of a parent or guardian or an appropriate adult; and the written information supplied to the adult.

## 5.9. **Offences taken into consideration**

5.9.1. The practice of taking offences into consideration (TICs) has no statutory foundation. The benefits of using this facility include:

- the court has a fuller and more accurate picture of the offending and is able to give a longer sentence than it would if it were dealing only with the substantive charge;
- the defendant receives a reduced overall sentence, possibly tailored sentencing and rehabilitative programmes and is able to clear the slate to avoid the risk of subsequent prosecution for those offences;
- the victim has an opportunity to claim compensation in respect of an offence admitted by the defendant, detected and acknowledged by the criminal justice system; the police gain valuable intelligence, increase clear up rates, record a fuller picture of offending for possible use in future cases or to support applications for CR/ASBOs or other restrictive orders;
- the prosecution has a fuller and more accurate picture of the offenders criminal history when considering the public interest test, bail decisions, bad character, dangerousness etc; resources are used efficiently; and
- the public's confidence in the criminal justice system is improved.

5.9.2. The offender will usually have signed the appropriate documentation which identifies the specific offences that are admitted. In court, the offender is ordinarily asked personally (rather than through the representative) for an oral admission to the offences to be taken into consideration.

5.9.3. Offenders are afforded the opportunity to admit TICs where they are less serious than the offence(s) charged but which, generally, have the same characteristics as those charged. So, for example, one charge of fraud is accompanied by a number of other fraud offences and possibly minor thefts.

5.9.4. The CPS is consulted by the police in these circumstances to ensure that the TICs are appropriately proposed. It is frequently the case where multiple offences are committed in a series that specimen charges are preferred and the bulk of the others are presented as TICs.

5.9.5. Where the PNC record or other information indicates that there are TICs, further information is only usually available from the relevant force.

## 5.10. **General Principles in relation to the assessment of evidence**

- 5.10.1. When you have completed the process of receiving and gathering all the information, evidence must be assessed in terms of what reliance may be placed on it for the purposes of making a barring decision.
- 5.10.2. As mentioned already, in the cases of cautions, convictions and findings of fact by competent bodies, you will be able to treat the facts as proved.
- 5.10.3. In relation to other evidence, you will first need to assess each piece of evidence and judge how reliable it is. The judgment as to how reliable a piece of evidence is will determine how much weight can be placed on it. Less reliable evidence will carry less weight in a barring decision than highly reliable evidence. Some evidence will be so unreliable, for example because it is contradicted or called into question by other reliable evidence, that no lawful reliance can be placed on it at all. Such evidence must be disregarded altogether.
- 5.10.4. Having assessed the reliability of the evidence and sifted out unreliable evidence, look at it in the light of the powers identified as potentially appropriate in the initial assessment. If one of the “behaviour powers” was identified, the question is whether the evidence demonstrates that relevant conduct happened on the balance of probabilities. If an allegation is made that is not “relevant conduct” but which, if proved, would lead to a conclusion that someone may harm a child or vulnerable adult, that again must be assessed on the balance of probabilities. Other evidence not specifically relating to any particular event may be judged relevant in that it leads you to believe that someone may harm a child or vulnerable adult, or is otherwise relevant for the purposes of the Structured Judgment Procedure.
- 5.10.5. Assessing whether something happened on the “balance of probabilities” means, simply, whether it is “more likely than not” that something happened.
- 5.10.6. If it is found that the evidence demonstrates on the balance of probabilities that an event happened (be it “relevant conduct” or other conduct pointing to risk of harm), then that is treated as a “finding of fact”. However, even if it doesn’t, the evidence may still be highly relevant in the context of the “risk of harm powers” or for the purposes of the Structured Judgement Procedure.
- 5.10.7. To take a practical example, on initial assessment you note that it is alleged that a teacher had a sexual relationship with a 15 year old pupil in his class. This would be relevant conduct. You gather information and uncover evidence consisting of an email from the teacher to the pupil suggesting a private meeting and a statement from a reliable witness that the teacher was seen alone with the pupil in a park holding her hand. This evidence in itself would not prove a sexual relationship on the balance of probabilities and therefore doesn’t disclose relevant conduct. However it does show that the teacher was behaving inappropriately, which would be relevant to a possible bar on the basis that he may harm a child.
- 5.10.8. You must always be alive to the principles that the findings of fact that can or cannot be made in the light of the evidence may mean that you must re-assess which powers can be relied on to bar; and that not all evidence

needs to relate to an event, be it relevant conduct or otherwise, in order to be relevant. Evidence not specifically related to any individual event, or that is not enough to show on the balance of probabilities that an event happened, could still be highly relevant for the purposes of the “risk of harm” powers or the Structured Judgement Procedure. For example, you may come into possession of an email or text message disclosing inappropriate sexualised attitudes in general; you may receive medical evidence about future risk; or, conversely, you might be sent, as part of a referral or in the course of representations, testimonials which speak positively about someone’s employment record.

- 5.10.9. At the end of the evidence evaluation phase, you may have facts arising from convictions, cautions or findings of competent bodies, findings of facts that you have made, and other evidence which is judged relevant. All of this is then “fed into” the structured judgment procedure (in the “case assessment phase”) to assess what actual risk the person currently poses.

## 6. Case Assessment

6.1. It is anticipated that straightforward cases, such as new ‘auto-bar’ convictions and new convictions for ‘auto-bar with representations’ (where there are no significant representations or complications) are dealt with reasonably quickly. More complicated matters, including those where significant representations are made or where additional information is sought, require additional file building and are dealt with at a more senior level.

6.2. The ‘Structured Judgement Procedure’ (SJP) is used for consideration of individual cases and is focused on risk factors linked to future harm. Risk factors are divided into four broad areas and comprise the following.

6.3. **Harm-Related Interests/Intrinsic Drives** - the extent to which the behaviour (be it “relevant conduct” or otherwise) was driven by or motivated out of a specific interest in, and/or fantasy about, harmful behaviour.

6.3.1. Within this context, consider how far the case material reflects the presence or absence of the following risk factors (not exhaustive):

- Sexual preference for children;
- Excessive/obsessive interest in sexual activity;
- Any linked harm-related sexual interest (e.g. coercive or violent sexual activity or concerning paraphilia);
- Excessive/obsessive interest in violence and/or inflicting violence on others;
- Personal gratification derived from thoughts/acts of violence or violent fantasy;
- Personal gratification derived from thoughts/acts of theft and/or causing others to suffer financial harm;
- Personal gratification derived from thoughts of being in control over others and/or thoughts of having/abusing power over others through, for example, neglect or arbitrary discrimination.

6.4. **Thinking, Attitudes and Beliefs** – the extent to which the behaviour was underpinned by attitudes or belief systems that are linked to harmful activity.

- 6.4.1. Within this context, consider how far the case material reflects the presence or absence of the following risk factors (not exhaustive):
- Child abuse supportive beliefs e.g. children can consent to sex, that it is not harmful, that children can enjoy sex or any other attitude that would endorse sexual behaviour between adults and children;
  - Attitudes that would endorse violent sexual behaviour;
  - Belief that one is entitled to or deserves to have sex;
  - Strong anti-social and/or pro-violence beliefs/attitudes;
  - Presence of hostile attributions towards others generally or towards specific groups/individuals;
  - Belief that one is entitled to exploit others financially;
  - Belief that one is entitled to use, con, manipulate or otherwise control others;
  - Beliefs/attitudes that would support acts of financial harm;
  - Belief that one is entitled to breach rules and act outside of recognised safeguarding advice/guidance.

**6.5. Relationships** – the extent to which the behaviour was caused by the individual's difficulties in managing his/her relationships.

- 6.5.1. Within this context, consider how far the case material reflects the presence or absence of the following risk factors (not exhaustive):
- Presence of severe emotional loneliness and/or the inability to manage/sustain emotionally intimate relationships with age appropriate adults;
  - Strong sense of emotional congruence with children;
  - Suspicious, angry, resentful or vengeful style of relating to others within relationships;
  - Inability to resist peer influence (being easily led into anti social behaviour);
  - Elective links with anti-social peers and/or associates;
  - Inability to meet personal needs responsibly within the context of interpersonal relationships.

**6.6. Self Management and Lifestyle** – the extent to which the behaviour was caused by the individual's difficulties in maintaining pro-social behaviour generally.

- 6.6.1. Within this context, consider how far the case material reflects the presence or absence of the following risk factors (not exhaustive):
- Poor emotional arousal management skills;
  - Poor problem solving and/or coping skills (e.g. using substances and or sex to cope with stress);
  - Poor coping in response to provocation;
  - Out of control emotions/urges;
  - Presence of impulsive, chaotic, unstable lifestyle;
  - Inability to manage impulses/urges to act anti-socially e.g. theft;

**6.7. Concerns**

- 6.7.1 Within each broad area, make a determination as to how the evidence demonstrates in favour or against the presence of risk factors for that area and record this in the SJP templates. The assessment will be expected to

reflect one of three levels of concern:

- **No concerns** – where the case material indicates risk factors are not present in the area under consideration;
- **Some concerns** - where the case material contains some indications that risk factors are present in the area under consideration. However, there is no direct causal link to the harmful conduct and/or there is a significant amount of material that could reduce those concerns;
- **Definite Concerns** – where the case material indicates risk factors are present in the area under consideration and that there is a causal link to the harmful conduct (i.e. without the presence of the specific risk factor, the harmful conduct would probably not have occurred).

6.7.2 Where there are fields that cannot be adequately assessed due to 'Insufficient Information', you should only seek that information where you consider that the information would likely materially affect a barring decision. For example, if an individual already has two 'Definite Concerns' or one 'Critical Concern' recorded, then it could be argued that there would be no added value in seeking further information before seeking formal representations.

## 6.8. Behaviour

In making a determination as to presence of risk factors and the level of concern they represent, consider many aspects of the individual's behaviour relating to the harmful conduct leading to the referral, attendant circumstances and the general context in which it occurred. Relevant questions include (but are not restricted to):

### 6.8.1. Victim

- How vulnerable was the victim(s) and was this significant/causal?
- Was there more than one victim perhaps indicating a pattern or preference?
- How serious was the behaviour and did this reflect the intention?
- How serious was the harm or potential harm to the victim(s) and was this intentional, perhaps relating to a specific fantasy?
- What was the intended impact on the victim(s)?
- Over what period did the abuse or harm occur, perhaps reflecting a pattern of behaviour or specific interest?
- What was the relationship to the perpetrator and was this relevant to the thinking behind the commission of the act?

### 6.8.2. General

- Context of the abuse/harm insofar as it was relevant to the presence of risk factors (e.g. was the context important to decision making and/or opportunity);
- Seriousness and nature of the abuse/harm;
- Adequacy of information;
- Availability of further/unused information.

6.8.3. **Possible Mitigation** (dependent on circumstances in which harmful conduct occurred):

- Not received or inadequate training;

- Did not know the correct procedures or guidelines;
- Harm not intended;
- Isolated incident;
- Had taken steps to avoid or reduce the issue;
- The issue is old and there has been no evidence of other harmful behaviour since;
- Understaffing;
- Poor working conditions;
- Intentions misunderstood.

#### 6.8.4. Possible Aggravating factors

- The number of victims or incidents involved;
- Harm was deliberate or intentional;
- Harm was as a result of cognisant disregard for rules/potential outcome or was recklessly negligent;
- Repeated lies about the situation;
- It was continuous and/or conducted over a period of time;
- Indications of escalating seriousness;
- Previous incidents/allegations/disciplinary actions perhaps indicating cumulative behaviour.

### 6.9. Risk

- 6.9.1. Having completed the assessment as to presence/absence of risk factors, make a determination as to the level of risk of future harm presented by the individual and in relation to which workforces (i.e. working with children or vulnerable adults). Whilst not automatically compelling a conclusion, it is anticipated that in cases where there are **definite concerns** in two or more areas in relation to a particular workforce, the case would be regarded as 'minded to' include the individual on the relevant list. The presumption is that the presenting level of risk of future harm would most sensibly be managed by barring that individual from either or both workforces. Conversely, where there are **no or some concerns** in the majority of areas, the presumption would be not to bar them.
- 6.9.2. These are general guidelines, however, and it is permissible to depart from these presumptions although you must consult your line manager, and potentially the Board, in these circumstances.
- 6.9.3. This would normally include the situation where definite concerns were assessed as present in only one area but these concerns were considered to be **critical** to the question of potential for future harm to children and/or vulnerable adults. The question of whether a risk factor could be said to be critical would depend upon the degree of perceived causality between the risk factor and the potential for future harm (either through repeating behaviour or in cases where there is a reasonable belief that the behaviour could escalate), and the magnitude of the potential harm that would likely be caused.
- 6.9.4. Subsequent to making a determination on the level of risk of future harm and **prior** to seeking representations, the decision must be made as to which list is regarded as 'minded to' include an individual on and on the basis of which powers. The question of which list would be appropriate for any given

individual depends on the particular information contained within the structured judgement and a further analysis of the specific risk factors present. Assess likely scenarios that link these risk factors to potential harm to children and/or vulnerable adults. The decision as to which list would be appropriate derives from this analysis.

## 6.10. Specialist Referral

6.10.1. The internal escalation process enables the referral of some particularly difficult cases to a specialist for their opinion. Such cases may include where:

- the evidence is borderline and the referral will offer significant further specialist advice which will enable the decision to be better informed;
- advice is required in isolated sexual offences of the likelihood of repeated offending;
- advice is required from a specialist, e.g. implications regarding medication; examination of IT; mental health, etc. or other specialist advice which you feel is beyond your competence;
- the motivation of the applicant is unclear, for example in the case of alleged 'grooming'; or
- the applicant tenders an opinion from a specialist of his/her choosing and a referral may be requested to verify the specialist opinion that is tendered.

6.10.2. It is normal practice to identify the areas that need to be covered so that the specialist can give advice or an opinion on the specific issues raised. It is not the role of the specialist to recommend that a person is or is not included on the list(s).

## 7. Representations

7.1. When the ISA has decided that the evidence supports a bar for the children's or adults' lists, that is the 'minded to bar' stage is reached, the person must be given the opportunity to make representations why they should not be listed (with the exception of 'auto-bar' convictions/cautions).

7.2. The time at which representations are sought depends on the circumstances of the case but, the applicant must be advised of all the information upon which the ISA intends to rely when making its decision. As already indicated, there are certain matters that are taken as fact which cannot, ordinarily, be changed by representations; for example, convictions. However, representations can include, among other things, mitigating features or observations relating to the event(s) and the personal circumstances of the individual concerned.

7.3. The request for representations that is sent draws attention to issues that are material to the barring decision so that any representation made by the applicant can address specific areas to be explored in the case assessment. The applicant is advised which list the decision relates to and which powers are proposed to be used. Only if the applicant has been given an opportunity to make representations in relation to the list under consideration can a barring decision be imposed against that list. Therefore, for example, if the representations are sought regarding the children's list then, the consideration, and any subsequent barring decision, can

only be made in relation to the children's list.

7.4. Representations could alter the original conclusions in two areas. Firstly, in relation to the evidence, findings of facts or the value or significance of other evidence being relied on may be genuinely called into question; secondly, the conclusions reached in the Structured Judgement Procedure may need to be reviewed in the light of further evidence or things presented in the representations.

7.5. The representations are, ordinarily, expected to be in writing by the individual under consideration. However, they may submit their representations which are made on their behalf by another, provided they are authorised.

7.6. Where no representations are received in a "minded to bar" case, the person is placed in the list(s).

### 7.7. Determination cases (under the Transitional Provisions Order ("TPO"))

7.7.1. The cases that have been categorised by DCSF fall into 4 types – those which are "presumed to bar" on the children's list (Article 2 of the TPO/Article 3 of the NI TPO), "consider to bar" on the children's list (Article 3 of the TPO/Article 4 of the NI TPO), "presumed to bar" on the adults' list (Article 4 of the TPO/Article 5 of the NI TPO) and "consider to bar" on the adults' list (Article 6 of the NI TPO only).

7.7.2. The "presumed to bar" cases are;

- all cases on the PoVA List/Disqualification from Working with Vulnerable Adults List (NI) with the exception of those transferred from the NI Pre-employment Consultancy Service Index (for the adults' list),
- all cases on the PoCA List/Disqualification from Working with Children List (NI) with the exception of those transferred from the Consultancy Service Index/Pre-employment Consultancy Service Index (NI) (for the children's list),
- all cases on List 99/Unsuitable Persons List (NI) on grounds of unsuitability to work with children (for the children's list).

7.7.3. The ISA is required to place the person on the new barred list(s). Unless the person fits the criteria specified in the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria) (Transitional Provisions) Regulations 2008 or The Safeguarding Vulnerable Groups (Prescribed Criteria) (Transitional Provisions) Regulations (Northern Ireland) 2008, the ISA gives them the opportunity to make representations as to why they should be removed from the list. However, the representations can only be made in relation to the wider scope of the bar.

7.7.4. Where representations are received, they are considered by the ISA and the person may be removed from the list(s) where the ISA considers that it is not appropriate for the person to be included.

7.7.5. The "consider to bar" (on the children's list) cases are;

- Those on the PoCA list/Disqualification from Working with Children List (NI) who were transferred from the Consultancy Service Index/Pre-employment Consultancy Service Index (NI),,
- Those on List 99/Unsuitable Persons List (NI) on grounds other than unsuitability, i.e. misconduct, health and management of independent schools.

7.8.6 You must always remember that the whole of Schedule 3 to the SVG Act/Schedule 1 of the SVG Order is in force for the purposes of ISA carrying out its functions under the TPO. You must also remember the significance of paragraph 13 of Schedule 3/Schedule 1, which requires the ISA to always consider any information it receives in relation to both lists. This means that, in addition to applying the requirements of the TPO, paragraph 13 of Schedule 3/Schedule 1 requires you also to “cross-consider” the case in relation to the ‘other list’.

7.8.7 Thus, where a case is referred as “presumed to bar” on either the children’s list (under Article 2 of the TPO/Article 3 of the NI TPO) or the adults’ list (under Article 4 of the TPO/Article 5 of the NI TPO) they will be added to that list and given the right to make representations in relation to the wider scope of the bar. They must also be considered under the powers in Schedule 3/Schedule 1 (NI) in relation to the other list and where the ISA are minded to bar on that list they are given the right to make ‘full’ representations in relation to why they should not be included in the second list. In Article 3/Article 4 (NI) cases, you will be considering the referral under the powers to bar on the children’s list (this being expressly required by the TPO) and the powers to bar on the adult’s list in Schedule 3 to the SVG Act/Schedule 1 to the SVG Order.

## 8. Barring Decision

8.1. The ‘appropriateness test’ is based on the requirement to ensure children and vulnerable adults are safeguarded and the barring decision is not tarnished by any desire to act as a sanction or punishment. Additionally, the barring decision is not intended to undermine employers’ rights to reject candidates who they feel are not suitable for particular positions.

8.2. A key issue is that decisions to include or not on the barred list(s) are only taken after the merits of each case have been fully considered following an assessment of all available, relevant facts and evidence, any specialist opinions and where appropriate, any representations made.

8.3. If satisfied that a person has engaged in relevant conduct and that it appears appropriate to include that person on the list, then that person must be included on the relevant list it<sup>23</sup>.

8.4. Similarly, the person must be included in the relevant list if he may harm a child or vulnerable adult and, subject to representations, it appears (to the ISA) that it is

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<sup>23</sup> Para 3 and Para 9 Schedule 3 Safeguarding Vulnerable Groups Act 2006 and Para 3 and Para 9 Schedule 1 Safeguarding Vulnerable Groups (Northern Ireland) Order 2007

appropriate to include the person in the list(s).<sup>24</sup>

- 8.5. Likewise, in relation to ‘autobar with reps’ cases or TPO cases where reps are sought in relation to the wider bar, the question is whether it continues to be appropriate for the person concerned to remain on the list.
- 8.6. The “appropriateness test” in relation to any decision which results in someone being put on a list or remaining on a list is, therefore, the same.
- 8.7. You must put any personal values, beliefs, experiences or prejudices aside and look at each case dispassionately. If you, for whatever reason, feel unable to do this in a particular case, you should immediately discuss this with your line-manager
- 8.8. When deciding on “appropriateness”, you must look at the entirety of the circumstances of the case. This will mean looking at the facts, evidence, what the current level of risk was assessed using the SJP, and any other wider factors that will influence whether it is appropriate to bar or not.
- 8.9. In relation to these other wider factors, there are two particular considerations to be aware of.
  - 8.9.1. Firstly, the question of **proportionality**. You must realise that the powers the ISA have are restricted to including or not including individuals on the children’s and adults’ lists. A decision to include a person on a list means that they will be barred from the entirety of the workforce affected for a minimum period of one, five or ten years depending on the individual’s age. You will sometimes have a very difficult judgement to make as to whether the nature and level of future risk identified justifies a bar from working in the entirety of the workforce concerned. You must remember that the principle that a decision to bar is a protective measure, not a sanction. The question of proportionality will, therefore, focus on the nature and level of future risk that is identified in the SJP, not on the original conduct.
  - 8.9.2. Secondly, **Public confidence**. It is justifiable that the reasonable perceptions of the public should be considered when reaching decisions regarding ‘appropriateness’. The Care Standards Tribunal has, in the past, recognised the importance of maintaining public confidence in the system and public confidence has had a role their decisions. The question to consider is whether a decision to bar (or not to bar) would cause a reasonable person’s confidence in the system to be diminished because of their legitimate perception of risk (or lack of it).
  - 8.9.3. However, you should always exercise great caution in relying on public confidence when making a decision. In reality, issues of public confidence will more likely play a useful supportive role alongside other significant factors in marginal barring decisions. It would certainly be a rare and highly exceptional case where public confidence is the main reason for a barring decision in the

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<sup>24</sup> Para 5 and Para 11 Schedule 3 Safeguarding Vulnerable Groups Act 2006 and Para 5 and Para 11 Schedule 1 Safeguarding Vulnerable Groups (Northern Ireland) Order 2007

absence of other significant factors. Where there is a reliance on public confidence as a factor when making a decision, discuss it with a senior manager and seek legal advice and escalate to the Board.

- 8.9.4. A factor that frequently emerges in public confidence considerations is whether the outcome or the impact should be reflected in the barring decision. (In this context, the impact relates to the impact on the 'victim'; it does not relate to the impact that a bar would have on the perpetrator.)
- 8.9.5. The consequences of an act or a series of acts is taken into account in the Structured Judgement Procedure where the impact reflects, for example, a pattern of behaviour or intention or a preference. It is not appropriate, when assessing the risk that an individual poses, to take account of the impact on the victim or the outcome from a particular act; because irrespective of the outcome, the risk remains the same.
- 8.9.6. In making the final decision regarding barring, the impact of the behaviour is assessed to determine whether it is of such significance that the case should be referred to a senior manager for consideration. If the barring decision seems to be out of step with reasonable public perception by virtue of the impact, escalate the case to the Director of Operations so that the Board may be notified, as appropriate.

#### **8.10. Referral to the Board**

8.10.1. Some cases are referred to the Board of the ISA ('the Board'), including where:

- the recommendation is to remove from a list a person who is subject to an 'auto-bar' conviction/caution or to an 'auto-bar with reps' conviction/caution;
- marginal decisions raise issues relating to public confidence including victim impact;
- the specific expertise of a Board member is sought;
- the concern arises from a situation initiated by an association; or,
- the matter raises issues in respect of a policy of the ISA.

8.10.2. The Director of Operations determines which matters are referred to the Board.