At a glance

The briefing examines the current vetting and barring scheme which operates to prevent unsuitable persons from working with vulnerable adults. The briefing should be read in conjunction with LCNI Briefing No. 26 which can be found on LCNI website under Publications – Information Briefings - Community Care (www.lawcentreni.org)

The Briefing will be of relevance to:

- HSC Trusts
- Advisers
- Those working with vulnerable adults

Law Centre (NI)

- promotes social justice and provides specialist legal services to advice organisations and disadvantaged individuals
- in five areas of law: social security, community care, mental health, employment, trafficking and asylum
- through advice, casework, training, information and policy services

Our advice line

Monday to Friday: 9024 4401

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Introduction

The briefing examines the current vetting and barring scheme which operates to prevent unsuitable persons from working with vulnerable adults. It also highlights the changes introduced since the decision in the Royal College of Nursing & Ors, R (on the application of) Protection of Freedom Act 2012 schedule 7

1 Protection of Freedom Act 2012 schedule 7
2 www.lawcentreni.org
3 Protection of Freedom Act 2012 schedule 7
v Secretary of State for the Home Department & Anor which found that automatic inclusion on the barred list breached human rights under the Protection of Freedoms Act 2012.

1. The Legislation

1.1 The principle statute is the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 (the Order). The Order makes provision for the criminal record checking of persons seeking to work with children and vulnerable adults, and for barring those considered to be unsuitable for such positions, whether in paid employment or voluntary work. (The briefing examines the position relating to those seeking to or working with vulnerable adults only).

The Act introduced important changes to the vetting and barring process and to what constitutes regulated activity.

2. Criminal Offence

2.1 The Order makes it a criminal offence:

a) for individuals who are included on barred lists to engage in regulated activity (examined below)
b) for individuals to engage in regulated activity without being subject to monitoring and
c) for relevant employers to neglect to check an individual’s status in the scheme before engaging in regulated activity.

3. Barring and Vetting

3.1 The Order contains two lists

(i) of persons barred from engaging in ‘regulated activity’ with children and
(ii) of persons barred from engaging in ‘regulated activity’ with vulnerable adults.

The lists are maintained by the Disclosure and Barring Service (DBS) which replaced the Independent Safeguarding Authority (ISA). There are currently 63,000 individuals across England, Wales and Northern Ireland on DBS barred lists.

4. Referral to the DBS

4.1 A person must be referred to the DBS if s/he was

- dismissed because s/he had harmed someone
- dismissed or removed from working in regulated activity because s/he might have harmed someone

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4 [2010] EWHC 2761
5 https://www.justice-ni.gov.uk/articles/disclosure-and-barring
the employer was planning to dismiss him/her for either of these reasons, but s/he resigned first. This may also include situations where the person was re-deployed to a non regulated activity or resigned or retired.

4.2 The power to refer may also be used when a local authority or regulatory body is acting in a role other than as a regulated activity provider, for example when undertaking a safeguarding role. If the employer makes a referral, there must be 2 conditions met before s/he may provide any information to the DBS about the individual referred:

1. The employer thinks that the employee has harmed/poses risk of harm to a vulnerable adult, satisfied the harm test or received a caution or conviction for a relevant offence.
2. The person that is being referred is or has been, or might in the future be working in regulated activity and the DBS may consider it appropriate for the person to be included in the barred list.

The duty to refer applies regardless of whether another body has made a referral in relation to the same person.6

5. Regulated activity

5.1 These are activities that the DBS can bar people from doing. It is a criminal offence for a barred person to seek to work, or work in, activities from which they are barred. It is also a criminal offence for employers or voluntary organisations to knowingly employ a barred person in regulated activity. The DBS will decide whether the person should be barred from working in regulated activity with adults.7

5.2 Under the Order, the following activities were considered ‘regulated activity’ if it was carried out frequently by the same person or the period condition was satisfied:

a) any form of training, teaching or instruction provided wholly or mainly for vulnerable adults
b) any form of care or supervision of vulnerable adults
c) any form of assistance, advice or guidance provided mainly for vulnerable adults
d) any form of treatment or therapy provided for vulnerable adults
e) moderating a public electronic interactive communication service which is likely to be used wholly or mainly by vulnerable adults
f) driving a vehicle which is being used only for the purpose of conveying vulnerable adults and any person caring for the vulnerable adults

6 https://www.gov.uk/guidance/making-barring-referrals-to-the-dbs#what-is-a-referral
g) anything done on behalf of a vulnerable adult in such circumstances as are prescribed

The period condition was satisfied if the individual carrying out the activity did so at any time on more than two days in any period of thirty days. In relation to the activities referred to in (a), (b), (c), (d) or (g) above the period condition is also satisfied if the person carrying out the activity did so at any time between 2am and 6am and the activity gave the person the opportunity to have face-to-face contact with vulnerable adults.

6. Changes to regulated activity

Under the 2012 Act regulated activity was scaled back.

There are now six categories of people who fall within the new definition of regulated activity (those who provide day to day management or supervision of people with in the categories will also fall with the category).

They are as follows:

6.1 Providing health care - any health care professional providing health care to an adult, or anyone who provides health care to an adult under the direction or supervision of a health care professional. This includes the provision of psychotherapy and counselling to an adult which is related to health care the adult is receiving from, or under the direction or supervision of a health care professional and includes psychotherapy and counselling over the telephone. First responders are also included in this category as well as any person who provides first aid on behalf of an organisation which is established for the purpose of providing health care.

Exceptions - A worker employed for another purpose who volunteers as a first aider to a vulnerable adult, is not engaged in regulated activity.\(^8\)

Members of peer support groups, staff who work in community pharmacies, opticians, GP surgeries or dental practices who are not regulated health care professionals and do not provide health care are not included.

Life coaching is also excluded as a regulated activity.

6.2 Providing personal care – This is anyone who:

- provides physical assistance with eating or drinking, going to the toilet, washing or bathing, dressing, oral care or care of the skin, hair or nails because of an adult’s age, illness or disability;
- prompts and then supervises an adult who, because of their age, illness or disability, cannot make the decision to eat or drink, go to the toilet, wash or bathe, get dressed or care for their mouth, skin, hair or nails without that prompting or supervision;

\(^8\) Factual note
or trains, instructs or offers advice or guidance which relates to eating or drinking, going to the toilet, washing or bathing, dressing, oral care or care of the skin, hair or nails to adults who need it because of their age, illness or disability

**Exceptions**
Hairdressers cutting the hair of residents in care homes are not regarded as engaged in regulated activity.⁹

**6.3 Providing social work** – this is provision by a social care worker of social work which is required in connection with any health care or social services to an adult who is a client or potential client.

**6.4 Assistance with general household matters** - The provision of assistance to an adult because of their age, illness or disability, if that includes managing the person’s cash, paying their bills or shopping on their behalf.

**6.5 Assistance in the conduct of the person’s own affairs**– this includes acting as an enduring power of attorney or an appointed controller.

**6.6 Conveying** - this includes anyone who transports an adult because of their age, illness or disability either to or from their place of residence and a place where they have received, or will be receiving, health care, personal care or social care; or between places where they have received or will be receiving health care, personal care or social care. This will include Patient Transport Service drivers and assistants, hospital porters and Emergency Care Assistants and Ambulance Technicians. It does not include licenced trips taken for purposes other than to receive any of the above for example, trips for pleasure.¹⁰

**7. General**

**7.1** There is also no longer a requirement for a person to do the activities a certain number of times before they are engaging in regulated activity. This means that anyone providing personal care to an adult is in regulated activity regardless of whether this occurs for example in a care home, hospital or day care centre.¹¹

**7.2 Enhanced AccessNI checks** - The activities and work which are being taken out of regulated activity will still be eligible for enhanced AccessNI checks (but they will no longer be eligible for barred list checks) This may occur for anyone working in the pre-2012 definitions of regulated activity but not within the current definitions, this mainly applies to working with adults.¹² An enhanced check together with a barred list check can only be obtained where the person is engaged in regulated activity.

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⁹ Factual note
¹⁰ Factual note.
¹¹ Factual note
¹² https://www.justice-ni.gov.uk/articles/disclosure-and-barring
The Vetting and Barring process and Regulated Activity

7.3 Family Arrangements - Regulated activity excludes family arrangements, and personal, non-commercial arrangements.

7.4 Vulnerable Adult - Regulated activity for adults no longer labels adults as ‘vulnerable’. Instead, the definition is now any adult to which the regulated activities as mentioned above are provided. The focus is on the activities/services required by the adult; and not on the setting in which the activity/service is received, or the personal characteristics or circumstances of the adult receiving the activities.

For people who work in these roles the DBS can provide an Enhanced Criminal Records Certificate with information about whether the individual is barred from working in regulated activity. If an individual is working with adults in a regulated activity, they can apply for an Access NI enhanced check together with a check of the ‘barred lists’ held by the DBS and the Scottish government. This must be countersigned by an organisation that is registered with Access NI and it is up to the organisation and the registered body which countersigns an application, to decide if an individual is working within the definition of regulated activity.¹³

8. Other changes to the 2007 Order

8.1 Under the 2007 Order it had been intended that in the Vetting and Barring Scheme – was that anyone who wanted to work with vulnerable groups including children would need to register with the Scheme and to be continuously monitored for any new criminal records information. This never came into force and since the 2012 Act registration and monitoring will not be introduced. The 2012 Act repeals those parts of the 2007 Order which provided for registration and monitoring.

Controlled activity was repealed and registration and continuous monitoring were also repealed.

8.2 Portable Disclosure Service – ‘DBS update service’

The service has not yet been implemented in Northern Ireland and the date of implementation is unclear.¹⁴ It will allow an individual to apply for a criminal record certificate only once and then, if the person needs a similar sort of check again, the existing certificate can be reused. His/her employer can check online to see if a certificate is still up to date. The service was introduced in England and Wales in 2013 and avoids unnecessary repeat applications whilst saving time and money. It is referred to as the DBS update service throughout England and Wales.

¹³ Disclosure and barring supporting information

Independent Advice, Support and Mediation Service (Community Care)

The Law Centre’s Independent Advice, Support and Mediation Service (Community Care) runs a specialist advice line and representation service.

How we can help you

We provide advice and assistance to:

- adults who have needs due to physical or mental disability, ill health or age,
- adults with sensory disabilities, and
- adults whose needs arise because of their role as carer.

We can help in cases which raise issues concerning the legal responsibilities of health and social care trusts and other public bodies in the provision of health and social care.

We also welcome calls from health and social care staff, other healthcare providers and advisers.

**Our advice line:** 028 9024 4401, Monday to Friday, 9am to 1pm and 2pm to 5pm, out of hours voicemail service available

We also run a regional advice clinic service, please contact us for further information.

We advise in all areas of community care, including:

- needs assessments
- provision of services
- direct payments
- benefits and community care
- grants for home improvements for people with disabilities
- services for young adults transitioning from Children’s Services
- financing residential and nursing home care
- carer’s assessments
- capacity and decision making in social care
- human rights issues and social care

**Representation service** - We resolve the majority of cases through negotiation with HSC Trusts and service providers.

Where necessary, we initiate judicial review proceedings in the High Court to clarify interpretation of health and social services law and/or to challenge decisions made by public bodies or HSC Trusts. We can pursue appeals to the Court of Appeal and beyond where necessary.

**Training** - We provide training for health and social care staff and for advisers working in the field of community care. For more information on courses available, visit: [www.lawcentreni.org/training/training.html](http://www.lawcentreni.org/training/training.html).
More information

Consult our website for more information on the service and on health and social care legal issues: www.lawcentreni.org