

8 ISA update (ISA referrals in Northern Ireland cases – general guidance for decision makers) Annex B2

ISA referrals in Northern Ireland cases – general guidance for decision makers

Introduction

1. Guidance has been written on the Vetting and Barring Scheme, covering the application of the Scheme to the medical profession and the GMC's obligation to refer information to the Independent Safeguarding Authority (ISA) in England, Wales and Northern Ireland. This document is called the 'master guidance' and is saved in Livelink at:

<http://livelink/edrms/lisapi.dll?func=ll&objId=33550536&objAction=browse&sort=name&viewType=1>

2. Decision makers should note that there are different trigger points for considering referral to ISA under the **Harm Test**. This document sets out the trigger points for considering referrals to ISA under the Harm Test in Northern Ireland cases and should be read in conjunction with the master guidance.

3. Similar to the master guidance, this is a living document which will be revised periodically, including at the conclusion of the government review of the Vetting and Barring Scheme, which is to be conducted over the second half of 2010.

4. A separate scheme, overseen by Disclosure Scotland, has been established in Scotland. There is separate guidance for referrals to Disclosure Scotland under the Scottish Scheme.

5. Decision makers should note that the definitions of Regulated and Controlled Activity, as well as the application of the Vetting and Barring Scheme to the medical profession are the same for all three jurisdictions – England, Wales and Northern Ireland. These issues are set out in the master guidance document. The master guidance document also covers the other two parts of the first referral condition (autobar offences and Relevant Conduct) and the second condition.

6. Referral of Northern Ireland cases will follow the same hardcopy referral process as set out in the master guidance document.

‘Northern Ireland’ cases

7. While the application of the autobar, Relevant Conduct and Harm Test criteria are the same in Northern Ireland and in England and Wales, the trigger points for the application of the Harm Test are different. This guidance covers the application of the Harm Test to Northern Ireland cases. Northern Ireland cases are where:

- a. A case will be considered to originate from Northern Ireland if the relevant facts of the case materialised in Northern Ireland (i.e. the conduct took place in Northern Ireland or the circumstances which gave rise to the Harm Test materialised in Northern Ireland);
- b. If (a) cannot be applied, a case will originate from Northern Ireland if the doctor’s registered address is in Northern Ireland.

8. If there is any doubt about the origin of the case (i.e. England, Wales or Northern Ireland) decision makers should contact the ISA Referral Officer.

The third limb of the first condition: the Harm Test

9. The definition of the Harm Test in Northern Ireland is the same as the definition of the Harm Test in England and Wales (including the general definition and the exceptional application of the Harm Test). The only difference between the three jurisdictions is the trigger points at which decision makers must consider making referrals under the Harm Test.

Trigger points – application of the Harm Test in Northern Ireland

10. In Harm Test cases, the decision maker must first consider whether the Harm Test can be applied to the circumstances of the case (that is, where there has been no conduct in the past, but there is a future risk of harm in relation to children and/or vulnerable adults, or where the exceptional application of the Harm Test applies), and secondly whether the referral trigger point has been reached. The trigger points for the Harm Test in Northern Ireland are different to those in England and Wales. Specifically, in Northern Ireland cases decision makers must refer cases at an earlier stage than in cases originating in England and Wales.

11. Details about the types of circumstances which can give rise to the Harm Test being met are explored in earlier parts of the master guidance document. The following paragraphs set out the various points of the fitness to practise process whereby GMC decision makers must consider making a referral to ISA under the Harm Test in Northern Ireland cases.

Triage

12. If we close a case at triage because it’s not about a doctor we need to consider whether the harm test is met and whether a referral to ISA should be made.

Receipt of a conviction certificate or notice of determination

13. Decision makers must consider making a referral to ISA under the Harm Test on receipt of a certificate of conviction, formal notice of police caution or notice of a determination by an overseas regulator or other document recording the outcome of an investigation by a reputable body. In general, only the exceptional application of the Harm Test will need to be considered on receipt of one of these documents as the offence will always involve past conduct, and therefore the case cannot meet the general application of the Harm Test.

14. For example, we may receive a notice of conviction which indicates a doctor has committed an offence that is not an auto-bar offence, but we suspect that in committing the offence the doctor has engaged in Relevant Conduct. If the case is 24 months old or more (i.e. the case is unduly delayed) and we have not referred the case to ISA under the Relevant Conduct criteria because the case is still awaiting a FTP decision, and therefore the Relevant Conduct referral trigger point is not met, decision makers must make a referral under the exceptional application of the Harm Test on receipt of the notice of conviction.

15. Similarly, if we receive a determination from an overseas regulator which suggests that a doctor has engaged in conduct that would amount to Relevant Conduct had it occurred in Northern Ireland, decision makers will need to make a referral under the exceptional application of the Harm Test (technicality). These cases cannot be referred under the Relevant Conduct provisions as these provisions extend only to conduct occurring in England, Wales and Northern Ireland.

16. Note if the offence is an auto-bar offence, receipt of a certificate of conviction will trigger a referral under the auto-bar limb of the first condition, not the Harm Test.

Interim Order Panel stage

17. Decision makers will need to consider making a referral to ISA under the Harm Test when an Interim Orders Panel decides to impose conditions or to suspend a doctor, provided that the reason, or one of the reasons for the Panel's decision is also the reason or a reason for the decision maker thinking that the Harm Test is met. For instance, if a doctor verbalised violent thoughts and an Interim Orders Panel suspended the doctor to protect the public from the risk posed by the doctor, a referral to ISA would need to be made.

18. The referral criteria need only be considered when an Interim Order is made, not when a case is referred for an Interim Order hearing.

Case Examiner stage

19. Decision makers must consider making a referral to ISA under the Harm Test after Case Examiners decide:

- a. That the Realistic Prospect Test is met and refer a case forward for a panel hearing, provided that referral of the case for a panel hearing is also the reason, or one of the reasons for us thinking that the Harm Test is met;

b. To refer an application for restoration forward for consideration by a FTP Panel;

c. When the Case Examiners decide to issue a warning or agree undertakings with the doctor, or to refuse an application for restoration provided that a reason for taking such action is the reason, or one of the reasons for us thinking that the Harm Test is met.

20. In all cases, the trigger point is only met where the reason or a reason for the action taken on the doctor's registration is also the reason or a reason for the GMC thinking that the Harm Test is met. In other words, the reason, or a reason for the action taken by the Case Examiners was because of the risk of harm posed by the doctor.

21. Decision makers need not consider the ISA referral criteria when Case Examiners close a case with or without advice.

FTP Panel stage

22. A referral to ISA will need to be made when a FTP panel makes a relevant registration decision, provided that a reason for the decision is also the reason or a reason for us thinking that the Harm Test is met. For clarity, panel decisions include warnings, conditions, suspension, erasure any decision not to grant an application for restoration and the agreement of undertakings.

23. Note it is likely that in most Harm Test cases the earlier IOP or Realistic Prospect trigger point (or even receipt of a certificate of conviction or overseas determination) will have triggered the referral to ISA. Accordingly, it is likely that post-FTP hearing consideration of the Harm Test will only be used when, for instance, new information comes to light at a panel hearing which indicates that the Harm Test is met (whereas it was not met at the time the Realistic Prospect Test was considered by the Case Examiners). For example, evidence of a doctor's violent or sexual thoughts towards patients might come to light for the first time at a panel hearing, meaning that the first time GMC decision makers consider the Harm Test and referral trigger points is following the panel hearing.

Registration

24. If an Assistant Registrar within the Registration and Resources directorate decides to refuse an application for registration, and the reason or one of the reasons for the Assistant Registrar refusing the application is also the reason or one of the reasons for us thinking that the Harm Test is met, a referral to ISA must be made.

General points

25. The master guidance document gives information relating to a cross border protocol, completing the hardcopy referral process and notifying the doctor following a referral to ISA. Those parts of the master guidance apply to referrals which are made in Northern Ireland cases as well as those in England and Wales. In particular, decision makers must use the same referral form as for England and

Wales cases, and we must also refer the same level of prescribed information if the legal duty to refer arises.

Annexes

Annex A – Flow chart which illustrates the two referral conditions

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— Annex A

Chart of the referral process in Northern Ireland cases

