

## **Legal Duty To Refer and Barring Referral Service Article**

Did you know that all regulated activity providers (those who have employees or volunteers engaging in regulated activity/those eligible for an Enhanced with Barred List(s) DBS check) and personnel suppliers (those who supply individuals to organisations with a view to them carrying out regulated activity) have a legal duty to refer individuals to DBS when 2 conditions are met?

You can find out more about regulated activity on the [DBS guidance leaflets GOV.UK page](#).

### **What are the 2 conditions?**

Condition 1: The first condition covers the person being removed from regulated activity (withdrawing permission), either proactively through dismissal but also through other ways, including redeployment, retirement, redundancy, or them resigning voluntarily. This is all specified in legislation.

Redeployment could be moving the individual from one area of the business where they are carrying out regulated activity to an area where they aren't, such as to back office or administration work.

Retirement, redundancy, or resigning applies as while the individual may no longer be able to cause harm in your organisation, they could still go on to get another job with another employer or volunteer in regulated activity. Often for those who resign, they do so before or during disciplinary proceedings, but this is still included in the legal duty to make a referral.

Withdrawing permission for a person to engage in regulated activity does not include suspension. This is because the employer, on reaching the outcome of their internal investigation, may choose to lift the suspension and allow the person back to work in regulated activity. The only exception could be a Bail scenario where the employer is hindered in dismissal as they are waiting for the progression of a case to prosecution.

Condition 2: You have removed the individual because of relevant conduct, or they have satisfied the harm test.

### **What is the harm test?**

By this we mean behaviour where there is no evidence of Relevant Conduct, but there is sufficient and compelling evidence of risk of harm to a vulnerable group. The sufficient compelling evidence of risk must relate to children or vulnerable adults. It is not the intention of the legislation to extend to people who are a risk to people in general.

### **What is Relevant Conduct?**

This is conduct that endangers or is likely to endanger those the individual is carrying out regulated activity with, or conduct that, if repeated against or in relation to a child or vulnerable adult, would endanger them or be likely to endanger them.

It is important to consider that relevant conduct is not only when a person has directly caused harm, it is can also be when their actions have indirectly caused harm or have put someone at risk of harm. They may have attempted and failed to cause harm, or they may have incited others to do so.

### **At what point should a referral be made?**

You should make a referral when you have completed your investigation and identified that you have met the 2 conditions. If you do not meet the 2 conditions, you can still refer to DBS for safeguarding reasons and DBS will consider the referral. In the case of referrals that do not meet the legal duty to refer, it is advisable to seek your own legal advice.

The duty to refer still applies even if you have reported to another body, such as the Police, CQC or Local Authority. The duty to refer still applies if another body has made a referral about the same individual. A person who has the legal duty to refer and fails to refer to DBS without reasonable justification is committing an offence. If they are convicted, they could be subject to a fine of up to £5000.

The burden of proof to be met by the prosecution's evidence in a criminal prosecution is 'beyond a reasonable doubt. The standard of proof used by DBS is the civil standard of proof, the 'Balance of Probabilities' – it is more likely than not to have taken place. Therefore, even if there is not a criminal prosecution or an individual has been found not guilty, DBS may still bar the individual.

### **How can I make a referral?**

DBS accept referrals made using the Barring Referral Service, you can do this on [the submit a barring referral GOV.UK page](#).

You are allowed to provide this information under UK General Data Protection Regulation (UK GDPR) and the Data Protection Act (DPA). You can find more information about GDPR on DBS [guidance pages](#).

This service is only available Monday to Sunday, 8am to 11:30pm. If you do not add any information for 90 minutes your session will end, your answers will not be saved, and you will need to start the referral again.

For more information about how to use the Barring Referral Service and what information you will need to make a good quality referral you can watch [this video on the DBS YouTube page](#).

## **Where can I go for more help or support?**

If you would like to know more about the legal duty to refer and the barring process, DBS holds free monthly online workshops. Places can be booked via the [DBS Barring and Legal Duty to Refer Workshops](#) eventbrite page.

DBS Regional Outreach Advisers are available to provide organisations with support around all DBS processes, products, and legislation. If you would like to contact your Regional Outreach Adviser you can email [dbsregionaloutreach@dbs.gov.uk](mailto:dbsregionaloutreach@dbs.gov.uk) or visit [the DBS Regional Outreach service GOV.UK page](#) to contact your Regional Outreach Adviser directly.