

**2nd Report of the Review Panel on the Employers'  
Guidance on Recruiting People with Conflict  
Related Convictions**

**May 2016**

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## Section 1 - Acknowledgements

The Review Panel would like to express their thanks to all of the organisations and individuals who engaged with them and who made a valuable contribution in the preparation of this report.

The Review panel would like to also express their thanks to Monye Anyadike-Danes QC who provided legal advice on various aspects of the Panel's work.

The Review Panel also wish to acknowledge the death of William Poole, first Chair of the Review Panel. As a business leader he encouraged the inclusion of those with conflict-related convictions into the labour market in order to normalise relationships in the post-conflict period.

Professor Peter Shirlow, Alan Mercer, Peter Bunting and Grainne Killen and Linsey Farrell

## Section 2 - Summary Comments and Recommendations

### Section 2 – Summary Comments and Recommendations

#### Preamble

Despite the relative success of the Guidance Principles and related improvements in access to insurance and other services, the Review Panel continues to be made aware of persons with conflict-related convictions who as applicants or employees are being denied entry to or are being removed from the labour market.

In light of the Review Panel's understanding of the information it has received, we are concerned that the decision to remove/not appoint persons to posts does not at times factor in the Guidance Principles' interpretation of material relevance, information on decision-making and the decline in conflict in Northern Ireland.

The Review Panel welcomes the public expenditure and investment in training and education for rehabilitation that was provided for conflict-related prisoners during and post-incarceration. But we question the value of that expenditure when re-integration is limited by debarring and vetting legislation. Such legislation leads to high levels of unemployment and underemployment within the conflict-related prisoner community. An intention of investment for rehabilitation was to reduce ex-prisoners dependency upon welfare and employment related benefits. That investment should now be facilitated by legislative change that will aid the intended re-integrative possibilities.

The Review Panel is concerned by this lack of transparency in decision-making criteria and information regarding how decisions are made when they relate to disclosed information. We are unable to find evidence on how information such as employment capacity, qualifications and capacity to undertake a post as well as conviction type is weighted. This is particularly the case when posts are not related to security-linked positions. This sends out a signal that post-conflict transition thus far has not been paralleled by changes in vetting legislation and behaviour and goes against the re-integration commitment contained within A Fresh Start.

As a demonstration of commitment to supporting the re-integration of people with conflict related convictions, the Northern Ireland Civil Service should adopt the

Guidance Principles. The cases we have reviewed which are linked to decisions that fall under the Civil Service recruitment policy may lack transparency that would be provided via Guidance Principles and procedures. The Department of Finance and Personnel, which appoints panels to review vetting-related decisions, would in adopting the Guidance Principles adopt variant procedures that are used by many larger employers and also key business organisations. The Belfast and St. Andrew's Agreements commitment to rehabilitation as well as exemplary career histories and candidates' ability does not seem to have had much effect upon decision-making in the cases that we have reviewed. Other public sector funded employers apply the Guidance Principles such as Northern Ireland Health and Social Care. Again we state that due to the lack of transparency over how decisions are reached that we cannot do more than raise the question regarding how material relevance is weighted.

The following recommendations and proposed actions focus on assisting the process of conflict transformation and enabling those with conflict related convictions to gain access to employment, facilities, goods and services.

### **Fair Employment and Treatment Order (FETO) 1998**

As with our first report we recommend that Article 2(4) of the Fair Employment and Treatment Order (FETO) 1998 should be amended, or repealed to reflect changed political circumstances such as the dramatic fall in paramilitary violence and commitments to re-integration made in both the Belfast Agreement and St. Andrew's Agreement.

Article 2(4) is too broad and covers all types and forms of employment in Northern Ireland whether regulated activity or otherwise.

Article 2(4) is not required as existing Orders and clearance procedures are linked to jobs that are regulated in terms of national security. Article 2(4) remains as an unnecessary piece of blanket legislation that is outdated with regard to developments linked to the peace process.

With regard to the use and relevance of Article 2(4) members of the judiciary, the Equality Commission, the Fair Employment Tribunal and others have called for either

legislative review or legislative change. It is evidently a piece of legislation that is not required given the existence of other extensive vetting laws. Article 2(4) truncates the capacity for full-citizenship for those with conflict-related convictions. It is a law that bears no resemblance to the political and security progress made since the signing of the Belfast Agreement.

Article 2(4) means that those with conflict-related convictions are not, under FETO and other vetting and disbaring laws and procedures, protected from unlawful discrimination on grounds of religion and/or political opinion.

**Recommendation 1. - Article 2(4) of the Fair Employment and Treatment Order (FETO) 1998 should be amended, or repealed to reflect changed political circumstances such as the dramatic fall in paramilitary violence and commitments to re-integration made in both the Belfast Agreement and St. Andrew's Agreement and more recently within A Fresh Start. Furthermore, FETO Article 2(4) is no longer required due to an array of legislation linked to regulated activity and other vetting procedures.**

### **Vetting and Barring Legislation**

There is a plethora of vetting mechanisms and laws that affect those with conflict-related convictions, their families and the communities which they live including the rehabilitation and offenders legislation, Special Advisers Act, Counter-Terrorism Check, Security Check and Developed Vetting. These laws and procedures, Civil Service Recruitment Policy and Article 2(4) present evident barriers with regard to re-integration for those with conflict-related convictions.

This array of vetting and barring legislation does not, with regard to the information we have been presented, permit reasonable opportunities for appeal based upon transparent due process mechanisms. In many instances, when applicants present evidence regarding their character and work history, such material does not reverse vetting and disbaring decisions. We cannot find adequate evidence that relates to how such information is weighted, considered or evaluated.

During preparation of this report the Review Panel became aware of the Security Vetting Appeals Panel and Special Advocate Support Office. This process can lead

to those who are disbarred from security or regulated activity gaining access to sites that require security clearance. This works via recent permitted appeals processes. Few people who challenge or are affected by disbarring and vetting legislation are aware of this appeals mechanism. The Review Panel is very concerned that knowledge of Security Vetting Appeals Panel/Special Advocate Support Office is low. The Review Panel will work to promote knowledge of this prospect to challenge security clearance decisions and recommend that this should also be undertaken by the Department of Justice.

**Recommendation 2 – We would welcome a meeting with the Minister of the Department of Justice, and the Review Panel should meet to discuss the contents of this report and how best to secure the Guidance Principles. This should develop into a working paper relating to the elevation of the Guidance Principles.**

**Recommendation 3 - The Department of Justice should make it easier to obtain information on how to challenge vetting decisions as they relate to policies such as Security Vetting Appeals Panel and Special Advocate Support Office <https://www.gov.uk/government/organisations/attorney-generals-office/about>.**

### **NI Civil Service Recruitment Policy**

We presently do not know how decisions linked to the risk matrix used for Civil Service recruitment and related positions are taken as there is an absence of information provided to applicants who have been refused employment. This would suggest given the lack of transparency regarding vetting decisions that present procedures regarding material relevance could, in our opinion, be improved. We are unable to conclusively answer, with regard to disbarring those from the Civil Service, the following;

Is an applicant rejected based solely on his/her conviction record?

How is material relevance, such as good character, work ethic, training and skills weighted? Is material relevance less relevant than convictions?

We present cases herein where persons, following their release from prison, have obtained decades of valuable experience working with children and vulnerable young people but who are being disbarred from posts that involve contact with such persons. This experience of trouble-free working within regulated activity appears to count as less important than convictions received decades ago and prior to engaging in such work.

Candidates' challenges to decisions made about them are usually noted as having been considered but without clarification as to how the information submitted regarding their character, work history, experience and capacity to undertake posts applied for was weighted, considered or appraised. What is generally mentioned is that information was received and deemed less relevant than convictions held.

The Review Panel is concerned that employers who receive government contracts, may be unable to place or maintain staff, with conflict-related convictions, on those contracts via the Northern Ireland Civil Service Recruitment Policy, . We have evidence of employers who are aware of their employees' convictions, who trust and support them, and who are content for them to work on such contracts but are unable to retain them as staff. We have evidence of how employer's challenges to Civil Service vetting decisions are ineffective. This is a worrying development and places employers in a position of powerlessness regarding their employees' continuity of employment.

With regard to the Northern Ireland Civil Service job application procedure, it is stated that '...further advice regarding statements of disclosure can be obtained by contacting the Northern Ireland Association for the Care and Resettlement of Offenders (NIACRO)' . Similar advice is also offered regarding Access NI, Steps to Success and Invest NI procedures. However, the Panel has discovered that in light of funding cuts, the intended guidance and support mechanisms to be offered by NIACRO have not been available for some time. This indicates a failure to comply with the support mechanisms that would have potentially aided more effective disclosure statements and related documentation.



**Recommendation 4 - The Northern Ireland Civil Service should adopt the Guidance Principles to aid the re-integration of persons with conflict related convictions. In adopting the Guidance Principles this would aid the commitments made under the Belfast Agreement and St. Andrew's Agreement. We would welcome a meeting with the Minister for Finance and Personnel to discuss this and related matters.**

**Recommendation 5 - All relevant websites(linked to recruitment and vetting) under the auspices of the Northern Ireland Executive should be updated with regard to support available for those applying with conflict-related convictions. As a means of supporting re-integration a Department of Justice funded service to support those applying for posts (presently supposed to be undertaken by NIACRO) in the NI Civil Service should be re-instated immediately;**

**Recommendation 6 - The Review Panel asked the Department of Finance and Personnel for figures on the number of individuals who had been refused employment in the Civil Service because of a conflict-related conviction. The Review Panel was advised that this information was not captured or held across the twelve departments. We recommend that such monitoring information is now gathered to advance the work of the Review Panel;**

**Recommendation 7 - We contend that decisions (rejection of applicants/disbarring of employees) that are taken via Rehabilitation and Offenders legislation, should explain in detail why convictions are deemed to be materially relevant. The information provided at present does not provide such transparency or explain how decisions are made. The Department of Finance should monitor the impact of this legislation and review the transparency of decision making**

**Recommendation 8 - AccessNI undertakes compliance visits with Registered Bodies<sup>1</sup> to ensure they are complying with the Code of Practice<sup>2</sup>. The Code specifically requires Registered Bodies to have a written policy on the suitability for employment of those with convictions. That Code lays out that**

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<sup>1</sup> Those bodies permitted to request AccessNI checks

<sup>2</sup> <https://www.nidirect.gov.uk/sites/default/files/publications/accessni-code-of-practice.pdf>

information provided via an AccessNI check should not unfairly discriminate on the basis of conviction or other information disclosed. DoJ should ensure that Registered Bodies are making these policies available to applicants on request. AccessNI's role during a compliance visit is to ensure that a Registered Body has adopted their Code of Practice. However, it does not determine if compliance with the Code of Practice is adhered to. At present such a role would be beyond AccessNI's statutory remit. It is essential that the Department of Justice evaluates how and through which body adherence to policy is measured and evaluated.

**Recommendation 9 - As with the Review Panel's recommendation regarding the removal of Section 2(4) of the Fair Employment and Treatment (Northern Ireland) we recommend that processes linked to AccessNI checks should consider the distinction between conflict and non-conflict-related offences.**

## **Future Monitoring**

Without effective measurement we do not know:

- The number of persons in Northern Ireland who have/have not been permitted Security Vetting Appeals;
- The number of persons without conflict-related convictions, but who have family links to those who have, who have failed security clearance checks or fallen under vetting arrangements;
- The link between unemployment and under-employment among those with conflict-related convictions and the link to vetting and disbarring legislation;
- The impact (financial, emotional, personal) upon those with conflict-related convictions when accessing/not accessing employment;
- The number of persons with conflict-related convictions who have been disbarred from employment irrespective of their suitability for that employment;
- The number of persons with conflict-related convictions who are removed from employment even when they have disclosed their conviction(s);

- The impact of the blanket ban contained in FETO upon family life in terms of poverty, social marginalisation, social fatalism, stigma and exclusion;
- The number of persons who have disclosed via AccessNI and gained posts they applied for;
- The number of persons with conflict-related convictions who have gained entry to the Northern Ireland Civil Service;
- The impact of failing to gain work or remain in work due to this legislation;
- The impact of vetting and disbaring and the financial burden it puts upon the welfare and other benefits system;
- With regard to Case Study 5 we have obtained evidence and know of another individual who has information held on them and used by AccessNI when undertaking checks which is incorrect. This information does not hold the correct sentence information. This has now being corrected but it opens up the question regarding the accuracy of information held.

**Recommendation 10 - There is insufficient monitoring of the impact of legislation that permits vetting and disbaring within the labour market upon those with conflict-related convictions. This should be addressed immediately by The Executive Office (TEO) and the Department of Justice in terms of a proper analysis of the commitments made in the Belfast and St. Andrew's Agreement and if these have led to re-integration. Such monitoring should also measure the social welfare and other benefit costs of vetting and debarring legislation in the context of underemployment, unemployment and other re-integrative strategies.**

**Recommendation 11 - We note that the Review Panel has been included in A Fresh Start and would recommend that those developing policy in relation to re-integration would discuss relevant themes and issues with us;**

**Recommendation 12 - The Review Panel believe that the Executive should meet their commitments as outlined in the Belfast Agreement and St. Andrew's Agreement. It should also adopt the United Nation's Inter-Agency Working Group position on Disarmament, Demobilization and**

Reintegration that “reintegration is defined as the process by which ex-combatants acquire civilian status and gain sustainable employment and income. Reintegration is essentially a social and economic process with an open timeframe primarily taking place in communities at the local level.<sup>3</sup>”

**Recommendation 13 – We know of two cases when sentence information held by DoJ was shown to be incorrect after AccessNI checks were undertaken. We do not know how many conflict related prisoners have challenged the information provided on them and recommend that the Department of Justice provides (to the Review Panel) the number of times individuals have had their information corrected after an AccessNI check. We would also like to know if the provision of such information has had a detrimental impact upon any individuals who have gone through AccessNI checks. We would also recommend that the Department of Justice meet with the Review Panel to discuss sentence information and its internal review for accuracy and issues relating to data protection legislation**

**Recommendation 14 – The Review Panel will continue with its work for an additional three years and review its future in December 2019. We are still collecting information and particularly case studies that relate to inter-generational vetting. There are significant recommendations here and the Review Panel is required to measure their implementation or otherwise as they relate to the effectiveness of the Guidance Principles. The inclusion of the Review Panel in A Fresh Start is important and we aim to assist that agreement. We shall produce a further report within the next two years and maintain our role as an independent review panel.**

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<sup>3</sup> <http://unddr.org/iddrs.aspx>

## Section 3 - Background to the Review Panel

3.1 In 2007 the Office of the First Minister and deputy First Minister (OFMDFM) issued guidance for employers on the recruitment of people with conflict related convictions. This satisfied a commitment given by the British Government within the St Andrew's Agreement to:

*'work with business, trade unions and ex-prisoner groups to produce guidance for employers in the private and public sectors'<sup>4</sup>*

3.2 The guidance was developed by the Ex-Prisoners Working Group (then co-chaired by Sir George Quigley and Sir Nigel Hamilton), comprising representatives of Government departments, the Irish Congress of Trade Unions, the Confederation of British Industry and a representative group of ex-prisoners. The voluntary guidance for employers aimed at reducing barriers to employment and enhancing the reintegration of ex-prisoners with conflict-related convictions.

3.3 To this end, the guidance advises employers to disregard any conflict-related conviction unless it is materially relevant to the post. By virtue of this guidance, the responsibility for demonstrating material relevance rests with the employer. In summary, the basic principle arising out of the main report by the working group was that any conviction for a conflict-related offence that pre-dates the Belfast Agreement (April 1998) should not be taken into account unless it is materially relevant to the employment being sought. The guidance was deemed relevant for all employers in the public, private and voluntary sectors.

3.4 The guidance is designed to assist employers follow best practice in recruiting people with conflict-related convictions. Generally, these are offences listed in the relevant schedules to the various Emergency Provisions (Northern Ireland)

Acts pre-April 1998. As noted this satisfied a commitment given by the British Government within the St Andrew's Agreement to work with business, trade unions and ex-prisoner groups to produce guidance for employers in the private, public and voluntary sectors. The Employers' Guidance outlined details on the formation and composition of a tripartite review panel. The Review Panel is tasked with considering individual cases, building up evidence regarding the acceptance and adoption of the Guidance Principles, and producing a progress report on the impact of the Employers' Guidance. The 1st report was produced in March 2012 and this 2nd report continues that work.

- 3.5 In its terms of reference the Review Panel was tasked with considering individual cases, building up evidence regarding the acceptance and adoption of the Guidance Principles<sup>5</sup>, and producing progress reports on the impact of the Employers' Guidance. As stipulated within the Employers' Guidance, the Review Panel is tripartite in nature comprising one representative from each of the parties involved in putting together the Guidance, as well an independent Chair.

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<sup>5</sup> See [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/136651/st\\_andrews\\_agreement-2.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136651/st_andrews_agreement-2.pdf)

<sup>5</sup> See <https://www.ofmdfmi.gov.uk/publications/employers-guidance-recruiting-people-conflict-related-convictions> and <https://www.ofmdfmi.gov.uk/publications/employers-guidance-recruiting-people-conflict-related-conviction>.

## Section 4 - The Review Panel and Post-Conflict Building in Northern Ireland

- 4.1 Our recommendation for proper monitoring of the impacts of vetting/disbarring legislation should be tied to previous commitments for rehabilitation outlined by government in the Belfast Agreement. The relevance of the Review Panel is presently linked to it recognising that the re-integration of those with conflict-related convictions is both ad hoc and incomplete. In such recognition and as outlined when the Review Panel was established and after the Guidance Principles have been tried and tested we now conclude that the only adequate response to the commitments made during the St. Andrew's Agreement is to now promote legislative change.
- 4.2 The Panel is aware that Northern Ireland has had some form of Disarmament, Demobilisation and Reintegration (DDR) that has included the de-escalation in violence (Table 1) and conflict-related activity since the ceasefires of 1994. The Review Panel recognises that there are aspects of paramilitarism that remain and which require resolution but the positive post-conflict nature of the vast majority of activity that represents the former prisoner community is evidenced further by low levels of recidivism.
- 4.3 Of the c477 prisoners released under the Belfast Agreement, according to the Parole Commissioners' Secretariat, 19 prisoners have been recalled to prison. Of these 5 licences were confirmed and 14 were revoked. This is a recidivism rate some 8/9 times less than that located among those released from prison not convicted of conflict-related activity.

**Table 1: Security Situation Statistics Northern Ireland (1994 and 2015)**

	<b>1994</b>	<b>2015<sup>6</sup></b>
<b>Deaths</b>	84	3
<b>Shooting Incidents</b>	348	76
<b>Bombing Incidents</b>	207	36
<b>Firearms Found</b>	178	38

<sup>6</sup> Most of this data relates to groups or elements opposed to the peace process.

<b>Explosives Found</b>	1285 (kgs)	2.31 (kgs)
<b>Persons charged with terrorist offences</b>	349	19
<b>Paramilitary Assaults (Shootings)</b>	122	31
<b>Paramilitary Assaults</b>	70	59

Source: Author's Calculations from PSNI data.

4.4 There is also significant evidence that former prisoners have played a key role in internationally recognised conflict transformation, social justice and restorative justice practice. Evidence of commitment to the peace process and low levels of recidivism should be part of any recognition of the capacity to now design a coherent DDR process with an emphasis upon the impact of vetting and disbarring upon rehabilitation.

4.5 The Review Panel notes its inclusion in the recently published Fresh Start document. This recognition of the role of the Panel in developing, defining and measuring post-conflict outcomes as they relate to conflict-related prisoners inclusion into and away from exclusion is welcomed. With regard to the outplaying of Fresh Start the Review Panel's relevance may lie in;

- supporting the development of positive work by former prisoner groups which may be relevant to Fresh Start;
- aiding the development of a rehabilitation/inclusive citizenship strategy linked to labour market entry and the issues around inclusion of former prisoners and Fresh Start strategy;
- identifying the instruments, vetting mechanisms and laws which undermine the positive agency required to end paramilitarianism, criminality and the full transition to peace and societal stability;
- identifying with regard to Fresh Start how enhanced labour market inclusion for former prisoners would be a key strategy linked to Fresh Start's aims and objectives.

4.6 The Review Panel welcomes the recognition of its work within the A Fresh Start agreement and is keen to advance strategies that develop rehabilitation,



inclusion and the methodologies of best practice required to build positive post-conflict outcomes. Dealing with paramilitary issues through A Fresh Start would be aided by wider re-integrations strategies supported by the Review Panel.

- 4.7 The issue which this and our previous report highlights is that embedded transitional work undertaken by former prisoner groups has not been paralleled by the removal of/or changes in disbarring laws and processes. The removal/re-drafting of FETO legislation would mark out a reciprocal action and demonstrate a clear inter-community commitment to re-integration.

## Section 5 - The Guidance Principles and the Review Panel

5.1 Many persons who hold conflict-related convictions, since release, have played active and positive roles in conflict transformation processes<sup>7</sup>. The importance of these processes has been well documented and evidenced by a number of national and international studies. Despite such evidence and related opinion, low levels of re-offending/licence revoking and the role that conflict-related prisoner groups have played in challenging the re-appearance of conflict the capacity to vet and bar those with conflict related convictions remains. The commitment to reintegration by government has been part-aided by the Guidance Principles and the promotion of those principles by the Review Panel for Employers' Guidance on Recruiting People with Conflict-Related Convictions. The Panel also works to ameliorate the impact of other structural and legal barriers that impact upon those with conflict-related convictions and those affected by those convictions.

5.2 The aim of the Panel and the Guidance Principles is:

- to assist employers follow best practice in recruiting people with conflict-related convictions;
- to relate the principles to those holding convictions/offences listed in the relevant schedules to the various Emergency Provisions (Northern Ireland) Acts pre-April 1998;
- to recognise that the transposition of the Guidance Principles will be for employing organisations and their human resource professionals;
- to promote the basic code that any conviction for a conflict-related offence that pre-dates the Belfast Agreement (April 1998) should not be taken into account unless it is materially relevant to the employment being sought;

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<sup>7</sup> The ideas of transition and conflict transformation among paramilitary and former prisoner groups is not broadly known within public or policy discourse. Examples include: "Taking Responsibility": Conflict Transformation and the Loyalist Paramilitaries of Northern Ireland, <http://www.scribd.com/doc/27603/Progressive-Unionist-Party-Principles-of-Loyalism-Docment>, <http://www.epic.org.uk/images/custom/uploads/129/files/PMEPP-Final%20-Version.pdf>, [http://www.seupb.eu/Libraries/Peace\\_Network\\_Meetings\\_and\\_Events/PN\\_\\_Thematic\\_Evaluation\\_of\\_FundedProjects\\_Politically\\_motivated\\_former\\_prisoners\\_and\\_their\\_families\\_\\_020210.sflb.ashx](http://www.seupb.eu/Libraries/Peace_Network_Meetings_and_Events/PN__Thematic_Evaluation_of_FundedProjects_Politically_motivated_former_prisoners_and_their_families__020210.sflb.ashx), [http://news.bbc.co.uk/nol/shared/bsp/hi/pdfs/17\\_12\\_13\\_coiste\\_haass.pdf](http://news.bbc.co.uk/nol/shared/bsp/hi/pdfs/17_12_13_coiste_haass.pdf), <https://www.qub.ac.uk/research-centres/isctsj/filestore/Filetoupload,484810,en.pdf>.

- to promote an understanding of the systemic, structural and attitudinal barriers that affect those with conflict-related convictions as they relate to employment and access to goods, facilities and services;
- to promote the concept that the onus on demonstrating incompatibility would rest with whoever was alleging it and the seriousness of the offence would not, per se, constitute adequate grounds for disbarring;
- to argue that when an applicant is ruled out of consideration at any stage of job application/employment of service provision he/she should be given the opportunity to outline his/her perspective before a final decision is taken;
- to recognise that the guidance needs to be understood in conjunction with existing legislative obligations and employment-related criminal record checks;
- to not, via the principles, ask employers or service providers to give preferential treatment to ex-prisoners with conflict-related convictions as that would run counter to fair employment and equality legislation. Rather, the guidance aims to ensure that a conviction is not taken into account, unless it is materially relevant to the post or service in question;
- to promote the procedure that only, after interview when the successful candidate for employment has been chosen, should the issue of a conviction, be considered;
- to promote three possible scenarios once a successful candidate has been selected and a record check occurs:
  - 1) if the candidate does not possess a conviction, the appointment is made;
  - 2) if the candidate has declared a conviction, but the employer considers that it is not materially relevant to the post, the appointment is made;
  - 3) if the candidate has declared a conviction and the employer considers that it is, or could be, materially relevant, and is manifestly incompatible with the post then the appointment is not immediately offered.

Moreover,

1. to encourage employers to contact candidates who are not appointed/dismissed to explain the decision taken;
2. to permit an unselected candidate with an opportunity to speak to the employer about their decision and at that time provide supporting evidence in regard to his/her case and how they believe it is not materially relevant. The applicant should be given the opportunity to make his/her views known regarding the conviction and its relevance, or otherwise, to the post;
3. to, after the employer continues to consider that the conviction is materially relevant and manifestly incompatible with the post, encourage the candidate to bring the matter to the review panel.

### 5.3 The Review Panel exists:

- to ensure that de-selected candidates and those barred/vetted have an opportunity to receive complaints and concerns raised by individuals;
- to promote the principle that any person with a conflict-related conviction, as described above, will, if there is no material relevance attached to their conviction and the post applied for/held will, compete with other applicants on a level basis, and that the employer should make his/her decision on the basis of skills and experience.

5.4 A particular problem identified when the Guidance Principles were conceived was the increasing use of on-line application processes. Whether using online recruitment or more traditional recruitment processes, it is important that the methods of recruitment are applied consistently. Online recruitment is the use of technology to attract candidates and aid the recruitment process. Surveys have shown that online recruitment in both the public and private sectors has grown significantly with greater use being made of email applications. The technology can be used to:

1. advertise vacancies – on organisations’ websites or job sites;
2. deal with the applications – email enquiries, emailed application forms/CVs, online completion of application forms;
3. select candidates via online testing.

5.5 Whichever format of recruitment is used, the fact that an applicant has a conflict-related record should not play a part in any decision making regarding their application until the individual has successfully gone through a selection process. In accordance with best practice, application forms should normally not require a criminal record declaration except where the job is covered by rehabilitation of offender’s legislation. However, it would appear that security checks are sometimes used by employers for posts not considered under that Order. Many application forms request information on convictions which can lead to applicants not passing the first stage of the application process when they disclose. Therefore, those with conflict-related convictions fall foul of an electronic system which has no capacity to consider material relevance, good character or the candidate’s ability.

5.6 Given the indiscretion of vetting and barring mechanisms it is important to note that those who have adopted the Guidance Principles have found the approach helpful. It is also an approach that helps both design and aid reintegration and the recognition of the pursuit of a post-conflict society. It is based upon the central principle of the Review Panel;

*‘.....that conflict-related convictions of ‘politically motivated’ ex-prisoners, or their membership of any organisation, should not generally be taken into account [in accessing employment, facilities, goods or services] provided that the act to which the conviction relates, or the membership, predates the Agreement. Only if the conviction, or membership, is materially relevant to the employment, facility, goods or service applied for, should this general rule not apply’.*

5.7 However, if the Guidance Principles and related advice are to be effective they must be placed in the context of various processes that define conflict transformation. That has included processes of DDR which aim to remove the

tensions and capacity for future conflict, senses of alienation that drive conflict and the sharing of approaches to achieve broader forms of reconciliation. Therefore, reintegrating conflict-related prisoners into the labour market is a key factor in reducing exclusion from routine and normal activities within the life-cycle. It is also key to reducing the financial and related problem of financing unemployment and related benefits.

5.8 As we noted in our first Report existing legislation and broader approaches do not support this form of reintegration. The Review Panel is of the opinion that an opportunity exists to support reintegration through legislative change. Such a step will help to reduce a significant burden on welfare and other benefit systems and will increase the opportunity to raise taxpaying and other contributions. If people with conflict-related convictions are unable to secure posts they are qualified for removes the capacity to aid post-conflict economic growth and the then transfer of those with conflict-related convictions out of unemployment/under-employment and into work is limited. For argument sake if 10,000 person with conflict-related convictions or their relatives are dependent upon the welfare system, due to vetting and disbaring and total costs of delivering/receiving income related benefits was £5500 per capita per year the total bill would be some £55 million per annum or over half a billion per decade.

5.9 Significant public funds were spent upon education and labour market training during imprisonment. It is therefore problematic that the principle of such expenditure which was to aid re-entry into the labour market is undermined by FETO and other vetting practices. It is highly problematic that government has never, to our knowledge, evaluated the cost upon the exchequer of the impact of vetting and disbaring legislation upon public resources and in not doing so they are not taking rehabilitation seriously. To understand the cost upon the exchequer of the impact of vetting and disbaring legislation upon public resources the Government should undertake a full review of the costs of FETO and vetting upon welfare and other related expenditure. Such information would be important with regard to advancing **Recommendation 1**.

5.10 Evidence supports the contention of low levels of employment within the conflict-related prisoner community and also experiences of convictions precluding employment. In 2014 in Northern Ireland it was estimated that 21% of the working age population claimed at least one key benefit. Within a former prisoner survey, sponsored by the Red Cross the bulk of respondents (68.7%) were in receipt of sickness/incapacity or unemployment benefit<sup>8</sup>. Evidence of the link between vetting and disbaring has been captured in several surveys of those with conflict-related convictions since 1998<sup>9</sup>.

5.11 Part of the reason for high levels of unemployment or under-employment rests with the perception that employing those with convictions is risky even though international evidence shows that risk of so doing, is very low<sup>10</sup>. Evidence suggests that the majority of former conflict-related prisoners when, in employment, are capable, dependable and reliable employees who pose no risk to their colleagues, clients or the business for whom they work. This also holds true for those in Northern Ireland with conflict-related convictions. As shown by re-offending figures it should also be noted that groups which represent those with conflict-related conviction have done much to encourage

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<sup>8</sup> Tar Isteach: A Survey of Conflict-Related Prisoner's Needs [https://www.researchgate.net/publication/270794317\\_Tar\\_Isteach\\_A\\_Survey\\_of\\_Conflict-Related\\_Prisoner's\\_Needs](https://www.researchgate.net/publication/270794317_Tar_Isteach_A_Survey_of_Conflict-Related_Prisoner's_Needs) [accessed Feb 21, 2016].

<sup>9</sup> Bruce, A., McKearney, T. and Corr, O. (2009) Innovative Intercultural Learning in Post-War Environments: Conflict Transformation Education in Northern Ireland. <http://www.expac.ie/wp-content/uploads/2009/01/eden-2.pdf>; Community Foundation for Northern Ireland (2003) Taking 'Calculated' Risks for Peace II. Belfast: CFNI; Crothers, J. (1998) EPIC Research Document 2: Reintegration – the Problems and the Issues. Belfast: EPIC; Dwyer, C. (2007) 'Risk, Politics and the "Scientification" of Political Judgement: Prisoner Release and Conflict Transformation in Northern Ireland', *British Journal of Criminology* 47(5): 779-797; Dwyer, C. (2008) 'Dealing with the Leftovers: Post-Conflict Imprisonment in Northern Ireland', *Prison Service Journal* 175: 3-12; Gormally, B. (2001) Conversion from War to Peace: Reintegration of Ex-Prisoners in Northern Ireland. Bonn: Bonn International Center for Conversion; Gormally, B. and McEvoy, K. (1995) Release and Reintegration of Politically Motivated Prisoners in Northern Ireland: A Comparative Study of South Africa, Israel/Palestine, Italy, Spain, the Republic of Ireland and Northern Ireland. Belfast: NIACRO; Grounds, A. and Jamieson, R. (2003) 'No Sense of an Ending: Researching the Experience of Imprisonment and Release upon Republican Ex-Prisoners', *Theoretical Criminology* 7(3): 347-362; Jamieson, R. and Grounds, A. (2002) No Sense of an Ending: The effects of longterm imprisonment amongst Republican prisoners and their families. Monaghan: ExPrisoners Assistance Committee [<http://www.changingageing.org/FileStore/QUBSeminarPrograms/SeedGrantReports/Fileupload,211667,en.pdf>]; Jamieson, R. and Grounds, A. (2008) Facing the Future: Ageing and Politically Motivated Former Prisoners in Northern Ireland and the Border Region. Monaghan: EXPAC [<http://www.expac.ie/wp-content/uploads/2009/08/EXPAC-RESEARCHAging-former-prisoners-2009.pdf>]; NIVT (2001) A Level Playing Field: The Final Evaluation Report of the Work of Politically-motivated Ex-prisoner Self-help Projects Funded by the Peace Programme. Belfast: NIVT; Ó hÁdhmaill, F. (2001) Equal Citizenship for a New Society? An analysis of training and employment opportunities for republican ex-prisoners in Belfast. Belfast: Coiste na n-Iarchimí; Shirlow, P. (2001) The State They Are In. University of Ulster, Coleraine, Social Exclusion Research Unit Shirlow, P. (2008) Politically Motivated Former Prisoners: Evaluation of the Core Funding Project 2006-2008. Belfast: Community Foundation for Northern Ireland; Shirlow, P., Graham, B., McEvoy, K., Ó hÁdhmaill, F. and Purvis, D. (2005) Politically Motivated Former Prisoner Groups: Community Activism and Conflict Transformation. Belfast: Northern Ireland Community Relations Council; Shirlow, P. and McEvoy, K. (2008) Beyond the Wire: Former Prisoners and Conflict Transformation in Northern Ireland. London: Pluto Press.

<sup>10</sup> See for example Pager, D., and B. Western, 'Investigating Prisoner Reentry: The Impact of Conviction Status on the Employment Prospects of Young Men', Washington, D.C.: U.S. Department of Justice, National Institute of Justice, October 2009, NCJ 228584 and Maruna, S. (2012). Elements of Successful Desistance Signalling. *Criminology & Public Policy*, 11, 73-83

the development of a post-conflict society. That has included job creation/training, meeting with victims of conflict and members of the security forces, challenging sectarian and racist asperity and reducing tensions at interfaces.

5.12 In our previous report we argued that Article 2(4) of the Fair Employment and Treatment Order 1998 (FETO) needs to be amended/removed with regard to making employers prove the material relevance of a conviction when not employing or dismissing a person with a conflict related conviction. This perspective, as noted above, is shared by others from beyond the conflict-related prisoner community.

5.13 Kerr J (as he then was) heard a judicial review against the decision of the Recorder of Belfast in 2002 in which the Recorder had refused an appeal brought by Damien McComb, who had served a conflict-related conviction and had, because of that, been refused a PSV licence. The Recorder had refused the appeal holding that the Belfast Agreement was “*an aspiration only*” and therefore could not affect the approach to the application of the relevant provisions of the Northern Ireland Act 1998. Kerr J (as he then was) disagreed and allowed the judicial review<sup>11</sup> re-iterating the meaning of the government’s obligation to the re-integration of those with conflict-related convictions in line with the Belfast Agreement.

*‘The Agreement contemplated that mechanisms would be put into place for the accelerated release of prisoners and that those prisoners who benefited from that programme would be reintegrated into society. It appears to me therefore that particular attention should be paid to the fact that a prisoner released under the terms of the Northern Ireland (Sentences) Act has been adjudged not to be a danger to the public.’<sup>12</sup>*

5.14 The Panel is also concerned that the blanket exception in Article 2(4) of FETO remains. This law means that in principle any employer in Northern Ireland can

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<sup>11</sup> *In an application by Damien McComb for Judicial Review* [2003] NIQB 47

<sup>12</sup> *ibid*, para.31



lawfully discriminate against any person with a conflict-related conviction. This is a law that covers all jobs including those that are regulated and those that are not. No conflict-related prisoner is covered by the fair employment legislation that relates to recruitment or job retention. Effectively this means that those with conflict-related convictions cannot avail of full citizenship even with regard to extensive equality legislation. This blanket law is both unsympathetic to the aims of the Belfast Agreement, legal pronouncements that challenge perceptions of risk and the capacity to build an inclusive post-conflict society. A Fresh Start explicitly mentioned the findings and recommendations of the Review Panels 1<sup>st</sup> Report. This 2<sup>nd</sup> Report strengthens the original arguments that we made and highlights how transition is being impeded.

## Section 6 – First Review Panel Report

6.1 The first Review Panel report produced in 2012 recommended/noted the following:

- 1) Where the employers' guidance has been implemented by employers it functioned well and without difficulty;
- 2) Despite the uptake of the Guidance Principles it is evident that vetting legislation, practices and other impediments still undermine the capacity of many with conflict-related convictions to gain employment and full citizenship;
- 3) Given this, the view of the Review Panel is that the employers' guidance should be complemented by legislative change;
- 4) The Panel recommended either removing Section 2(4) of the Fair Employment and Treatment (Northern Ireland) Order 1998 or allowing Article 2(4) to remain but placing a caveat that it would not apply to those conflict-related convictions that pre-date 1998;
- 5) In the interim and in the absence of the guidance being supported by statutory change the Review Panel would continue as a mechanism to investigate barriers to full citizenship for conflict-related prisoners;
- 6) The Panel noted the increased cooperation between ex-prisoner groups from across the political divide and recommends that these groups should continue to work together to engage with employers and develop employability and training initiatives to meet employer needs.

6.2 On 11th May 2012 the 1<sup>st</sup> report of the Review Panel on the impact of the Employers' Guidance on recruiting people with conflict-related convictions was presented to the First Minister and Deputy First Minister for consideration and subsequently a meeting between the Panel and Ministers took place. The Panel understands that following the meeting Ministers agreed for officials take forward work to consider how the Panel's recommendations regarding vetting and material relevance might be implemented.

- 6.3 The Review Panel is awaiting agreement concerning the initial decision by OFMDFM to advance our main recommendation in the 1st report. In the meantime we have continued to promote and fulfil our role with the Ex-Prisoner working group and the Employment Task and Finish Group. We have also undertaken case reviews and promoted issues around travel, insurance and well-being.
- 6.4 In producing this 2nd Report we highlight a range of impediments and legal barriers that continue to exist and prevent the guidance from working as a voluntary arrangement. Given no legislative change it remains evident that conflict-related former prisoners can remain treated and excluded from full labour market entry due to Section 2(4) of the Fair Employment and Treatment (Northern Ireland) Order 1998 (FETO) and other legislation.
- 6.5 In general, the Review Panel is concerned by other issues and cases that it has observed, during the period since our 1st Report. The employment of conflict-related former prisoners remains ad hoc in terms of employer's use of their right to vet/disbar applicants/employees.
- 6.6 When employers **do not adopt** the Guidance Principles we find cases of employers and contractors who remove/unselect applicants in a manner that the Review Panel would contend does not factor in a more holistic understanding and assessment of risk, appropriate career history and work/training experience of the candidate/employee. Those following the Guidance Principles are more discrete in that they establish material relevance when deciding upon an applicant's suitability and in several cases offer employment.
- 6.7 The success of the Guidance Principles is related to uptake by employers. However, and yet again, despite successive agreements to support person with conflict-related convictions gaining full citizenship many employers are operating vetting/monitoring practices contrary to the spirit of the Belfast Agreement and St. Andrew's Agreement. We view A Fresh Start as important in

moving that support into legislative change and other more transparent processes.

6.8 The Panel is also locating examples of employees being removed from present posts or excluded from posts they have applied for. This is not due to a direct decision made by their employer but due to contractual arrangements set by an external organisation. In several cases contracts, with government and in some cases private businesses, state that all staff must be vetted for convictions. This can lead to the dismissal of staff or them not being permitted to work on certain contracts. This is a further and retrograde approach that undermines the capacity to establish and maintain voluntary Guidance Principles as employers are provided with no capacity of discretion to establish material relevance or to keep employees, who are persons with conflict-related convictions, in post.

6.9 Legislation hands influence over job vetting to non-employers. It undermines the spirit of the Belfast Agreement, St. Andrew's Agreement and the Guidance Principles that aimed for former conflict-related prisoner re-integration. It also means that employers who have built up trust, trained and developed their employee's skill base and who are opposed to removing staff from contracted work are rendered ineffective in terms of their employment choices. This development further identifies that the Guidance Principles require greater capacity and scope.

6.10 The Panel has become aware of other legal instruments that are affecting labour market entry/employment. These include:

- National Security Certificate
- Security Vetting Appeals Panel/Special Advocate Support Office
- Third party contracts upon employers decision making
- Rehabilitation and Offenders Order

6.11 In terms of obligations presented in the Belfast Agreement, and as noted above, there are no adequate mechanisms for measuring and reporting, capable of establishing the rate, volume or extent of labour market entry for those with conflict-related convictions and in particular the rate of entry

following vetting procedures. It is also not evident why applicants/employees whose convictions are used to vet and disbar them do not consider their presentation of evidence that highlights good character, unblemished post-imprisonment career histories or in the case of some working with vulnerable people and children in an exemplary manner. Vetting appears more as data capture concerning convictions and not defined by risk management.

6.12 It is unclear how re-integration is supposed to be measured by government which is at present unfathomable as is the capacity, beyond those employers who have signed up to the Guidance Principles, to judge if employers are properly adjudicating upon material relevance in terms of the duties the post holder will be expected to undertake. Government should evaluate the commitments made under the Belfast Agreement and St. Andrew's Agreement with regard to re-integration.

6.13 In 2015 Monye Anyadike-Danes QC agreed to assist the Panel. This has helped the Panel understand more about forms of evidence that has emerged and other matters regarding vetting, appeals and job removal issues.

## Section 7 – Work of the Review Panel

- 7.1 Since the initial Review Panel report was published in March 2012 the Review Panel has continued to meet with key individuals/organisations to discuss the ongoing barriers facing ex-prisoners in the areas of access to employment, goods and services. In addition to the work of the Review Panel, the Ex-Prisoner Working Group has also focused its work on these areas through a number of thematic task & finish groups.
- 7.2 The Ex-Prisoners Working Group is chaired by the Head of the Northern Ireland Civil Service, has been operating for a number of years and meets on a quarterly basis. The main focus of the working group is to address issues which continue to influence the lives of ex-prisoners and their families such as barriers to accessing employment, goods and services.
- 7.3 Both the Review Panel and the Ex-Prisoner Working Group have focused on the following barriers:

**Access to Employment** – many ex-prisoners and their immediate family members experience issues accessing employment as a result of their convictions.

**Access to Insurance** – many ex-prisoners and their immediate family members experience issues accessing home and car insurance as a result of their convictions. This is made more difficult as there are a limited number of companies who will quote insurance by making premiums extremely high and competition limited.

**International Travel** – many ex-prisoners and their family members face barriers when trying to travel to USA, Canada, Australia and New Zealand as a result of their convictions.

**Health & Wellbeing** – many ex-prisoners and their family members are facing health and wellbeing issues as a result of their imprisonment or the imprisonment of a family member. In many cases individuals have mental health issues which can often lead to social exclusion.

7.4 Attached at **Annex A** is a list of organisations/government departments with which the Review Panel/Ex-Prisoner Working group has corresponded with or met with since our 1<sup>st</sup> report.

Also attached at **Annex B** is a list of companies/organisations that have either adopted the employers' guidance or whose HR policies are in line with the Guidance Principles

## **Recent Progress**

### **Legislative amendments to Transport Act NI 1967**

7.5 In mid-2014 the Department of the Environment (DOE) completed legislative amendments to the Transport Act (Northern Ireland) 1967 and on 18 August 2014 the Road Passenger Transport (Qualifications of Operators) Regulations (Northern Ireland) SR 2014/206 entered into force. This removed the provisions which automatically disbarred for three years those with certain convictions, including murder, terrorism offences, sectarian aggravation from applying for a Road Service Licence. Under the new regulations an 'absolute bar' on those with a conviction for a terrorism offence subject to a discretionary application was introduced.

7.6 The amended legislation allows the Department to exercise discretion in relation to the requirement of 'good repute'<sup>13</sup> in a manner that is compatible with EU Regulation 1071/2009. This Regulation, which repeals Directive 96/26/EC which established the previous regime, was introduced to achieve consistency in the application by EU member states of the rules for admission to the road transport operator business.<sup>14</sup>

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<sup>13</sup> See the new section 46(B) titled 'Good repute' replacing the existing section

<sup>14</sup> In general terms Directives lay down certain results that must be achieved but each Member State is free to decide how to transpose Directives into national laws, which means that there can be differences throughout the EU as to how the requirements of a Directive are achieved. See for example *In the matter of an application for Judicial Review by Joseph McParland* [2002] NICA 22 in which Carswell LCJ (as he then was) commented upon the transport sector and the application of the 'good repute' requirement: "*It is, we agree, surprising, and it might be regarded as undesirable, that the law should differ markedly between two different constituent parts of the United Kingdom. But we would regard that as a matter of policy for the Government to address, determining whether differences in social or other conditions justify the*

7.7 DOE in adopting this discretion adopted the Guidance Principles. Thereby, considering each application for a licence will be considered with regard to the procedures and direction as a laid out in the Guidance Principles.

7.8 This amendment to the blanket statute contained in the 1967 Transport Act, is now linked to a scoring system for applicants linked to the recruitment model presented in the Guidance Principles. In essence, merely determining that an applicant is not of sound character due to their conviction is no longer a DoE practice.

7.9 The Review Panel views the adoption of the Guidance Principles with regard to licensing arrangements as a positive development and consider that they have influenced this decision through meetings and the sharing of the employers' guidance.

## **Security Industry Authority (SIA) – Policy on treatment of Northern Ireland Conflict Related Convictions**

### **Background**

7.10 The Security Industry Authority (SIA) governs entry to working in the security industry. The SIA vets all applicants who work in the private security industry with regard to the granting or otherwise of appropriate licenses. Its remit was extended to Northern Ireland in May 2009.

7.11 In the 1st Review Panel report it was highlighted that an ongoing issue in relation to people with conflict-related convictions included:

- The inconsistency of approach by the SIA in relation to the treatment of different types and lengths of convictions;
- Applicants with convictions were being invited to provide evidence as mitigation in the form of character references from someone who was aware of their offence;

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*maintenance of a different provision in each jurisdiction.* ” (para.17) By contrast a Regulation must be followed by member states in the manner provided. Regulations have binding legal force throughout every Member State and enter into force on a set date.



- Information from the applicants' legal representatives (which presented difficulties for more historic convictions);
- An overall lack of clear guidance over how different convictions will be treated.

7.12 In 2012 the SIA stated that their practice aligned with Guidance Principles, however the experience of individuals who presented to the Review Panel did not support this claim.

7.13 On 17 May 2011 Treacy J<sup>15</sup> granted Tony Doherty (Antaine O'Dochartaigh), who had concurrent life/determinate sentences, leave to issue judicial review against the Home Office and the Security Industry Authority in relation to the application of rules prohibiting convicted prisoners from immediately qualifying for a license to work in the security industry. The applicant worked as a doorman until new licensing requirements for security industry staff were extended to Northern Ireland, which meant that he no longer satisfied the criteria. The issue was whether there should be a distinction between convictions that related to the conflict prior to the Belfast Agreement (reflecting the change in status afforded conflict-related convictions) and those after that Agreement. Of significance was argument that the relationship of an offence to the conflict did not of itself say anything about its intrinsic seriousness or severity.

7.14 The judicial review hearing took place on 13 October 2011 by Treacy J,<sup>16</sup> who indicated that he was concerned that the SIA criteria were inconsistent with the commitment given by Government in the Belfast Agreement in relation to the treatment of former conflict related prisoners and their rehabilitation. It was argued that these inconsistencies arose because, under the licensing criteria, an applicant with a life or determinate sentence for a conflict-related offence committed prior to the Belfast Agreement, would automatically be refused a licence unless a specified period has elapsed - i.e. nine years for a life sentence prisoner; length of sentence plus five years for a serious offence. The

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<sup>15</sup> The case is unreported

<sup>16</sup> The case is unreported

point being that the application is not considered at all (in terms of material relevance) unless the 'qualifying period' has passed.

7.15 The Home Office/SIA undertook to review the approach.

The SIA/Home Office explored options on how they might proceed in light of the judge's comments, the Belfast Agreement and the Employers' Guidance on Recruiting People with Conflict-Related Convictions. Following discussions with Counsel, they decided that the most suitable option was one in which all applicants with only conflict-related convictions on record (for offences committed prior to the Belfast Agreement) will fall within "*consider additional factors*". Then, a test of whether the convictions were materially relevant would be made before the granting or refusal of a licence. In other words, there would be no time period for life or lengthy determinate sentences (noting that those released under the 1998 Act will ordinarily have been released for a considerable period), thus removing the irrationality argument about the differing treatment of individuals with life and lengthy determinate sentences.

7.16 This option permitted the SIA to be consistent with the wording in the Employers' Guidance and ensure that no applicant with conflict-related convictions would fall into the "automatic fail" category. A review of the SIA policy was initiated in 2011 by the Home Secretary following a judicial review which had been taken by an individual with conflict-related convictions who had been refused a door supervisor licence. The judicial review was taken on the basis that an automatic ban is unlawful and that there should be a distinction between convictions that were related to the conflict obtained prior to the Belfast Agreement and those which are not.

7.17 The Home Secretary in 2012, having taken legal advice and in light of comments from Mr Justice Treacy at the full judicial review hearing to the effect that the existing criteria were not in line with the Belfast Agreement, proposed an amendment to the criteria. The inconsistency arose because, under the

licensing criteria, an applicant with a life or determinate sentence for a conflict-related offence committed pre-Belfast Agreement, will automatically be refused a licence unless a period has elapsed i.e. nine years for a life sentence prisoner; length of sentence plus five years for a serious offence. The point being that the application is not considered at all (in terms of material relevance) unless the qualifying period has passed. It was recognised that this leads to different treatment between applicants with conflict-related convictions and those with non conflict-related convictions.

7.18 The amendment passed in 2012 now means that applications, from those with conflict-related convictions will be considered on receipt and will pass into the 'Consider Additional factors' category where an assessment will be made of the material relevance of the conviction to potential roles in the private security industry.

7.19 The issues outlined in the 1<sup>st</sup> Review Panel report directed the Ex-Prisoner Working Group (of which the Review Panel are members) who were influential in gaining the achieved amendment. Prior to the judicial review the working group had engaged with the SIA to outline their concerns which were primarily around the treatment of those individuals with concurrent life and determinate sentences and the consideration of those individuals who were convicted towards the end of the conflict and still have a large part of their sentence to serve.

7.20 Under the amendment to the criteria individuals in both of these categories would have their applications treated under 'Consider Additional Factors'.

### **Access to Insurance**

7.21 Under the auspices of the Ex-Prisoner Working Group an Insurance Task & Finish group was established to examine the barriers facing people with conflict-related convictions in accessing home and car insurance.

7.22 Evidence collected by the Ex-Prisoner Working Group and the Review Panel pointed to the impact of disclosure. In some case higher rates were charged than would be the case for those without convictions. It was also found that some when applying for insurance were automatically disbarred. Evidence also

suggested that insurance brokers did not differentiate between conflict and non-conflict related convictions.

7.23 The Ex-Prisoner Task & Finish group engaged with Unite the union, NIACRO and the British Insurance Brokers Association (BIBA) regarding these issues.

7.24 As a result of this engagement and in particular the efforts of BIBA we now have a small selection of insurers who will provide insurance for those with conflict-related convictions with more competitive pricing than others in the market. There are now 23 insurance companies who will provide insurance to those with conflict related convictions.

## Section 8 – Forms of Vetting and Disbarring

- 8.1 As evidenced in our previous report and herein there are a range of legislative barriers to the re-integration of those with conflict-related convictions. Despite success in some agencies and businesses adopting the Guidance Principles we remain concerned that opportunities for re-integration into the labour market can remain blocked by FETO, and a range of vetting laws.
- 8.2 The Panel has located evidence of exclusion of those within/from posts in the voluntary and community sector that are government-funded or based upon access to properties controlled by the Civil Service. The barring of individuals due to their conviction(s), has not in our opinion, regarding the evidence presented to us, adequately factored in career-history or other factors such as experience and good-character or upheld what we would consider as an adequate version of the Guidance Principles.
- 8.3 The Fair Employment and Treatment (Northern Ireland) Order 1998 does not protect those whose political opinion includes approval or acceptance of the use of violence for political ends connected with Northern Ireland. Rehabilitation of Offenders legislation permit exclusion, from employment, on the basis of opinion and/or conviction. Former conflict-related prisoners can and have been excluded from employment under both forms of legislation. In effect persons with conflict-related convictions cannot challenge this because of the exception in Article 2(4) FETO. Disbarring and vetting is also obtained via Counter Terrorist Check (CTC), Security Clearance Checks (SC) and Developed Vetting (DV).

### ***FETO***

- 8.4 Religious discrimination in employment has been unlawful since the introduction of the Fair Employment Act 1976. The development of Fair Employment legislation has been affected by forms of affirmative action through which employers have to confirm 'fair participation' by religion and political opinion. In 1998, for example, the Fair Employment legislation introduced compulsory monitoring by employers and a range of affirmative action

measures. It permitted affirmative action and the option of setting goals and timetables for improving employment patterns and working towards fair participation in workplaces. However, since 1976 there has been an exception now in Section 2(4) of the Fair Employment and Treatment (Northern Ireland) Order 1998 (FETO) which states that;

‘In this Order any reference to a person’s political opinion does not include an opinion which consists of or includes approval or acceptance of the use of violence for political ends connected with the affairs of Northern Ireland, including the use of violence for the purpose of putting the public or any section of the public in fear.<sup>17</sup>’

- 8.5 In our previous report we mentioned the 2007 Fair Employment Tribunal judgment *McConkey/Marks v The Simon Community (N.I.)* and the Tribunal’s conclusion that Article 2(4) of the Fair Employment and Treatment Order 1998 specifically limits the protection against discrimination of fair employment that the Order as a whole provides. At that time the Fair Employment Tribunal stated that;

‘In light of the Belfast/Good Friday Agreement, and the changed environment in Northern Ireland since the words set out in Article 2(4) were first enacted, there may be good reasons to consider appropriate amendments to the said Article, or even its repeal, to reflect those changed circumstances; and not least to reflect the terms of the said Agreement with its reference to the introduction of measures to facilitate the reintegration of prisoners into the community in the area of employment...In the view of the Tribunal it is therefore a matter for Parliament and not this Tribunal whether amendments ... should be made, and if so the terms of any such amendments, and/or whether the provision should be repealed.<sup>18</sup>’

- 8.6 The continuation of Article 2(4) limits the protection for those who were previously engaged in the conflict. In essence, any person with a conflict-

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<sup>17</sup> Cited at <http://www.publications.parliament.uk/pa/ld200809/ldjudgmt/jd090520/conkey-2.htm>

<sup>18</sup> Cited at <http://www.niassembly.gov.uk/globalassets/documents/finance/special-advisers-bill-submissions/08.tar-isteach.pdf>

related conviction, even if they meet the criteria of an advertised post, can be legally excluded from employment or interview. Section 2(4) does not factor in the actualities of the peace process or the suitability of that legislation in a society emerging out of conflict. In our previous report, we challenged Article 2(4) of the Fair Employment and Treatment Order 1998 and the bluntness of its regulatory and barring capacity. The impact of this exception in FETO, is unmeasured and thus does not create a mechanism to provide any evidence regarding the impact of the Belfast Agreement's commitment to re-integration. Thus there is no information on: It does not measure:

- The impact upon those with conflict-related convictions when accessing/not accessing employment;
- The number of persons with conflict-related convictions who are disbarred from employment irrespective of their suitability for that employment;
- The number of persons with conflict-related prisoners who are removed from employment even when they have disclosed their conviction(s);
- The impact of the exception FETO upon family life in terms of poverty, social marginalisation, social fatalism, stigma and exclusion;
- The impact of failing to gain work or remain in work due to this legislation and the financial burden it puts upon the welfare and other benefits system.

8.7 The Review Panel recommend that Government undertakes an impact assessment of the effect of FETO upon those with conflict-related convictions.

### **Rehabilitation of Offenders Legislation**

8.8 Rehabilitation of Offenders Order (Northern Ireland) 1979 is a further mechanism related to disclosure. Commonly understood as operated via AccessNI checks the information gained regarding convictions can be used by an employer to determine if the conviction renders an applicant or employee suitable for employment. As well as entry to specific occupations, licences or permits it also permits the exclusion of an individual from employment if they have failed to disclose convictions when that evidence is/was sought. The period in Northern Ireland for which a custodial order cannot be spent is 30 months. Unlike England and Wales in which no custodial sentence can be

spent if it is longer than 4 years. In the vast majority of cases conflict-related convictions are rarely spent. Standard checks are only available where the position or role in question is exempt from the legislation.

8.9 Recent amendments in the 2014 (Amendments) Order now mean that an individual does not have to disclose to an employer for example any conviction information that is filtered from an AccessNI standard or enhanced certificate. This does provide some privacy but does not enhance successful job applications.

8.10 The work of Access NI functions through the Disclosure and Barring Service (DBS) aim to protect children and vulnerable adults from present or potential employees. It aids employers and voluntary organisations in making ‘...safer recruitment decisions and prevent unsuitable people from working with vulnerable groups, including children. The DBS decides whether it is appropriate for a person to be placed on or removed from a barred list’<sup>19</sup>. In Northern Ireland, the relevant legislation that enables DBS to place individuals on a list that prevents them working with such persons is the Safeguarding Vulnerable Groups (NI) Order 2007.

8.11 Safeguarding is achieved through legislation which enables employers and related organisations to carry out background checks on individuals they either engage as employees or as volunteers within regulated activity. The checks are, in the case of Northern Ireland, managed by AccessNI. AccessNI provides criminal record checks for registered bodies such as employers or voluntary organisations. Checks can also be undertaken with regard to adoption and fostering agencies.

8.12 There are three forms of check - basic, standard and enhanced. An individual can apply for their own basic check whereas standard and enhanced checks must be applied for through registered bodies. Enhanced checks, undertaken on behalf of a registered body, disclose an individual’s full criminal record, giving:

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<sup>19</sup> See <http://www.nidirect.gov.uk/index/information-and-services/crime-justice-and-the-law/accessni-criminal-record-checks/accessni-applications.htm>



- spent and unspent convictions
- relevant cautions, informed warnings and other non-court disposals from the Police National Computer;
- information held by the DBS;
- information held by the police that is relevant to the role applied for.

8.13 Standard checks through a registered body are also used to check employees and applicants backgrounds. An individual cannot request a standard check. This form of check discloses an individual's full criminal record including both spent and unspent convictions as held on the Police National Computer (PNC). AccessNI data on convictions could potentially lead to a person with a conflict-related conviction becoming the appropriate person or signatory/counter-signatory nominated as the representative of a registered body.

8.14 AccessNI registered bodies are certified to direct standard and enhanced checks to AccessNI. Some of these registered bodies operate as an umbrella body for employers and voluntary groups which permit them to manage AccessNI for unregistered bodies. This is generally due to registered bodies being those likely to undertake over 20 applications per year. Remaining as a registered body, and avoiding penalties, is based upon acting in accordance with Access NI's code of practice. Employers/voluntary bodies must inform DBS if they are aware of any person on the de-barred list, who has applied for posts with them. It is also the case that recipients of disclosure information must abide by the Access NI Code of Practice which means;

- observe guidance issued or supported by AccessNI on the use of Disclosure information; and, in particular, recipients of Disclosure information shall not unfairly discriminate against the subject of Disclosure information on the basis of conviction or other details revealed.
- have a written policy on the recruitment of ex-offenders, so that a copy can be given to all applicants for positions where a Disclosure will be requested;

- ensure that a body or individual at whose request applications for disclosures are countersigned, has such a written policy and, if necessary, provide a model for that body or individual to use.
- In order that persons who are, or may be, the subject of Disclosure information, are made aware of the use of such information; and be reassured, employers shall:
  - ensure that application forms for positions where Disclosures will be requested contain a statement that a Disclosure will be requested in the event of a successful application, so that applicants are aware of the situation;
  - include in application forms or accompanying material, a statement to the effect that a criminal record will not necessarily be a bar to obtaining a position, in order to reassure applicants that Disclosure information will not be used unfairly;
  - discuss any matters revealed in Disclosure information with the person seeking the position before withdrawing an offer of employment;
  - make every subject of a Disclosure aware of the existence of this Code of Practice;
  - and make a copy available on request; and in order to assist staff to make appropriate use of Disclosure information in reaching decisions, make available guidance in relation to the employment and fair treatment of ex-offenders and to the Rehabilitation of Offenders (Northern Ireland) Order 1978 (SI 1978/1908 (NI 27)).

8.15 The Review Panel found that although these agreements and procedures must be in place to become a Registered Body there is no monitoring of that

agreement once it has been drafted and inspected. We are not sure, given insufficient monitoring, if these policies are fully adopted and how they are applied. This is a major weakness in the design of the policy at present.

8.16 DBS can also, if it receives information that shows that a person may pose a risk of harm to vulnerable groups, including children, place individuals on a barred list. Any such person placed on the debarred list would be breaking the law if they were to work or volunteer, or also try to work or volunteer, with vulnerable groups. Furthermore, an organisation which knowingly employs someone who has been barred from working with said groups would also be liable for prosecution.

8.17 The approach undertaken by the Civil Service is linked Rehabilitation of Offenders legislation.

8.18 A range of different types of work, occupations, employment and professions fall under the category of exceptions. This includes work that involves access to children, young people and vulnerable people. In such cases organisations are legally entitled to ask applicants for details of convictions, irrespective of whether they are 'spent' or 'unspent' under the Act. A Standard Disclosure applies to posts exempted under the Rehabilitation of Offenders legislation particularly to certain sensitive areas of employment.

8.19 The second type, Enhanced Disclosure, applies to posts involving greater contact with children and vulnerable adults. In addition, the Safeguarding and Vulnerable Groups (NI) Order 2007 also prevents those with certain convictions from working with children and/or vulnerable adults.

## **Recent Changes to Access NI**

8.20 With effect from 2nd November 2015 the Department of Justice made significant changes which provided additional safeguards for those applying for Access NI checks to ensure that the service is compliant with human rights requirements.

8.21 In summary the changes are:

- Access NI will no longer provide certificates for standard and enhanced checks to the employer. Only the applicant will now receive a copy, and the employer will only be able to see any information disclosed if the applicant wishes to continue with the recruitment process.
- Where police information is disclosed other than that contained in criminal record information, the applicant can appeal to an independent monitor to review the information if the applicant believes the information is not relevant to the job they are applying for or should not have been disclosed. An independent reviewer was appointed in February 2016 and will only review information in respect of spent convictions.
- The statutory test applied by the police for releasing information will change from 'might be relevant' to 'reasonably believes to be relevant'. Statutory guidance for chief officers of police has been introduced to assist police in deciding whether information should be disclosed on enhanced certificates.

### ***Impact on those with conflict related convictions***

8.22 While these are welcome changes to the Access NI process for many individuals, the changes are not beneficial to those with conflict related convictions. Those with conflict-related convictions will be able to retain their own Access NI records and will not have to disclose until their employment/recruitment process progresses. However they will not be able to utilise the services of the independent monitor to review information which they do not feel to be relevant to the job applied for, as the majority of conflict related

convictions are unspent. This is a further barrier to employment for those with conflict-related convictions.

***Special Advisers Act (Northern Ireland) 2013 (SPAD Act)***

8.23 In October 2011 a Private Members' Bill was advanced in the Northern Ireland Assembly. This became the Civil Service (Special Advisers) Act (Northern Ireland) 2013 (SPAD Act) as passed in the Northern Ireland Assembly in June 2013. As stated in the Act;

*'a person is not eligible for appointment as a special adviser if the person has a serious criminal conviction'.*

8.24 As stated exclusion relates to any person;

**(1) In this Act “serious criminal conviction” means a conviction for an offence for which**

- a) a sentence of immediate imprisonment of 5 years or more was imposed.
- b) a sentence of imprisonment for life was imposed.
- c) an indeterminate custodial sentence under Article 13 of the Criminal Justice (Northern Ireland) Order 2008 was imposed.
- d) a sentence of detention during the pleasure of the Secretary of State or the Minister of Justice, or for life, or for 5 years or more, was imposed under Article 45 of the Criminal Justice (Children) (Northern Ireland) Order 1998 (children convicted of grave crimes), or.
- e) a sentence of detention during the pleasure of the Governor or the Secretary of State, or for life, or for 5 years or more, was imposed under section 73 of the Children and Young Persons Act (Northern Ireland) 1968 (children convicted of grave crimes).

**(2) This section applies whether the person—**

- a) was convicted in Northern Ireland or elsewhere;
- b) was convicted before or after the coming into operation of this section.

**(3) Where the person was convicted in a country or territory outside Northern Ireland, the references in subsection (1)(c), (d) and (e) to sentences are to be read as references to equivalent sentences in the country or territory in which the person was convicted.**

This legislation bans anyone with a sentence of more than 5 years from acting as a Special Political Advisor.

#### Counter Terrorist Check (CTC)

8.25 The Counter Terrorist Check (CTC) is mandatory for any person employed in posts involving proximity to public figures who would be assessed as being at risk from terrorist attack. It is also mandatory for any individual who will have access to any information or material that would be sought by terror groups, or those who will have unaccompanied access to any sites such as military bases, police stations or other places such as civil, industrial or commercial premises that would be viewed as being at particular risk from terrorist attack. CTC clearance is achieved via;

- Completion of a security clearance questionnaire by the candidate;
- Baseline Personnel Security Clearance (BPSC) requiring all government departments to vet all personnel employed/or engaged by (irrespective of working contract) them to work in their premises or on their system, access to the Public Service Network or in places where secret information may be overheard.

#### Security Check (SC)

8.26 A SC is the most commonly used process through which to gain security clearance. Those who will have access either as a direct employee/or employee of a contractor to information classified as secret on a regular/ or occasional basis which is supervised requires the successful completion of a SC. It also includes those whose career trajectory may at some point require such clearance. A SC includes information regarding personal files, staff reports, sick leave returns and security records, the checking of spent and

unspent convictions and a Security Service (MI5) records evaluation. It will also include checks upon any third parties listed on a BPSC.

### Developed Vetting (DV)

8.27 DV is understood as the most all-inclusive type of security clearance. It is required for "long term, frequent and uncontrolled access to TOP SECRET information or assets.... or in order to satisfy requirements for access to material originating from other countries and international organisations"<sup>20</sup>.

8.28 It includes successful completion of the Baseline Personnel Security Standard, for the applicant to complete a security questionnaire, a developed vetting, a developed vetting Supplement and Financial Questionnaire. It will also include reviews of personal files, staff reports, sick leave returns and security records. All spent and unspent convictions will be checked as will the applicant's credit and financial history with a credit reference agency. MI5 checks as well as a comprehensive interview conducted by a qualified Investigating Officer. As with each of these security clearance checks information will be required for natural parents, adoptive parents, foster parents, step-parents, legal guardians, siblings and partner's father and mother

### Issues with Vetting

8.29 The Panel is concerned that yet again evidence is not available to measure obligations as outlined in the Belfast and St Andrew's Agreements. As with FETO we have no evidence regarding the activities of Access NI that includes;

- How many persons with conflict-related convictions have gone through the AccessNI process?
- Of those who have gone through that process how many have secured/maintained employment post-check?

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See <http://webarchive.nationalarchives.gov.uk/tna/+http://www.mod.uk:80/DefenceInternet/AboutDefence/WhatWeDo/SecurityandIntelligence/DVA/DefenceVettingAgencyFrequentlyAskedQuestionsTheVettingProcess.htm>

- How many persons who are relatives have been negatively affected by this legislation?

8.30 It is also a misnomer to view vetting as being at a low or high level standard given that the evidence presented to the Review Panel, of individuals who have been dismissed or denied entry to employment whether those posts are in regulated activity or otherwise.

8.31 In addition to the form of vetting and labour market exclusion located within FETO, the introduction of Access Northern Ireland checks in Northern Ireland in 2008 has also created an additional barrier to labour market entry. Like FETO it does not permit any differential between conflict-related and other convictions and is therefore counter-productive regarding the principles of the Employers' guidance. Although it does promote those principles as good practice.

8.32 Access NI and existing legislation does provide some capacity to adjudge job applications beyond criminal record checking. The permission to provide a statement of disclosure is welcomed by the Review Panel but evidence suggests that convictions out-weigh the impact of these statements. When examining those barred/vetted under rehabilitation legislation it seems that the notion of a propensity for violence is the key determinant. That propensity for violence appears (see Case Study 6 Section 11) to be linked to conviction and not information on behaviour or character post-incarceration. There is no measure of the impact of statements of disclosure upon decision making. This is against the spirit of the Guidance Principles and undermines commitments given to full integration. What we seem to find is a situation in which convictions are not differentiated regarding conflict relationship and in which variant recidivism rates are not factored into decision making.

8.33 As with review panel's recommendation regarding the removal of Section 2(4) of the Fair Employment and Treatment (Northern Ireland) we would recommend that processes linked to AccessNI checks should consider the distinction between conflict and non-conflict related offences.



## Section 9 – Northern Ireland Civil Service and the Guidance Principles

- 9.1 The non-adoption of the Guidance Principles by the Northern Ireland Civil Service remains. This has been due to the assertion that the recruitment practices therein were deemed appropriate for those with convictions.
- 9.2 In the case of the Northern Ireland Civil Service a criminal record check is sought for all applicants and employees of those contracted by government departments and related agencies. If it transpires that the individual has a conviction, a statement of disclosure form is issued for completion by the applicant. This provides the opportunity for the candidate to put the nature of the offence/conviction in context and provide any supporting material e.g. testimonials, references etc.
- 9.3 The arrangements for 'dealing with' a candidate's conviction(s) record relate to a Criminal Record Check which presents information regarding unspent criminal offences. The Appointments and Marketing Branch of the Northern Ireland Civil Service is tasked when convictions are disclosed to place that information in the context of the Northern Ireland Risk Assessment Form. This, in the opinion of the Review Panel, is a standard but very basic matrix through which to assess unspent conflict and material relevance. All conflict-related offences will fall under the unspent category that includes:
- Convictions demonstrating a propensity to violent, destructive, or abusive behaviour.
  - Convictions demonstrating serious negligence causing death or injury to others.
  - Convictions demonstrating dishonesty.
  - Convictions for motoring offences which are directly related to the post applied for or where the individual has been convicted on more than one occasion for the same offence.
- 9.4 Any of these convictions will lead to the Appointments and Marketing Branch advising HRConnect to write to candidates in order to confirm if convictions

relate to them and to provide the applicant with an opportunity to present a statement of disclosure concerning identified conviction/s. The opportunity to present a statement of disclosure provides for applicants to 'outline any special circumstances which he/she feels should be considered before any decision to appoint/not appoint is made'<sup>21</sup>.

9.5 These policies and procedures are communicated in the Northern Ireland Civil Service Recruitment Policy and Procedures Manual which is published on the Department of Finance and Personnel recruitment website <sup>22</sup>. Section 9.1 of that manual details how disclosures are managed. In so doing the Manual provides contact details for the Northern Ireland Association for the Care and Resettlement of Offenders (NIACRO) to aid potential applicants with criminal convictions when seeking assistance in making application for employment in the Northern Ireland Civil Service. It states that 'you should not put off applying for a post because you have a conviction.' The Review Panel is concerned that NIACRO, due to funding cuts, has not had a person in place to offer the advertised service. Rectifying this would demonstrate a commitment to assisting those with the rehabilitation/reintegration of persons with conflict-related convictions.

9.6 This indicates a serious flaw in aiding those who need assistance with disclosure and may indicate that rehabilitation is not being taken seriously or monitored properly.

9.7 For those positions requiring a higher level of vetting (as determined by Rehabilitation and Offenders legislation, questionnaires are provided by HRConnect and completed by candidates. HRConnect will forward the completed questionnaires to the Defence Vetting Agency for processing. All elements of the higher level check will be completed by the Defence Vetting Agency including the Criminal Record Check. Before this action is initiated letters advising candidates of their 'status' are sent to the candidate. As stated in the relevant appointments manual;

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<sup>21</sup> See <https://irecruit-ext.hrconnect.nigov.net/resources/documents/v/1/1/v11.pdf>

<sup>22</sup> <https://irecruit-ext.hrconnect.nigov.net/resources/documents/r/p/p/rppmv13.pdf>

*'A candidate should not normally be appointed if he/she has repeated, or has been convicted on more than one occasion for an offence. All candidates who have convictions which could preclude them from appointment must be invited to provide a statement of disclosure before any decision on his/her suitability is made'.*

9.8 The criteria used to determine vetting as it relates to conviction is of concern to the Review Panel. It is a very rudimentary instrument. As shown in some of the case studies convictions seem to have determined barring decisions when weighted against disclosure. The fact that persons have been community leaders, have worked with children for a long-period of time, are parents, have shown leadership in assisting vulnerable persons and have had direct contact with children within schools appears to be out-weighed by convictions that were obtained several decades ago. It appears that such work and the character of those who have undertaken positive and inclusive conflict transformation work, over a considerable period of time, has failed to prevent perpetual vetting and/or disbarring.

9.9 The Review Panel is of the opinion that DFP in adopting the Guidance Principles develop a more adequate matrix than that used at present. The present risk matrix, listed above, is too contingent upon convictions and does not adequately weight material relevance, good character, the Belfast and St. Andrew's Agreements commitments to rehabilitation as well as exemplary career histories and candidates' ability. Although applicants, with conflict related convictions, are able to submit a statement of disclosure it is not evident how it is evaluated, interpreted or reasoned as no feedback is provided to the applicant and there is no mechanism to appeal. Whether the conviction is conflict-related is not factored in as far as we can observe. Also the issue of variant recidivism levels between conflict and non-conflict related does not seem to have impact either.

9.10 We also note that in the relevant manual it states;

*'Appointments and Marketing Branch will consider any mitigating circumstances provided by the candidates which tend to suggest that the convictions are not representative of the overall character of the candidate'.*

9.11 The Appointments Branch are required to consider the information received against the following criteria:

- Relevance of conviction to post.
- Severity of penalty imposed by Court.
- Circumstances surrounding conviction.
- Mitigating circumstances.
- Rehabilitation and contribution to Society
- Statements of character
- Any other information provided by the candidate which tends to suggest that the convictions are not representative of the overall character of the candidate.

9.12 The Review Panel have not been able to locate any information in which these criteria are adequately explained or have been used to reverse vetting decisions. In response to a Freedom of Information request we have been advised that no records are held regarding unsuccessful applications and the link to conflict-related convictions.

9.13 We argue that it would be useful if those who review vetting decisions cross-reference these criteria with the 'Risk Assessment' criteria within the relevant manual. The Civil Service should also consider whether or not its processes lead to the rejection of qualified staff and suitable candidates and what the impact of this is upon their organisation. We would suggest that vetting criteria, are properly weighted and that staff, if not already, are trained in material relevance related decision making. We contend that in Guidance Principle's risk assessment process a panel would be expected to consider a range of appropriate scenarios such as the likelihood of occurrence and the impact of such an occurrence. Through so doing a more accurate assessment of the significance of the risk involved can be determined. This consideration can then

be factored into the decision making process. Given, for example, the low level of recidivism among those with conflict-related convictions it would be expected that the likelihood of recurrence would be low and therefore the risk also low. It is not clear that Civil Service's procedures differentiate between conflict-related convictions and non-conflict related convictions and the variant degrees of recidivism between them.

9.14 We would encourage the Civil Service to consider our 1st report and our proposition that with regard to recruitment there is an adoption of the practices outlined in 'Employing people with criminal records' document produced by the Chartered Institute of Personnel and Development. The Civil Service operate under rehabilitation and not FETO legislation. Adopting the Guidance Principles is more relevant as FETO removal will not affect Civil Service recruitment procedure. This best practice guide concludes that an objective assessment would:

- focus on a person's abilities, skills, experience and qualifications;
- consider the nature of the conviction and its relevance to the job in question;
- identify the risks to the organisation's business, customers, clients and employees;
- recognise that having a record does not always mean a lack of skills, qualifications and experience;
- note the high-quality training, leading to qualifications, received during imprisonment.

9.15 This assessment of records would also:

- always be based in confidentiality and discretion when requesting and handling records;
- encourage applicant honesty by stating that applicants will be considered on merit and ability;
- not include requests for spent conviction records unless the job is excepted under Rehabilitation of Offender's Orders;

- advise applicants to submit confidential records separately from the usual application form and to a named employee;
- comply with data protection law;
- ensure access to recorded information is only on a need to know basis.

### Challenging vetting and barring decisions<sup>23</sup>

10.1 An important element of ensuring that those with conflict-related convictions can exercise the rights that they were intended to have under the Belfast Agreement in relation to rehabilitation, is the extent to which they are able to identify when there has been a breach of those rights so that they can seek redress. This raises important issues concerning the access to what is very often sensitive information. Whilst Judicial Review provides as a last resort, a means for an applicant to challenge decisions of public authorities, there are a number of Tribunals that provide a forum to do so where it raises security issues in relation to decisions affecting employment.

#### ***National Security Certificate Appeals Tribunal***

##### ***Certificate Appeals Tribunal***

10.2 The National Security Certificate Appeals Tribunal (“NSCAT”) is responsible for determining appeals against the refusal of national security certificates in proceedings in which it is claimed there has been an act of discrimination relating to employment. NSCAT considers whether the act of discrimination was done for the purpose of safeguarding national security, public safety or public order and whether the act was justified for that purpose.

10.3 Provision for the NSCAT is made in the Northern Ireland Act 1998, which provides at sections 90 to 92 for a Tribunal to hear a challenge to a ‘national security’ certificate issued by the Secretary of State under section 80 of the Fair Employment and Treatment (Northern Ireland) Order 1998, which states:

*“Effect of certificates by Secretary of State*

*(1) This Article applies where in any proceedings—*

*(a) a person claims that an act discriminated against him in contravention of any provision of Parts III to V; and*

<sup>23</sup>

<http://www.niassembly.gov.uk/globalassets/documents/finance/special-advisers-bill-submissions/response-to-assembly-committee-query---vetting-procedures.pdf>

*(b) the person against whom the claim is made proposes to rely on a certificate purporting to be signed by or on behalf of the **Secretary of State and certifying—***

*(i) that **an act specified in the certificate was done for the purpose of safeguarding national security or protecting public safety or public order; and***

*(ii) that **the doing of the act was justified by that purpose.***

*(2) **The claimant may, in accordance with rules under section 91 of the Northern Ireland Act 1998, appeal against the certificate to the tribunal established under that section.***

...

*(4) If—*

*(a) the **claimant does not appeal** against the certificate; or*

*(b) the certificate is upheld on appeal,*

*the **certificate shall be conclusive evidence** of the matters certified by it.*

*(5) Sections 91 and 92 of the Northern Ireland) Act 1998 shall 1998 c. apply in relation to appeals under this Article as they apply in relation to appeals under section 90 of that Act.” (Emphasis added)*

10.4 The context for this inclusion in the Northern Ireland Act 1998 was provided by a successful appeal to the European Court of Justice on 9 July 1997 on the grounds of the conclusiveness of section 42 certificates<sup>24</sup> (predecessor to section 80 certificates) violated article 6 of the European Convention on Human Rights.

10.5 Tinnelly & Son Ltd (“Tinnelly”) were a construction company whose managing director was catholic had the lowest bid in a public procurement tender process for the demolition of a power station at Ballylumford. It was recommended for acceptance by the Northern Ireland Electrical Services (“NIE”). Nevertheless it was unsuccessful. The trade unions at Ballylumford would not permit Tinnelly’s employees access to the site alleging that some of them were IRA sympathisers. Pursuant to a request from NIE the Secretary of

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<sup>24</sup> Section 42, Fair Employment (Northern Ireland) Act 1976



State issued a section 42 certificate certifying that the decision not to grant the contract to Tinnelly was ‘an act done for the purpose of safeguarding national security or of protecting public safety or public order’. That certificate was conclusive evidence that the NIE decision was taken for the stated purpose. The Fair Employment Agency sought to judicially review the NIE and the Secretary of State responded with a ‘public interest immunity certificate’ (“PIIC”) certifying that full disclosure of the information it held would be injurious to the public interest because it could put the lives of sources at risk by revealing them to those involved in terrorism. McCollum J held that there was no evidence that the section 42 certificate had been applied for in bad faith.<sup>25</sup> The FEA did not appeal.

- 10.6 A similar issue arose for the McDuff family, who were catholic joiners, in relation to a sub-contract for premises in Omagh for the Department of the Environment (“DOE”). They were told that they had been successful and could start subject to security clearance. The DOE refused to issue the clearance based on information from the police. The Secretary of State issued a section 42 certificate and the DOE successfully defended the complaint to the Fair Employment Tribunal on the ground that it was safeguarding national security.
- 10.7 Tinnelly and the McDuffs took their cases to Strasbourg on the basis of breaches of article 14 and article 6. The European Court had previously dealt with the equivalent provision under the Sex Discrimination Act 1975 in *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1663. In that case the appellant argued that the equivalent provision, section 53(1), was contrary to article 6 insofar as it permitted a certificate issued by the Secretary of State to be treated as conclusive evidence and thereby prevented the Industrial Tribunal from considering the merits of her case. The Court agreed with her.

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<sup>25</sup> *In Re the Fair Employment Agency for Northern Ireland (application for Judicial Review), Fair Employment Agency for Northern Ireland v. Secretary of State* (1991) unreported, judgment delivered on 12 November 1991

- 10.8 The Standing Advisory Committee on Human Rights (the predecessor of the Northern Ireland Human Rights Commission) intervened in the Tinnelly and McDuff cases, arguing that there was no effective judicial scrutiny of whether an act had been done to safeguard national security or to protect public safety as asserted in the section 42 certificate. The European Commission of Human Rights considered there was a violation of article 6 and referred the matter to the European Court of Justice on 9 July 1997.
- 10.9 The unanimous judgment of the European Court of Justice delivered on 10 July 1998 in *Tinnelly & Sons Ltd and McElduff v. United Kingdom* [1998] 27 EHRR 249 was given just 3 months after the conclusion of the Belfast Agreement negotiations and before the enactment of the Northern Ireland Act 1998.
- 10.10 The timing was opportune. It was clear:<sup>26</sup>

*“... the conclusive nature of the section 42 certificates had the effect of preventing a judicial determination of the merits of the applicants’ complaints that they were victims of unlawful discrimination. The Court would observe that such a complaint can properly be submitted for an independent judicial determination even if national security considerations are present and constitute a highly material aspect of the case. The right guaranteed to an applicant under Article 6 § 1 of the Convention to submit a dispute to a court or tribunal in order to have a determination of questions of both fact and law cannot be displaced by the ipse dixit of the executive.”*  
(para.77)

- 10.11 The Court concluded at para.79 that there was a *“disproportionate restriction on the applicants’ right of access to a court or tribunal”* and a consequent breach of article 6 of the ECHR. That judgment was given just 3 months after the conclusion of the Belfast Agreement negotiations and before the enactment of the Northern Ireland Act.

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<sup>26</sup> See also *Devlin v. The United Kingdom* [2002] IRLR 55 in which although judgment was delivered on 30 January 2002, the facts date back to 1991. The case concerned a catholic Irish National’s claims that his application to join the Northern Ireland Civil Service was blocked by a section 42 certificate which could not be challenged. As in the *Tinnelly* and *McDuff* cases, the Court found article 6 had been breached.

10.12 Section 90 of the Northern Ireland Act states in relation to the ‘effect of certificates’:

*“(1) This section applies where in any proceedings—*

*(a) a person claims that an act discriminated against him in contravention of section 24 or 76; and*

*(b) the person against whom the claim is made **proposes to rely on a certificate purporting to be signed by or on behalf of the Secretary of State and certifying—***

*(i) that an act specified in the certificate was done for the purpose of safeguarding national security or protecting public safety or public order; and*

*(ii) that the doing of the act was justified by that purpose.*

*(2) The claimant may, in accordance with rules made under section 91, **appeal against the certificate to the Tribunal**, that is to say, the **tribunal established under section 91.**” (Emphasis added)*

10.13 The Tribunal and an appeal to the Court of Appeal, which together are to provide the necessary judicial scrutiny and ensure that the system is ECHR compliant, are provided for in section 91 and section 92:

*“91(1) **There shall be a tribunal** in relation to which Schedule 11 shall have effect.*

*(2) The Lord Chancellor may, after consultation with the Lord Chief Justice of Northern Ireland, make rules—*

*(a) for regulating the exercise of rights of appeal to the Tribunal;*

*(b) for prescribing the practice and procedure to be followed on or in connection with appeals to the Tribunal, including the mode and burden of proof and admissibility of evidence on such appeals; and*

*(c) for other matters preliminary or incidental to or arising out of such appeals.*

*(7) The **Attorney General for Northern Ireland may appoint a person to represent the interests of a party to proceedings before the Tribunal** in any proceedings from which he [ie in relation to closed proceedings] and any legal representative of his are excluded. (Emphasis added)*

*92(1) Where the Tribunal has determined an appeal under section 90—*

(a) **any party to the appeal;** or

(b) *where the Secretary of State was not a party to the appeal, the Secretary of State,*

*may bring a further appeal to the Court of Appeal in Northern Ireland on any question of law material to the Tribunal's determination.*

(2) *An appeal under this section may be brought only **with the leave of the Tribunal or, if such leave is refused, with the leave of the Court of Appeal in Northern Ireland.***" (Emphasis added)

10.14 To underscore the significance of the procedure established by sections 90 to 92 and Schedule 11, the interpretation provisions of the Northern Ireland Act provide at paragraph 98:

*"(6) No provision of an Act of the Assembly or of subordinate legislation, and no making, confirmation or approval of a provision of subordinate legislation, shall be treated for the purposes of this Act as discriminating if the provision has the effect of safeguarding national security or protecting public safety or public order.*

*(7) **No other act done by any person shall be treated for the purposes of this Act as discriminating if—***

*(a) the act is done for the **purpose of safeguarding national security or protecting public safety or public order; and***

*(b) **the doing of the act is justified by that purpose.***" (Emphasis added)

10.15 In order to give effect to sections 90 to 92 of the Northern Ireland Act and provide the mechanism relied upon by article 80 of the Fair Employment and Treatment (Northern Ireland) Order 1998, the Northern Ireland Act Tribunal (Procedure) Rules 1999 were brought into force on 29 July 1999. The provisions are similar to those that had been established for the Special Immigration Appeals Commission where similar security and article 6 issues arise. The material provisions are as follows:

*"General duty of the Tribunal*

3.—(1) *When exercising its functions, the **Tribunal shall secure that information is not disclosed contrary to the interests of national security**, public safety or public order or in any other circumstances where disclosure is likely to harm a public interest.*

...

(3) *The Tribunal shall satisfy itself that the material available to it enables it properly to review decisions.”*

*“Notice of appeal*

8.—(1) *An **appeal to the Tribunal is made by sending to the Tribunal a notice of appeal.***

...

(5) *As soon as practicable after he receives the notice of appeal, the clerk to the Tribunal shall send a copy to the person proposing to rely on the certificate and, where that person is not the Secretary of State, to the Secretary of State.”*

*“Special advocates*

9.—(1) *On receiving a copy of the notice of appeal, the Secretary of State shall inform the Attorney General for Northern Ireland of the proceedings before the Tribunal, with a view to the Attorney General for Northern Ireland, if he thinks fit to do so, **appointing** either or both of the following—*

(a) *a **special advocate** to represent the interests of the appellant;*

(b) *a special advocate to represent the interests of the person proposing to rely on the certificate, where that person is not the Secretary of State.*

(2) *Paragraph (1) applies unless the Secretary of State does not intend to argue that the certificate should be upheld.*

(3) *The function of a special advocate is to represent the interests of a party, as mentioned by paragraph (1), by—*

(a) *making submissions to the Tribunal in any proceedings from which that party and his representative are excluded;*

(b) *cross-examining witnesses at any such proceedings; and*

(c) *making written submissions to the Tribunal.*

(4) *Except in accordance with paragraphs (5) to (8), a special advocate may not communicate directly or indirectly with the party whose interests he has been appointed to represent on any matter connected with proceedings before the Tribunal.*

(5) *A special advocate may communicate with the party whose interests he has been appointed to represent at any time before the Secretary of State makes material available to him under rule 10(3) or 11(4).*

(6) *At any time after the Secretary of State has made material available to him under rule 10(3) or 11(4), a special advocate may seek directions from the Tribunal authorising him to seek information in connection with the proceedings from the party whose interests he has been appointed to represent.” (Emphasis added)*

10.16 The ‘Tribunal’ referred to by sections 90 to 92 of the Northern Ireland Act is known as the National Security Certificate Appeals Tribunal Northern Ireland (“NSCAT”). The NSCAT is ‘administered’ by the Department of Justice and ‘sponsored’ by the Northern Ireland Office.<sup>27</sup> The Lord Chancellor is responsible for the determination of the terms and conditions of appointment of the Chairman of the NSCAT and its other members – Deputy Chairman, legal member and lay member. The NSCAT is currently advertised on the website of Northern Ireland Judicial Appointments Commission as:

*“This Tribunal is responsible for **determining appeals against national security certificates in proceedings claiming an act of discrimination relating to employment.** It will consider whether the act complained of was done for the purpose of safeguarding national security, public safety or public order and whether the act was justified for that purpose.” (Emphasis added)*

The Tribunal is referred to by Weatherup J in *Robert Anthony McLoughlin, Judicial Review application* [2005] NIQB 50 at para.12 where he refers to a section 80 certificate and states in that eventuality:

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<sup>27</sup> Future Administration and Structure of Tribunals in Northern Ireland – Consultative Document; Appendix 3 – Northern Ireland Tribunals; p.56; 13 September 2011; Department of Justice

*“The applicant would then be entitled to appeal against the certificate to the Tribunal established under section 91 of the Northern Ireland Act 1998 and the Tribunal would determine whether the act specified in the certificate was done for the certified purpose that the doing of the act was justified by that purpose and if so the Tribunal would uphold the certificate or in any other case would quash the certificate.”*

10.17 However, the deliberations of the NSCAT are difficult to assess as its procedures involve the use of closed materials and special advocates as referred to in the example of *“the decision in Lockright, a case where the Northern Ireland Secretary refused to grant a licence for the provision of security guarding services”*, which is cited in the Report of the Annual Renewal of Control Orders Legislation 2010 at p.52.<sup>28</sup>

10.18 The Committee on the Administration of Justice (“CAJ”), an independent human rights organisation with cross-community membership that was established in 1981, asked the Northern Ireland Office under the Freedom of Information Act how many national security certificates had been issued and how often the ‘special tribunal’ had been convened. It was informed that the Northern Ireland Office ‘did not record’ such information.<sup>29</sup>

10.19 The incidence of section 80 certificates adversely affecting those with conflict-related convictions is unclear. So too is the extent to which this avenue for challenge is known to those who are affected by them and, therefore how effective the Tribunal is as a means of challenge.

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<sup>28</sup> House of Lords House of Commons Joint Committee on Human Rights Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010 Ninth Report of Session 2009-10 Report, together with formal minutes, and oral and written evidence, 23 February 2010

<sup>29</sup> Submission of Committee on the Administration of Justice to the Security Reading on the Justice and Security Bill on ‘Closed Material Procedures’, June 2012, at p.4, footnote iv

## ***Investigatory Powers Tribunal***

10.20 Criminal history disclosure (including through the AccessNI service) is a devolved matter and has been a matter for the Northern Ireland Department of Justice and the PSNI since 2010.<sup>30</sup> However, national security is of course also a matter for Westminster. Indeed schedule 2 of the Northern Ireland Act 1998 on ‘excepted matters’, includes “*National security ... special powers and other provisions for dealing with terrorism or subversion*”. Accordingly, those with conflict-related convictions may find employment decisions made in relation to them affected by matters of ‘national security’. In those circumstances, their avenue for challenging adverse employment-related decisions may therefore be to the Investigatory Powers Tribunal.

10.21 The Investigatory Powers Tribunal was established by section 65 of Regulation of Investigatory Powers Act 2000 (“RIPA”) with powers to examine claims that a public authority has acted in a way that is incompatible with the Human Rights Act 1998.<sup>31</sup> The RIPA Tribunal has the power to investigate complaints against public authorities using covert techniques regulated under RIPA. In accordance with section 7(1) of the Human Rights Act,<sup>32</sup> the RIPA Tribunal is able to investigate claims relating to the use of covert techniques by intelligence, military and law enforcement agencies and to a wider range of human rights misapplications committed by intelligence agencies.

10.22 The decision in *C v. The Police and the Secretary of State for the Home Department* (2006) IPT/03/32/H provided that the jurisdiction of the RIPA Tribunal extended to employment: “*In short, the employment relationship does not preclude the possibility of directed surveillance under RIPA. It is not possible to carve out an area of surveillance, which can be*

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<sup>30</sup> Northern Ireland Act 1993 (Amendment of Schedule 3) Order 2010 and The Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010

<sup>31</sup> There is also reference to this Tribunal in the *McLoughlin* case at para.21

<sup>32</sup> See: “A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may — (a) bring proceedings against the authority under this Act in the appropriate court or tribunal”



labelled “employment related” **and falls outside RIPA**<sup>33</sup> (emphasis added). An applicant may, in this way, be able to challenge the use of intelligence material in relation to employment decisions where it has been acquired through a breach of the Human Rights Act or is being used in such a way as to constitute a Human Rights breach.

### ***Security Vetting Appeals Panel***

10.23 The Security Vetting Appeals Panel (“SVAP”) was established in 1997 to hear appeals against the refusal or withdrawal of security clearance and to make recommendations. It is an advisory non-departmental public body sponsored by the Cabinet Office. The SVAP is available to all those in the public and private sectors and in the Armed Forces who are subject to security vetting and have exhausted existing appeals mechanisms within their own organisations and remain dissatisfied with the results. It is also available to contractors, but **not to candidates for recruitment**. Staff, contractors and recruits of the Security and Intelligence Agencies have separate arrangements via the Investigatory Powers Tribunal.

10.24 The Triennial Review Report on the Security Vetting Appeals Panel for 2013-2014<sup>34</sup> provides a very helpful summary of the Panel in relation to sensitive information:

*“Where the vetting decision turns on sensitive, national security, information which cannot be shared with the appellant, the Panel may offer the appellant the opportunity to request the appointment of a special advocate, who can represent the appellant at the closed parts of the proceedings.*

***Where the case involves sensitive information, the Panel endeavours to provide the appellant with a gist of the information, but the need to protect***

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<sup>33</sup> Para.78

<sup>34</sup> Carried out by Sir Alex Allan as part of the Cabinet Office’s triennial review programme for non-departmental public bodies

*such information means that in such cases a separate 'closed' report will be made to the head of the department or organisation.*<sup>35</sup> (Emphasis added)

10.25 Whilst the Review Report provides information on the number of cases from 1998 to 2012 and identifies specifically the PSNI, it is not possible to ascertain how useful the SVAP has been as a means of those with conflict-related convictions challenging vetting and barring decisions involving 'national security'. Case Study 3 below is one example of the Security Vetting Appeals Panel.

## Section 11 – New Evidence and the Workings of the Panel 2012-2015: Vetting and Exclusion Case Studies

### Case Study 1 – Termination of Employment as a Result of External Contract Arrangements

- A male in his late 50s who worked continuously for around 20 years for an environmental group. He was imprisoned from 1975 to 1987 and convicted when 19. This individual has held no convictions since his release 29 year ago.
- His employer noted that the standard of his work was exemplary especially given his leadership role in managing other employees and volunteers. His work generally involved litter management and environmental upgrading within a socially deprived community.
- The employee had, for that employer, declared his conviction and when in post he has been vetted by AccessNI security checks. His full disclosure was known to his employer who, via their own risk assessment considered him suitable for employment and working with young people, volunteers and other employees.
- His work for several years had been funded by a grant from the Department of Social Development (DSD). In 2013 the grant ended and his employer competitively tendered to continue the same work for DSD. The successful tender was accompanied by sub-contract arrangements which meant that all employees fell under the terms and conditions of Northern Ireland Civil Service (NICS) contracts. This meant an additional AccessNI check had to be completed and forwarded to the Department of Finance and Personnel (DFP).
- DFP then advised his employers that he was unsuitable to continue in his employment on that contract due to his conviction.
- With regard to this case the Review Panel contacted Access NI, who advised of the following:
  - Those in regulated activity must obtain an enhanced disclosure (i.e. for those working in care home/domicillary care/child-minding).

- A conviction should not automatically ban an individual from employment and that there were arrangements that would consider the material relevance of the conviction to any post.
  - It was confirmed that the individual had submitted two Access NI checks (one for his original post with his employer and a second one when the contract changed to DFP) and that the funders could have requested an enhanced disclosure on the grounds that he is working unsupervised and is supervising others (in regulated activity). The Review Panel finds this peculiar and re-iterates policy as outlined in point that a basic check ‘...is not suitable for roles working with children or vulnerable adults’. We therefore, given the lack of transparency over decisions, question how the material relevance of the conviction was determined.
  - The check was carried out through a third party organisation as his employers were no longer listed with Access NI as they did not submit applications on a regular basis.
- His employers clearly stated that they did not concur with DFP’s decision, and argued that they did not agree with the interpretation that his convictions were materially relevant given his good character, work ethic and experience. They contacted DFP who advised that they could not discuss the case because of data protection and also advised that there was no right of appeal. The employer drafted a letter to DFP supporting their employee
  - DFP were contacted by the Panel regarding this case and were advised that the employee was provided with an opportunity to submit a ‘statement of disclosure’. DFP considered this as an opportunity to provide additional information to allow their panel (comprised of 3 civil servants) to make an informed and materially relevant decision.
  - Following discussion with the Review Panel, DFP agreed to permit a statement of disclosure in order for the case to be reviewed. This case was reviewed by a panel in DFP who upheld their original decision that the employee was unsuitable for employment on this project.
  - The following has been received by the Review Panel from DFP;

- A basic security clearance was a condition of the DSD contract.
  - Because DFP have found him unsuitable for the DSD contract this does not stop him being employed elsewhere by his employer. Although, it was clear that his employment is for the same role he worked under during the contractor's previous grant funding;
  - It was a decision of the designated department to carry out checks.
  - A DFP panel met to discuss the security clearance issue and in light of this asked him to complete a statement of disclosure.
  - The individual concerned had originally failed to submit a statement of disclosure as he was unaware of what its nature and meaning was. Therefore his case was judged on the information available and refused employment. The additional and permitted disclosure did not change the decision and DFP have stated that there are no grounds of appeal.
- DFP declined a request to meet with the Review Panel. The Review Panel are concerned that this meeting did not take place and is not aware why the decision to disbar was taken given material evidence regarding the employees work record and other information regarding good character.
  - This case has now proceeded to judicial review. We await the outcome of this case.
  - In September 2014, prior to this case, the Review Panel met with DFP Corporate HR regarding the Employers' Guidance.
  - At the meeting with DFP the Review Panel members were reminded of the view and the decision taken by the then Minister of Finance and Personnel that NICS' current vetting arrangements relating to recruitment were appropriate and adequate. They were further advised that this remained the position. Since then, the legislation has extended the vetting arrangements for civil servants to include Ministers' Special Advisers.

- DFP advised that during the application process for NICS recruitment careful consideration is given to convictions and spent convictions but that the approach does not differentiate between conflict related and non-conflict related convictions. They further advised that no-one is ruled out simply on the basis of a conviction as all, convictions are judged in line with criteria and a risk matrix, and each case is judged on its own merits.
- In cases where a potential employee has passed the selection process on the basis of the merit principle and a conviction is identified as part of the Access NI check, the individual is invited by Corporate HR to provide a statement of disclosure which gives them the opportunity to put their convictions into context and to provide testimonials.
- They advised that to date they were unaware of any cases where a decision has been taken not to employ an individual in the NICS because of a conviction. It was reiterated that Corporate HR are only involved in the vetting process if there is a referral, in which case they would apply the risk matrix.
- In respect of applying the risk matrix, it was stated that a number of factors are taken into consideration such as, the seriousness of the offence, whether there had been any repeat offences, and how long ago the offence had taken place.
- DFP were asked if they held figures on the number of individuals who had been refused employment because of a conflict related conviction and the Review Panel was advised that this information was not captured or held across the twelve departments. The Review Panel stated that they would consider that capturing such information would be a recommendation in the 2<sup>nd</sup> Review Panel report and that said information should be held and traceable under FOI. The Review Panel were also concerned that it as stated that the process was taking into account factors regarding character etc. but that no evidence, even regarding how many disclosures there have been, was held or available.

- DFP advised that the NICS policy was compliant with the Rehabilitation of Offenders legislation. In addition, they indicated that the NICS always, despite having no evidence on how many persons with conflict-related conviction passed through the application system successfully, attempts to be fair and reasonable in accommodating individuals. It was also stated that in some cases if a materially relevant conviction arises among existing employees that they would consider redeployment rather than dismissal, depending on the circumstances of the case. It was also positioned that the NICS needs to ensure that those it employs are entirely suitable for public service and this often requires careful consideration and judgement.

### **Case Study 2 – Termination of Employment as a Result of Access NI Check**

- A woman in her mid 50s who received a conflict related conviction in respect of a firearms offence in 1982 when she was 22 years old.
- She had successfully secured employment, in 2014, through a parenting programme operated by a major children’s charity in conjunction with a university located in GB. Her employment, with the charity, was to facilitate trainers to support a parenting programme.
- Her employer in Northern Ireland was fully aware of her past convictions and did not feel, given her experience and excellent track record, that there was any material relevance in her conviction regarding undertaking this new position. Her past employment had been related to issues of anxiety and stress management and she was well-placed to undertake any tasks that involved working with children or vulnerable persons.
- Despite her having declared her convictions to her employer, the new post required that an Access NI Basic Check be completed. On completion she was informed by the charity’s head office (in GB) that she could not proceed with her employment as the check had flagged up her convictions.
- Two staff from Head Office in GB came to Northern Ireland to interview her and discuss her convictions, and how she came to be working on the

programme. After an 8 week period she was informed that her offer of employment would be withdrawn as she would be working with children. As noted a Basic Check is not suitable for such regulated activity.

- During her interview she clearly stated that she had several years' experience of delivering massage and stress management techniques in both primary and secondary schools and had also worked in catering within a local school. It would appear that her experience of working with children and vulnerable persons was not deemed as relevant to the post she was dismissed from. It also did not seem to matter that she had undertaken previous work for an employer to whom she had disclosed her convictions.
- The Review Panel contacted the employer with regard to the Guidance Principles. They asserted that they do not have a blanket ban on those with conflict related convictions. It was confirmed that their review team undertook what they proposed was an extensive review and risk assessment which conformed with their right to decline the services of those with criminal records. This they claimed was due to employee's role not serving best the interests of the charity or its beneficiaries. The Review Panel was not informed why the employees experience and the relevance of that experience was not less important

### **Case Study 3: Impact on Employment as a Result of Family Members Convictions**

- A man in his late 50s who received a fine in 1975 when 15 years old for riotous behaviour and has spent speeding convictions. He has had no other convictions. Two of his siblings hold conflict related convictions. He has an extensive record of employment as a locksmith and alarm fitter since 1979.
- He had generally no problems working for a well know security firm and regularly fitted alarms and locks in police stations, army barracks and judge's homes. In the 1980s he was working in the home of a senior member of the legal profession and claims that he was mistakenly identified by a police officer as one of his brothers who was imprisoned at that time. He was not formally vetted at this time by his employer but claims that his employer was



informed by said police officer that he held conflict-related convictions. Although, his employer accepted that this was a case of mistaken identity he stated to the Review Panel that he was no longer permitted to work, by them, in security sensitive sites.

- He contends that this restriction on his places of work undermined his promotion opportunities as he could not undertake a team manager's post which would require working across a range of contracts and within security sensitive sites. If working 'on call' he would have to arrange for colleagues to cover emergency work in security/sensitive based sites.
- He claims that on several occasions his employers were told by police officers to sack him and that they, as an employer, would be responsible for any issues that arose regarding his employment and his family links. He claims that his employer refused to do so due to the quality of his work and his reliability. However, he claims that on several occasions, given the limits imposed upon him concerning where he could work he was advised to take redundancy packages.
- After fulfilling a major contract for his employer in the health service, in 2008, he felt able to apply for a promotion which he did not receive. At this point given the impact of the allegations against him which he felt created a glass ceiling regarding promotion he took a redundancy package.
- In the final decade of his employment with that employer he applied yearly for security clearance and was refused.
- In 2008 he took employment with a similar company and was required to undertake a Counter-Terrorism Check (CTC) which yet again was declined. He continued for some time working for this new employer but was hindered by his inability to be permitted employment in security sites;
- He repeatedly appealed the decision regarding his security clearance. This, for example, he did in 2008 and was refused in 2009. He appealed that decision in 2009 and in the same year the Security Vetting Officer refused his appeal. He then immediately appealed the decision to the Assistant Chief Constable who refused his final appeal.
- The assessment of security vulnerability stated that his post required CTC clearance as he would be in a position to obtain information on the physical

layout of police stations and the location of police assets, such as firearms, ammunition and equipment, knowledge of police patrols, operations and routines, and the identities of persons working for, or in partnership with the police.

- For reasons unknown to him, but due to changes in PSNI policy regarding the hosting of interviews, he was granted a Service Vetting Unit interview in 2009 at which he was permitted to present information on why he felt the PSNI decision to block his security clearance was unfair. Part of that review process involved an interview by the PSNI in 2010. He attended the interview and was questioned regarding fines/penalties/driving offences and his brothers' convictions. He was also questioned about contact and other familial relationships. The decision, to grant security clearance, remained unchanged.
- Following that interview he was contacted by the Security Vetting Appeals Panel in 2013 and informed that that he could appeal CTC check decisions through the Special Advocate Support Office. An advocate came to Belfast to meet with him and he was informed that this barrister would be responsible for representing his case. After a year, and following a meeting of the Special Advocate Support Office, he was informed that he would receive security clearance if he applied.
- Given a career of being hampered by innuendo and guilt by association the employee is now working on a salary of less than 50% of what he had received previously.

## Case Study 4: Vetting Employment in Community Leadership I

- Case Study 4 relates to a community leader who holds a conflict related conviction. He has been employed in the community sector for over 15 years and for the past 9 years has worked as both the Operations Manager and then Managing Director of a community resource centre. His job involves working with various disadvantaged groups in a highly socially deprived area. The resource centre he leads is tasked under Neighbourhood Renewal to tackle problems such as educational underachievement, physical and economic regeneration and employment issues.
- In December 2013 his organisation submitted a bid for a social economy training project. This individual as a named applicant in the bid received capital funds from the Social Investment Fund in OFMDFM to purchase a building in which the social economy project would operate.
- A subsequent tender from Invest NI and DSD was successfully awarded. The aim was for him to work in this new social economy hub/enterprise as an Operations Manager with two additional staff to work on the project.
- The contract was awarded on the condition of an Access NI check for him and the other employees. His two staff passed these checks but his case was referred to the DFP for review.
- He was advised that he could not work on the project as a result of his Access NI check. His organisation had to arrange for someone to deputise for him on the project.
- Review Panel met with Invest NI who advised that they have no issues with ex-prisoner organisations and have had engaged with the groups in the past through other Invest NI training projects. In fact, Invest NI sit on the board for the social enterprise hub along with representatives from Department of Social Development and Department of Enterprise Trade and Investment. The Review Panel was also informed that Invest NI were asked to take the lead on the procurement/regulation of the hub regarding location and capability of the individuals to be employed and the organisation leading the project.
- Invest NI have confirmed to the Review Panel that the decision to list generic baseline clearance as a requirement in the tender for employment was based on two considerations:

- 1 The nature of the service to be delivered to potentially a wide range of groups; i.e. mother and toddler groups and youth groups including children and vulnerable adults;
- 2 The range of delivery agents and their professional ability.
  - Invest NI confirmed that based on these two considerations baseline clearance was considered an appropriate requirement and that any offences issued on an Access NI check would be taken into consideration. Baseline clearance which showed his unspent convictions ruled him out of the basis of Protection of Children and Vulnerable adults (POCVA).

### **Case Study 5: Vetting Employment in Community Leadership II**

- This individual was released from prison some 19 years ago and is a fully qualified youth worker who was formerly employed by an education and library board.
- The Development Trust (that employed him) in association with an enterprise agency that develops commercially viable organisations in areas of socio-economic plight and which enables people with learning disabilities and learning difficulties competitively tendered to operate a social enterprise hub. This hub was similar to that undertaken in Case 4 in that funding came from the Social Investment Fund.
- As a regeneration manager this individual was nominated to work in the newly established hub.
- The applicant was advised that contractors working in the Northern Ireland Civil Service (NICS) are generally subject to the same pre-employment checks as employees.
- He was advised when disbarred that his AccessNI disclosure certificate and statement of disclosure were ‘carefully considered in line with DFP policy and the NICS risk assessment guidance prior to a decision being reached’

- It was confirmed 'that there is no formal appeal process, however should the individual wish to contact us directly with any queries' these would be addressed.
- His employer and the partners involved in the bid that involved leadership to work across the sectarian divide stated in their letter to DFP that they found it 'strange that this individual was cleared to work directly for XXXX as a youth worker but not for DETI' and that 'we find this situation very discriminatory and formally request that you look into this matter'.

### **Case Study 6: Termination of Employment (Twice) as a Result of Access NI Check**

- This individual was released from prison in 1990 and has had no further convictions and has never been arrested or questioned in relation to any other incidents.
- Since release from prison this individual has worked mainly in the hotel/hospitality industry and listed a number of posts which he held since his release which all involved being in a position of trust and dealing with members of the public:
- In September/October 2015 this individual decided he wanted a career change and a change from working late shifts to 9-5 employment and applied for a job in 'soft services', he had not disclosed his convictions as the application process did not ask for details.
- He was one of three candidates interviewed and was the successful candidate. He started work as a porter in a government building and was in post one week when he was advised that the requirement of the job was to complete an Access NI check. He self disclosed about his 1984 conviction to his employer who commented that she thought it would not be a problem as he had no access to sensitive/confidential material in his job.
- His employers were required to send his Access NI check to DFP and during this time he continued to work for a further 2/3 weeks. After the 2/3 weeks his

employer was told by DFP that he was found unsuitable to work there and was to be removed from his employment.

- He completed a statement of disclosure which would allow DFP to make an informed decision about his suitability for employment and following this he received a further letter from DFP stating that they still found him unsuitable as he had propensity to violence.
- Several weeks later this individual was approached by a health care company who were interested in employing him as he held an OCN Health and Social Care certificate. He attended an interview as requested and disclosed verbally and in writing his convictions. During the interview (on a Friday) he was informed that he was 'an impressive candidate' who had a sound work history and experience and that he should call back on the following Monday to complete an AccessNI form. He phoned on the Monday and was told not to come in as a line manager had stated that he could not be employed due to his record.

### **Case Study 7: Incorrect sentence information held by Access NI**

In early 1985 and at the age of 18 this individual was originally sentenced to 2 years and 11 months for hijacking related offences. His sentence upon appeal to Judges Gibson, Gibson and Porter was reduced to 1 year. He served 6 months of that sentence in prison. He has not been convicted of any offence since then.

In 2016 he was dismissed from one post and left another in airports in Northern Ireland. In both instances he was appointed by private sector companies after completing Access NI checks and a full declaration. These posts were as a traveller helper /car park attendant and cleaner. With regard to the second post he was one of only two successful applicants out of c90 candidates. As with other case studies and despite his declaration both employers were content to employ him due to his work ethic, ability and employment background. Despite having held employment, this individual due to his conviction has been unsuccessful in gaining several other posts.

With regard to both posts he was asked to complete a 'Certificate of Disregard' as requested by the Civil Aviation Authority. When doing so the first time he was

removed from his employment and offered 28 days to appeal this decision. In the second post he was again asked to complete the certificate and declined to do so as it would lead to his dismissal. He left the latter post voluntarily.

Coiste contacted the PSNI's Personal Disclosure Unit to enquire why when applying for posts this individual's record showed a sentence of 2 years and 11 months. They were advised to raise the issue via [pduemploymentvetting@psni.pnn.police.uk](mailto:pduemploymentvetting@psni.pnn.police.uk) with regard to the correct sentence being recorded. Following this process Access NI confirmed that both the Police National Computer and the Northern Ireland equivalent records showed a sentence of 2 years and 11 months. There is no record of the appeal and thereby no proper logging of the appropriate sentence.

Access NI asked the Review Panel to establish if this individual had undertaken a formal appeal hearing, the dates of that appeal and the parties involved. This process has confirmed the individual's evidence regarding his sentence reduction. This individual is now working with Access NI to have his sentence record completed.

This holding of incorrect information raises several issues;

- 1) Each time this individual declares his conviction the regulated body receives the wrong information regarding his sentence;
- 2) Would an employer react differently when considering the evidence of a near 3 year sentence compared to one of 1 year? Even if the information is corrected for the posts above would a negative view have already have been created?
- 3) Given this and other evidence provided to the Review Panel it is reasonable to assume that this is not the only information held that is incorrect. We are aware that individuals can have information held on them corrected and this is made clear when receiving AccessNI checks. However, the Review Panel has no information regarding how many AccessNI checks have led to information being corrected. Without that information we cannot measure the scale of the problem. We are not sure if information on sentences is reviewed automatically by Access NI or if alterations are only made after Access NI checks;

- 4) If there is a wider problem with information and its accuracy then the Review Panel would suggest that the DoJ undertake a systematic review of evidence held.

### **Case Studies Summary**

With regard to Case Study 4 and 5 the Review Panel is concerned that the approach adopted by Invest NI in the Social Enterprise Hubs contract:

- Highlights inconsistency of approach across Government and in particular finds it peculiar (Case Study 4) that an individual can have responsibility for capital grant funding but cannot work in the facility for which capital funding was awarded through a competitive tender;
- Is inconsistent with wider efforts to facilitate people with conflict-related convictions (that pre-date 1998) to be mainstreamed into community development and conflict-related activities;
- Sends out a negative message to the community that individuals with conflict-related convictions who have been involved in long-term and dedicated community work are now precluded from such activities;
- Undermines the principles of the Employers' Guidance
- Does not provide for a risk assessment to be carried out on a case by case basis.

The case studies and our other work highlight how this report should be included in the outworking of A Fresh Start in order to aid wider re-integrative possibilities. This is an evidence led report which highlights the extensive range of vetting and other mechanisms that confront those persons with conflict-related convictions. This work should also be relevant to the 3 Person Review Panel led by Lord Alderdice. Dealing with paramilitary groups is both a legacy policy and strategy. That panel requires such evidence to highlight how issues of labour market non-entry can be altered through legislative change and higher levels of vetting transparency. Encouraging entry into the labour market and other changes would undermine the power of those who assert that the issues that affect those persons with conflict-related convictions will not be resolved. Their resolution



would do much to undermine such voices that generally challenge the veracity of the peace process.

## **ANNEX A**

### **Organisations/Government departments which the Review panel/Ex-Prisoners Working Group have consulted/met with.**

Department of Environment

DHSSPS

Department of Finance & Personnel

Invest NI

Local Councils and Local Council's HR forum

University of Ulster

Queens University, Belfast

Northern Ireland Independent Retail Traders Association (NIIRTA)

Independent Commission for the Red Cross

Public Interest Litigation Services (PILS).

Arts Council NI

Confederation of British Industry

US Consulate

Australian High Commission

FASA

Public Health Authority

Northern Ireland Prison Service

Federation of Small Businesses

Equality Commission

British Insurance Brokers Association

### **Engagement with organisations via email and telephone**

Labour Relations Agency

Equality Coalition

Human Rights Consortium

Chamber of Trade & Commerce

Henderson Group

NI Business Trust

Foreign & Commonwealth Office

New Zealand High Commission

Canadian High Commission

Unite Union

Northern Ireland Independent Retailers Association (email to all companies on mailing list)

Invest NI (email to all companies listed in the 'top 100 companies list')

## **ANNEX B**

**List of companies/organisations who have adopted the Employers' Guidance or whose HR policies are generally in line with the guidance.**

### **Prior to the production of the First Review Panel Report**

FG WILSON  
NI Chamber of Commerce and Industry  
H&J Martin  
Garvan O'Doherty Group  
Asda  
Belfast Trust  
North West College  
CBI

### **Since the production of the First Review Panel Report**

Hastings Hotel Group  
Iceland  
Queens University Belfast  
Sainsbury's  
M&S  
Merchant Hotel  
Price Waterhouse Cooper  
Bryson House  
Committee for the Administration of Justice  
Falls Community Council  
West Belfast Partnership  
St Mary's Teaching College  
Ulster GAA  
Wright Bus Company  
Local councils  
SIPTU (trade Union)  
NI Council for Integrated Education  
Bombardier  
WAVE Trauma Centre  
Community Relations Council