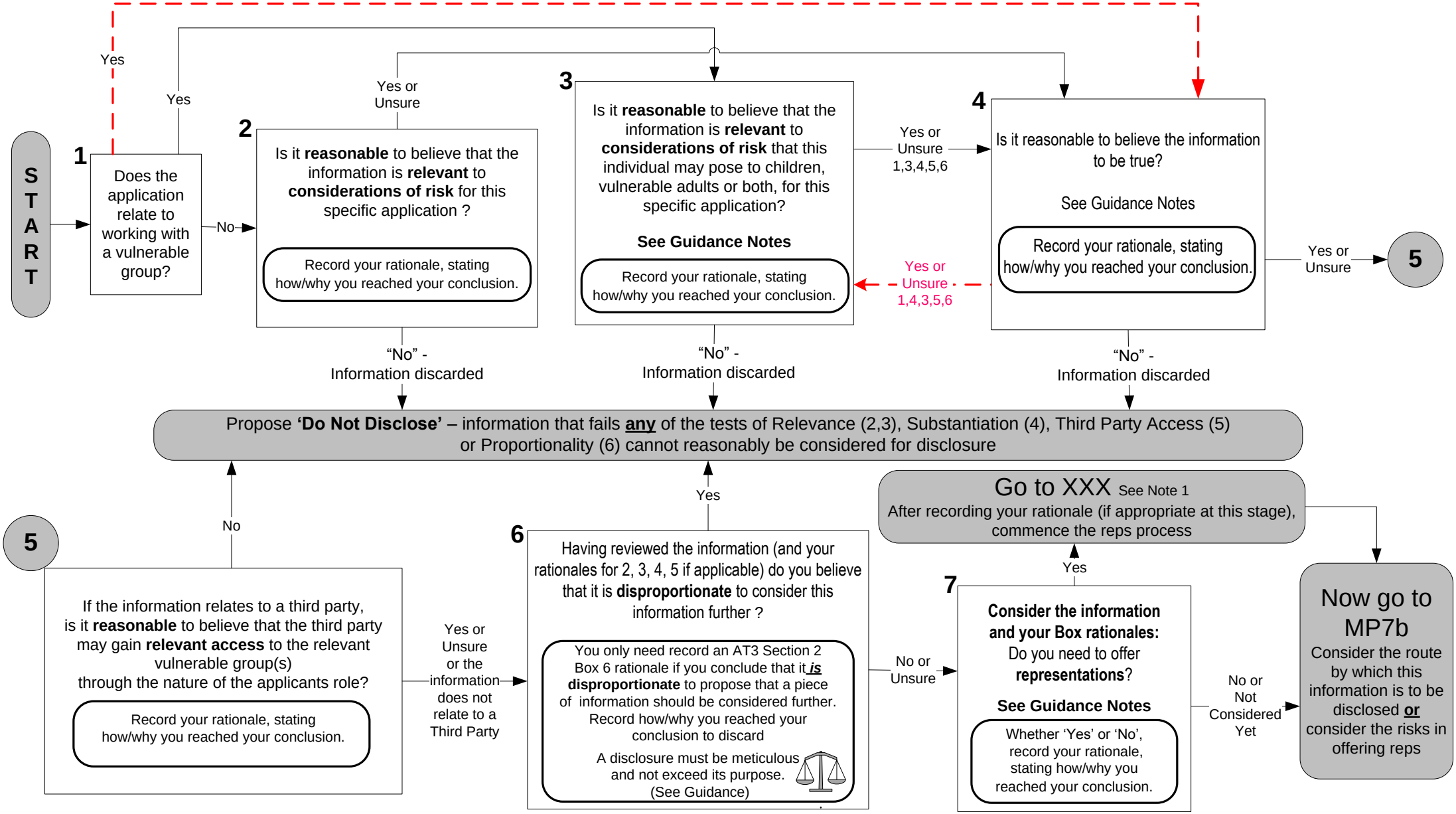
MP7a – Disclosure Rationale Consideration

Previous decision logs will have identified information about an applicant, or third party. This process will help you determine whether it is reasonable to believe that the information should be considered further.



This Method Product process does **not** need to be followed in strict numerical order - you need to decide which 'route' best suits the information that you are assessing. Although answering all relevant questions will produce the same end result, if you believe information is likely to be **discarded** you can reduce the amount of work (audit recording) required to reach your conclusion by beginning at the Box that relates to the weakest aspect of the information – if your information fails any test at Box (2), 3, 4, (5) or 6,it is likely that disclosure will not be possible (you cannot disclose what is not relevant/might not be true/cannot be substantiated or is not proportionate).

Note 1
XXX – the location used for recording reps in your DU

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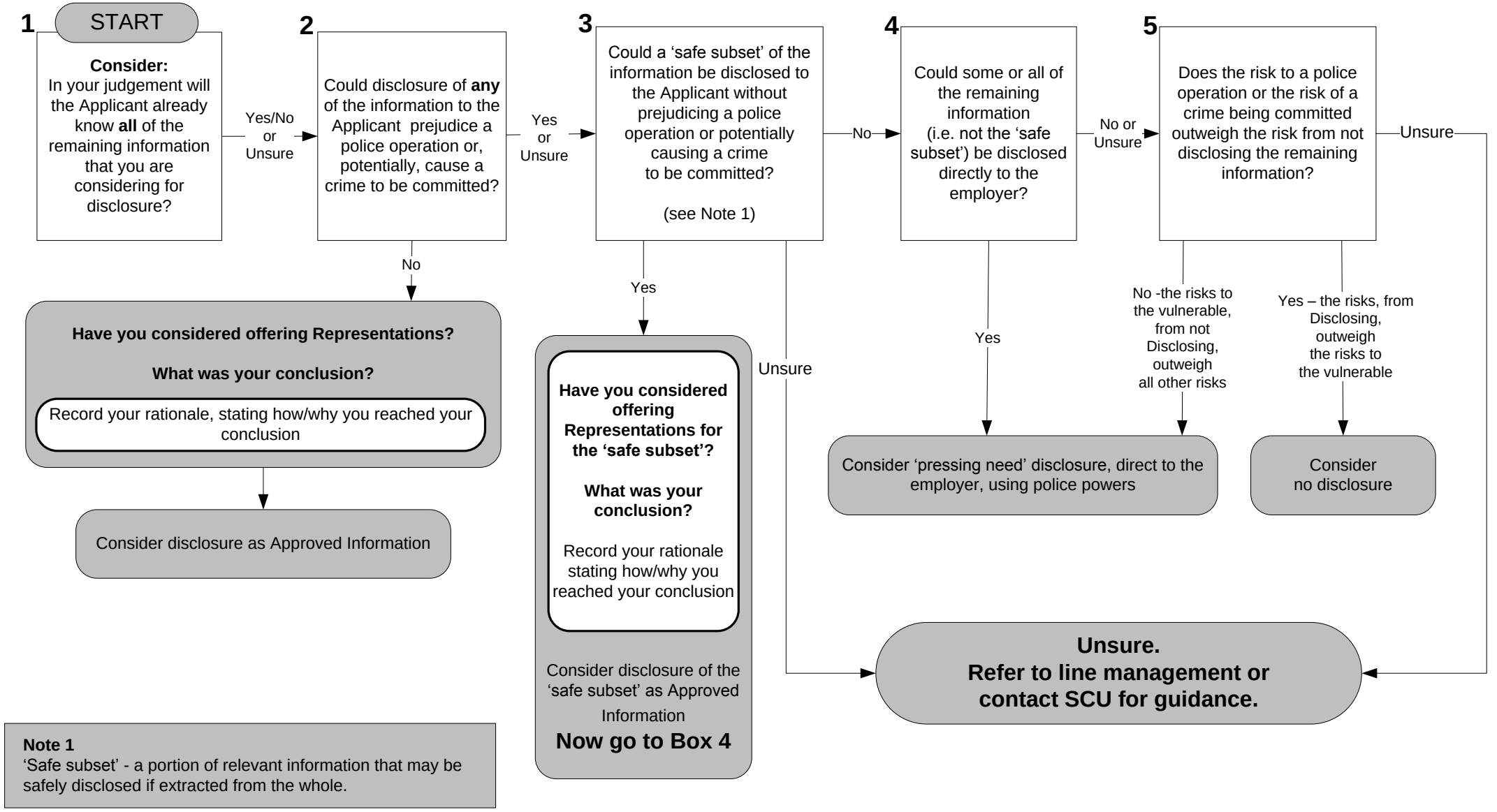
MP7b - Disclosure Method Consideration (page 2 of 6)

This process relates to AT3 Section 2.3 and asks that you consider the most appropriate method of disclosure for the information that has passed all previous tests.

MP7b also applies to your considerations of the potential risks from disclosing information within the Representations process – the term 'Applicant' may also relate to a Third Party.



Note 1
'Safe subset' - a portion of relevant information that may be safely disclosed if extracted from the whole.

MP7a – Boxes 1 to 3

Note: Your AT3 audit trail for Boxes (2) 3, 4 (5) and 6 should record the Rationale for your conclusion clearly and concisely. Rationale - the reasoning or principle that underlies or explains something, or a statement setting out this reasoning or principle. Your rationale should indicate how/why you reached your decision/conclusion.

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Box 1

– Does the application relate to working with a vulnerable group?

The application will indicate whether or not information should be considered for potential risks to vulnerable persons (or not) and will indicate the type of application: Enhanced Disclosure with Barring List (EDBL) Check or Enhanced Disclosure (ED) Check. For some Enhanced Disclosure applications – Denoted by '*Other Workforce* in the Position Applied For field – the answer will be 'No'.

On the AT3, record which vulnerable group(s) this application relates to (use the 'tick boxes') and record the type of check (EDBL or ED)

The application screen will specify which workforce(s) the applicant is applying (or registered with the Update Service) to work within (Children, Adults, Children & Adults or Other). NB – Application Reference numbers beginning with the letter 'P' denote Update Service Pseudo Applications (applicant already registered with the Update Service and their details have been matched to new information that needs to be assessed).

B**ox 2**

– Is it reasonable to believe that the information is relevant to considerations of risk, for this specific application?

Used for applications that do not relate to work/activity with vulnerable groups (licensing, gaming applications etc. i.e. 'Other') Only retain information that it is reasonable to believe would be relevant to anyone responsible for conducting a suitability/risk assessment of the applicant. Your considerations should be reasonably based on the risk in the employment sought and that the individual will be undertaking a role that does not involve direct contact/any relevant contact with either vulnerable group.

If in doubt follow 'Unsure' to allow further consideration

Box 3

– Is it reasonable to believe that the information is relevant to considerations of risk that this individual may pose to children, vulnerable adults or both, for this specific application?

See also MP7 General Guidance Page 2 '*reasonably believes to be* r*elevant & ought to be included*' section

Who is the risk? Who is at risk? What is the risk? What is the extent of the risk?

Only retain information that it is reasonable to believe would be relevant/of material use in an employer suitability/risk assessment of the applicant. The background to a conviction (the M.O.) can contain information/detail that is invaluable to an employer's suitability considerations. This includes information that would indicate that the applicant may present **a lesser risk** than their 'headline' PNC record may otherwise suggest.

All risk-relevant details and factors should be considered for disclosure.

The information/behaviour must have a reasonable relevance to the workforce(s) connected with the employment/regulated activity sought and any risk should not be a fanciful one.

If in doubt follow 'Unsure' to allow further consideration.

Where applicable, include reference to the level of access/supervision and the opportunity to put others at risk – relevant contextual information.

MP7a Boxes 4 to 5

Box 4

– Is it reasonable to believe the information to be true?

You need to determine whether or not it is reasonable to believe that the information is more likely to be true than false. Consider the following (taken from the Statutory Guidance):

1. Is the information from a credible source?
2. Are there any specific circumstances which lead the decision maker to consider that the information is unlikely to be true?
3. Is the information so without substance that it is unlikely to be true?
4. If minded to disclose, have all reasonable steps been taken to ascertain whether the allegations are more likely than not to be true?

Information need not be true '*beyond reasonable doubt*' – that is the standard required for prosecution in a criminal court. For disclosure/referral considerations, the civil test ("*on the balance of probabilities*") is a good starting point, however we have case law that is more specific to this purpose. Case law directs that we consider whether there are "*untoward circumstances*" that lead you "*to believe that the information might not be true*" or "*is so devoid of substance that it would be unreasonable to conclude that it might be true*" (case of "X v Chief Constable of West Midlands Police" applies).

If the information is not from a credible source or if you have or other information which contradicts or casts doubt on the accuracy/veracity of the source or if there are other circumstances which make you doubt whether the information is true, then there are '*untoward circumstances*' and the information may indeed be '*so devoid of substance…*' - great care must be taken when undertaking such evaluation.

Therefore, if the information is "*so unlikely to be true, or so lacking in substance, that it would be disproportionate to disclose*" , you must answer 'No' to this question (and provide the rationale in support of this conclusion)

For DBS Disclosure purposes, where you conclude that your information does pass this test and the test of relevance, you must still apply a test of proportionality (Box 6) as statute requires that you also be satisfied that the information "*ought to be disclosed*" - Box 6 asks whether it is disproportionate to consider information further

Box 5 (only used when information relates to a Third Party)

– If the information relates to a Third Party, is it reasonable to believe that the third party may gain relevant access to the relevant vulnerable group(s) through the nature of the applicants role?

Discard any information relating to a Third Party where it is not reasonable to believe that they have/may obtain relevant access to the vulnerable

You also need to satisfy yourself at Box 3 that a Third Party will present a reasonably tangible (not fanciful) risk to the vulnerable.

Box 6 – Having reviewed the information (and your rationales for 3, 4, 5) do you believe that it is *disproportionate* to consider this information further?

> **NB An AT3 Section 2 Box 6 rationale is only required if you conclude that considering this information further (for possible disclosure) would be disproportionate (i.e. a discard rationale).**
> If you are satisfied that it is **not disproportionate** to propose that the information is considered further, you **do not** need to record a rationale to support your conclusion at AT3 Section 2.2 - this will be considered at Section 3 and will be addressed in full at Section 4 when the COD considers whether the information 'ought to be disclosed'.

It may be considered disproportionate to disclose information that might be considered trivial, or simply evidence of poor behaviour, or opinions on life styles. Information that indicates an identifiable risk or an immediate danger to children or vulnerable adults or within the specific 'Other Workforce' role is of the type that may need further consideration.

The information may be relevant, but can the interference with the applicant's private life be justified in this specific instance? *"I accept that it is possible that there could be cases where the information should not be included in the certificate because it is disproportionate to do so; the information might be as to some trifling matter; it may be that the evidence made it so unlikely that the information was correct, that it again would be disproportionate to disclose it."* Lord Justice Mummery, X vs West Midlands 2004

Is the impact that disclosure it is likely to have (on the private life of the applicant/Third Party) disproportionate to the risk that you have identified? If it is disproportionate, proposing that the information should be considered further, for possible disclosure, may not be appropriate.

Consider the passage of time since the relevant events occurred – how does this affect your risk assessment and your conclusion? Events that occurred some years in the past may become decreasingly relevant over time, particularly if there is evidence that the individual has since changed their ways.

Age of offender at the time of offence is a factor - was the individual a youth at the time? With the passage of time, an offender who was a child or young person at the time of their offence may have matured to become a greatly reduced risk as an adult (or no risk at all) – do you have recent evidence that they have continued their relevant behaviour?

Box 7- Consider the information and your rationales: Do you need to offer representations?

NB – Though advisable, not all Disclosure Units have a structure that requires their officers to consider representations at the MP7a stage – if this is the case for your Disclosure Unit, you need not concern yourself with this aspect of the process as it will be addressed at a later stage.

Guidance on representations has been provided separately to forces (QAF GD4) and case law is available to all.

Some considerations:

- Has the subject of the disclosure had the opportunity to dispute/rebut the information?
- Was the subject found Not Guilty/acquitted of actions that you are considering disclosing?
- If information relates to allegations made against them, are they aware of them and their extent?
- Do you have all of the facts?
- Do you need to verify or establish the extent of a particular Third Party relationship?
- Is the applicant aware of the Third Party information and the risk that you are attempting to quantify?
- If information is historic, is it possible that something could have changed, over time, that if known could lead you to alter your decision or your proposed disclosure? This is particularly important in cases where there may be a risk that was brought about by the mental health state of an individual at a specific time of their life – one from which they may have since recovered. The nature of mental health-related risk makes it highly likely that representations will be required in order to obtain the most up-to-date information upon which to base your risk assessment.

If in any doubt, or if the information/incident/allegation is in dispute, consider offering representations – always record your reasoning for offering/not offering representations.

The information that you provide when you offer representations may still be classed as a form of disclosure – apply MP7b disclosure risk considerations

MP7 – General Guidance 1

Role of the police (see also 'QAF MP8)
The role of police is to identify information that might be relevant to an employer's assessment of applicant suitability and to determine whether it ought to be disclosed (having considered the potential impact upon the private lives of those concerned, if considering disclosure as Approved Information)

You are required to consider the gravity of the material involved, the reliability of the information on which it is based, the period that has elapsed since the relevant events occurred and the relevance of the information to the application in question.

Whatever information you determine to be relevant, you should also consider whether you need to offer Representations in order to satisfy yourself that your conclusions are not based on inaccurate/incomplete information or on a false premise or a state of affairs which is out of date – information that should no longer be considered a factor in your deliberations or that should be viewed in a different light.

These considerations should help you arrive at a conclusion of whether or not a reasonable employer, when considering the employment of an applicant, would find the information material to that decision.

You also need to be sure that all of the factors that influenced your decision are properly recorded – this is the purpose of the AT3: to provide an appropriate audit trail of your considerations and decisions that can be reviewed/referred to whenever necessary. This audit trail should be complete and accurately reflect all of the considerations made at the time: the factors that influenced your decision-making; the evidence available to you etc., all should be recorded to evidence and support how/why you reached your conclusion.

"**Reasonableness**" and "**proportionality**"
are separate concepts, though they sometimes produce the same result.
Reasonableness - following a proper reasoning process and so coming to a reasonable conclusion.
Proportionate - a proportionate decision: one that went no further and was no more drastic in its effects than was necessary to secure the legitimate aim. (paraphrased)

The Courts have recognised that, when two reasonable persons are faced by the same set of facts, it is perfectly possible for them to come to different conclusions, so that a range of lawful decisions may lie within the discretion of the decision-maker. At the same time, the Courts have defined a category of decisions which lie outside that range of discretion ('***perverse'*** decisions):

- "a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it";
- "beyond the range of responses open to a reasonable decision-maker".

The Wednesbury Principles
- play an integral part of your decision making process.
The following is taken from the Treasury Solicitor's Department publication "*The Judge over your shoulder*" (recommended reading):

"There are three "logical principles" to be followed in making a decision, they are called the "Wednesbury principles", after the licensing case in which they were formulated:

1 *to take into account all relevant considerations*
2 *not to take into account an irrelevant consideration*
3 *not to take a decision which is so unreasonable that no reasonable person properly directing himself could have taken it*

Even if the decision-maker has followed the first and second principles, he may still have come to a decision which is so wildly unreasonable or perverse that it cannot have been within his discretion to make it, and it was therefore unlawful. He may have had before him all the relevant information and none that was irrelevant, but he may nonetheless have attached wholly disproportionate weight to a particular factor or made some other logical blunder, which turned his whole reasoning process awry."

Police need to show that they have considered the widest range of material to ensure that appropriate weight has been given to the relevant interests and considerations set out in MP7. Representations have an important role, here.

Disclosure consideration (MP7b) – Representations and the prevention or detection of crime.
It should be noted that, in addition to the MP7b considerations applied when making your **final** disclosure decision, the same considerations may apply when offering **representations**. Any representation is likely (but not in every case) to involve the disclosure of information (within a draft of proposed disclosure text, for example) and the MP7b considerations relating to prevention or detection of crime etc. should be applied before contacting the applicant.

MP7 – General Guidance Page 2

Urgency: Should you conclude that, although disclosure is necessary, more immediate contact with the employer is required than the DBS can provide, consider what alternative action may be taken to communicate your concerns in order to protect the vulnerable. This is particularly relevant if the applicant is already in post, and a vulnerable group is at immediate risk of harm.

The content of an Enhanced Criminal Record Certificate

Section 113B(4) of the Police Act 1997 (the "Act"), as amended, states that:

(4) Before issuing an enhanced criminal record certificate the Secretary of State shall request any relevant chief officer to provide any information which —

(a) the chief officer reasonably believes to be relevant for the purpose described in the statement under subsection (2), and

(b) in the chief officer's opinion, ought to be included in the certificate.

(4a) In exercising functions under subsection (4) a relevant chief officer must have regard to any guidance for the time being published by the Secretary of State.

Throughout the QAF process, reference is made to the "application" (i.e. "*this specific application*"). In this context, this refers to an application made through the Disclosure and Barring Service (DBS) and provided to DBS Units for processing.

For a Disclosure, the tests '*reasonably believes to be relevant*' & '*ought to be included*' must both be addressed and must have equal weight/consideration/attention given to them.

Case of "R(L) v The Commissioner of Police of the Metropolis, Supreme Court 2009" stated –

> "The question whether the information might be relevant is not, however, the end of the matter. An opinion must also be formed as to whether it "ought" to be included in the certificate. It is here, as the guidance that is available to the police correctly recognises, that attention must be given to the impact that disclosure may have on the private lives of the applicant and of any third party who is referred to in the information. For the reasons I have already given (see paras 22-29), I consider that the decisions which the chief officer of police is required to take by section 115(7) of the 1997 Act will fall within the scope of (Article 8(1)Human Rights Act) in every case. So in every case he must consider whether there is likely to be an interference with the applicant's private life, and if so whether that interference can be justified." Lord Hope

(For a Disclosure, regardless of the change from 'might be relevant', the key point here is the equal consideration and application of the '*ought to*' test - SCU)

> "This is to be achieved in the first place by the chief officer of police giving **no less weight to the section 115(7) (b) requirement** that in his opinion the information ought to be included in the certificate than to the section 115(7)(a) requirement that he thinks it might be relevant (rather than presuming that any potentially relevant information should ordinarily be disclosed). " Lord Brown [our emphasis]

PoFA 2012 Note: Although their comments were framed in the terms of the Police Act 1997 pre-PoFA 2012, there is no reason to believe that the judgments of Lord Hope and Lord Brown are any less applicable now than they were at the time.

Police National Intelligence Model (5x5x5 Matrix)

Some of the information that you are considering may have already been assigned an alpha-numeric grading based on the police National Intelligence Model for source, intelligence and handling (A,1,3 for example) – such grading should never be used on its own to determine the veracity of the information that you are assessing. Consider the applied grading, by all means, but always apply your own discretion and evaluation using all of the information available to you. Whatever your conclusion, you should record a rationale supporting how/why you reached this conclusion.