

## Appendix B

### Examples of low-level concerns, and to illustrate the boundaries between low-level concerns and allegations

These examples are not exhaustive, nor will the responses set out below be appropriate in every context. This is because determining the appropriate response to any low-level concern is highly context-specific and depends on a range of factors. The purpose is not, therefore, to provide a template response to any given low-level concern. Rather, it is intended to stimulate discussion, and to provide examples of low-level concerns that might be shared with an organisation, as well as a situation in which low-level concerns might cumulatively amount to an allegation, as well as to illustrate the boundaries between low-level concerns and allegations.

#### 1. Low-level concern shared in a school context responded to under disciplinary procedure

A female teacher aged 38 consumes a large quantity of alcohol at the end of term party. The teacher persuades a 21-year-old male student PE coach, who is on a placement, to join her in some selfies, where they appear to be kissing each other. She posts the photos on her Facebook account which elsewhere identifies the school.

A colleague sees the photos and shares their concern about this verbally with the school's Designated Safeguarding Lead (**DSL**), who makes a record of the information. The DSL shares the concern immediately with the Head.

The DSL reviews the Facebook photographs and speaks with the teacher concerned, who is very embarrassed and apologetic, and agrees to remove the photographs and apologise to the student PE coach.

The DSL considers this to constitute a low-level concern and, as such, does not make a referral to the LADO (given it is not considered to meet the threshold of an allegation). The DSL makes a record of the information initially shared with her, and her conversation with the teacher, and retains the record in a central low-level concerns file. Given the misconduct concerns, the DSL also refers the matter to the HR manager.

The HR manager invokes the school's disciplinary procedure. The teacher admits the allegation of inappropriate social media use, and the teacher is issued with a formal warning, a record of which is kept on her personnel file. If the teacher were to leave before the expiry of the formal warning this should be referred to in any reference in the normal way.

#### 2. Low-level concern shared in a charity context resulting in further training

Mr. Simpson, a volunteer for a charity that provides support for vulnerable children, is part of a group of volunteers accompanying a class of reception age children from a local school on an outing to a local park. During the outing, Mr. Simpson is seen on the edge of the group talking to a child who is on

his own for a significant period. He also sits with the same child during lunch, and is seen speaking to the child later in the day when waiting for the parents to collect him. Another volunteer speaks to the charity's Safeguarding Lead (**SL**) about this, as it did not sit comfortably with them, and the SL makes a record of the information shared as a low-level concern.

The SL asks to speak to Mr. Simpson and, during their conversation, asks if he was aware of any behaviour which may have caused any possible concern whilst he was on the outing. Mr. Simpson explains that the child in question was "having a bad day," and he felt he needed some extra support and, new to volunteering, had not come across a situation like this before. He is horrified to hear that someone was concerned about his behaviour.

The SL considers this to constitute a low-level concern and, as such, does not make a referral to the LADO (given it is not considered to meet the threshold of an allegation). The SL also arranges some further training for Mr. Simpson and all the other volunteers. The SL retains a copy of the relevant paperwork (including the SL's record of their initial conversation with the volunteer, and with Mr. Simpson, and of the subsequent action taken) in a central low-level concerns file.

This one-off low-level concern should not be referred to in any reference.

#### 3. Low-level concern in a school context dealt with by management guidance

Several pupils, male and female, in Year 6, approach their Head of Year to say that they feel uncomfortable around Mrs. Brown because she 'touches' them, and they don't like it. When asked if they can explain a little more about what they mean, the pupils tell their Head of Year that Mrs. Brown puts her hands on their shoulder when she is talking to them, and sometimes sits at their table in such a way that their legs touch.

The Head of Year immediately makes a record of their conversation with the pupils, which they promptly share with the school's DSL. The DSL shares the concern immediately with the Head.

The DSL asks to speak to Mrs. Brown, who explains that she is working in very cramped conditions, especially with a group of Year 6 boys who have grown so much that they take up all the space around the table, and that she sometimes puts a hand on the shoulder to get a pupil's attention.

The DSL explains that they understand this is making pupils feel uncomfortable, and refers Mrs. Brown to the school's policy regarding appropriate touch. The DSL then plans for the Year 6 class to use a different room where there is more space.

The DSL considers this to constitute a low-level concern and, as such, does not make a referral to the LADO (given it is not considered to meet the threshold of an allegation). The DSL retains a copy of the relevant paperwork (including the Head of Year's record, and the DSL's record of their conversation with Mrs. Brown, and of the subsequent action taken) in a central low-level concerns file.

This one-off low-level concern should not be referred to in any reference.

#### **4. Self-report of a low-level concern in a sports club context**

Mr. Oliver is a coach at a tennis club, and asks to speak to the SL about an incident that took place the previous evening. He tells the SL that, after a tennis tournament in a nearby town, the parents of Jamie Jones contacted him at the last minute to say that they would not be able to pick him up as they had to deal with an emergency at home. Mr. Oliver offered to take Jamie home in his own car, and the parents were pleased to agree to this.

However, Mr. Oliver subsequently realised that this was in breach of the tennis club's Safeguarding Policy, and Code of Conduct – and he is therefore self-reporting this to the SL, and has filled out the club's low-level concerns form.

The SL is of the opinion that this was the best option available to Mr. Oliver at the time, but reminds Mr. Oliver that, should he find himself in such a situation again in the future, he should seek his line manager's or the SL's prior approval to his proposed course of action.

The SL considers this to constitute a low-level concern and, as such, does not make a referral to the LADO (given it is not considered to meet the threshold of an allegation). The SL retains a copy of the relevant paperwork (including the low-level concerns form completed by Mr. Oliver, and the SL's record of their conversation with him) in a central low-level concerns file.

This one-off low-level concern should not be referred to in any reference.

#### **5. A series of low-level concerns in a school context which result in response under disciplinary procedure**

Shortly after the start of the summer term, an initial concern is raised by a teacher with the DSL, that he has seen Mr. Stevens, the choir master, shouting at and deriding the young choristers in his care this week – which has led to a couple of them leaving their practice sessions in distress.

The DSL makes a record of the conversation, and shares the concern immediately with the Head. The DSL decides to contact the LADO, in the first instance, to seek their advice on a no-names basis on how best to respond. The LADO agrees that the behaviour is concerning but advises that the threshold of an allegation has not been met.

The DSL asks to speak to Mr. Stevens and informs him about the concern that has been shared about his behaviour. Mr. Stevens apologises profusely, and tells the DSL that over the past week he has been having a difficult time personally, has not been sleeping well, and has been feeling "a bit upset and short-tempered." However, Mr. Stevens appreciates that his behaviour has not been appropriate, will rectify it, and tells the DSL that he also intends to apologise to the children "for his short-fuse."

The DSL considers this to constitute a low-level concern and retains a copy of the relevant paperwork (including the DSL's record of their conversations with the teacher, the LADO, and Mr. Stevens) in a central low-level concerns file. The DSL also refers the matter to the Head of HR who, considering Mr. Stevens' response, notes the situation and does not consider any further action is required at this stage.

However, within a couple of weeks, the same teacher returns to share further concern with the DSL, having witnessed Mr. Stevens shouting at, and belittling, the young choristers again.

The DSL makes a record of the conversation, and shares the concern immediately with the Head. The DSL contacts the LADO, who advises that whilst they agree that the behaviour is, again, concerning, it still does not meet the threshold of an allegation.

The DSL then asks to speak to Mr. Stevens and informs him about the further concern that has been shared about his behaviour. Mr. Stevens is less apologetic, claiming it's not all his fault and expressing some frustration over the choristers' capability. He recognises that his personal circumstances "have a part to play in this."

The DSL considers this to constitute a further low-level concern, and retains a copy of the additional relevant paperwork (including the DSL's record of their conversations with the teacher, the LADO, and Mr. Stevens) in a central low-level concerns file.

The DSL informs the Head of HR who decides to invoke the disciplinary procedure, which results in Mr. Stevens being issued with a warning which is placed on his file, and a management plan is put in place.

At this point, the warning would need to be referred to in any reference should Mr. Stevens decide to leave the school before it expires.

Later that term, a parent contacts the DSL by email about Mr. Steven's behaviour – once again relating to distress caused by him belittling the choristers, and telling them that they are not fit to be part of the next singing competition that they have been practising for.

The DSL shares the concern immediately with the Head. The DSL contacts the LADO again, who advises that the matter still does not meet the threshold of an allegation but that they are becoming increasingly concerned by Mr. Steven's behaviour.

The DSL speaks again to Mr. Stevens, who states that the complaint is unfounded and has only been made because the parent's child was not selected to be a soloist in the competition.

The DSL considers this to constitute a further low-level concern, and retains a copy of the additional relevant paperwork (including the email from the parent, and the DSL's record of their conversation with the LADO, and Mr. Stevens) in a central low-level concerns file.

The DSL informs the Head of HR who, again, invokes a disciplinary investigation. As part of that investigation, Mr. Stevens is told that the school has consulted with the LADO and, while his behaviour does not meet the threshold of an allegation, the LADO has expressed increasing concern about his behaviour. Mr. Stevens is given a final written warning.

If Mr. Stevens were to leave the school prior to the expiry of the warning, this matter would be summarised in a reference making clear the nature of the concern and the action taken.

## **6. A series of low-level concerns in a school context which cumulatively meet the threshold of an allegation, and result in referral to LADO**

Ms. Crompton is a Teaching Assistant (TA) who gives support to children with learning difficulties.

Another TA verbally informs the DSL that Ms. Crompton seems to favour working with some

children, and won't always work with the others. The DSL shares the concern immediately with the Head.

The DSL speaks to Ms. Crompton who denies that she has done anything wrong. She says that she does exactly as she is directed by the teaching staff, and has no control over who she works with. The DSL considers that the information disclosed does not indicate any behaviour contrary to the school's Code of Conduct, and that no further action is required.

A few months later, a member of teaching staff verbally informs the DSL that Ms. Crompton sometimes makes excuses to take children out of his classroom to work quietly – and that he has already reminded her that this is against school policy.

The DSL shares the concern immediately with the Head. The DSL speaks to Ms. Crompton, who says that she didn't know it was contrary to the school policy and promises not to do it again. The DSL considers that the information shared is a low-level concern, and retains a record of their conversation with the member of teaching staff who shared the concern and Ms. Crompton, in a central low-level concerns file.

Two weeks later, a third member of staff submits a low-level concern form to the DSL stating that "they cannot be sure but think that Ms. Crompton applies make-up and perfume when she is working with teenage boys, and that her behaviour sometimes seems to cross the boundary."

The DSL shares the concern immediately with the Head. The DSL speaks to Ms. Crompton about this, who says she likes to look and smell nice, and "there shouldn't be a problem with that." She denies specifically applying make-up or perfume when working with teenage boys.

The DSL considers that the latest information shared is a low-level concern but is unsure whether, when combined with the previous low-level concern, the allegation threshold has been reached. The DSL contacts the LADO to discuss the two instances. The LADO advises that the threshold of an allegation is not met.

The DSL retains a record of their conversations with the member of staff that shared the concern, with Ms. Crompton and the LADO in a central low-level concerns file.

Six months later, a 17-year-old boy tells his Head of Year that Ms. Crompton always stands near the door of the changing room when they go swimming, and that she has her mobile phone with her. He thinks she may have taken some photos of them all, and of his friend Tom in particular. The Head of Year submits a low-level concern form to the DSL.

The DSL immediately informs the Head. The DSL recognises that the information shared by the Head of Year constitutes an allegation, and makes a referral to the LADO, referring to the allegation and the two previous low-level concerns.

The LADO decides that this pattern of behaviour meets the threshold for a strategy meeting and further investigation. Ms. Crompton is suspended pending an investigation but immediately resigns.

The investigation should continue notwithstanding the resignation, and a conclusion should be reached in the same way as if Ms. Crompton had continued in employment. If the allegation is substantiated it should be referred to in a reference, and consideration given to whether to refer to the Disclosure and Barring Service and Teaching Regulatory Agency.

If the investigation determines that the allegation is unsubstantiated, malicious or false, it should not be referred to in a reference.

## **7. An allegation in a school context with no history of low-level concerns, which leads to referral to LADO**

A male pupil aged 14 tells his form tutor that Mrs. Appleby, the chemistry teacher, has hurt him. He shows the tutor a red mark around his neck. When the tutor asks him what happened the pupil says that Mrs. Appleby had shouted at him, telling him that he should not be wearing a neck chain at school, Mrs. Appleby then approached the pupil telling him that he must take the neck chain off immediately – when he hesitated to do so Mrs. Appleby then grabbed the chain and pulled him to his feet. It is clear from the marks on his neck that force has been used and the boy is upset.

The form tutor records what the boy has said, and asks him to come with him to speak to the DSL. Mrs. Appleby has been at the school for five years and there have never been any previous concerns raised about her. The DSL immediately informs the Head, who decides that this is an allegation of physical assault which reaches the threshold, and the DSL contacts the LADO. The LADO advises that consideration is given to suspending Mrs. Appleby. The LADO also advises that they contact the police and that a strategy meeting will be held. The school is advised by police to ask pupils in the lesson that day to each write an account of what happened in that lesson. As a result, more witnesses come forward, and their accounts corroborate what the pupil said.

The DSL refers the allegation to the Head of HR who decides to suspend Mrs. Appleby (as a neutral act pending further investigation because, if true, the

allegation amounts to gross misconduct). The Head of HR initiates an investigation. Mrs. Appleby denies using force, but a number of credible witnesses confirm the male pupil's account. Mrs. Appleby is found to have committed gross misconduct and is summarily dismissed. The school refers the case to the Teaching Regulatory Authority.

The school subsequently receives a reference request for Mrs. Appleby to work as an assistant librarian. The school refers to her dismissal for gross misconduct, and accurately reflects the circumstances surrounding it, in its reference.

## Appendix C

### Diagram 1: Spectrum of behaviour

#### **Allegation**

Behaviour which indicates that an adult who works with children has:

- behaved in a way that has harmed a child, or may have harmed a child;
- possibly committed a criminal offence against or related to a child;
- behaved towards a child or children in a way that indicates they may pose a risk of harm to children.

#### **Low-Level Concern**

Any concern – no matter how small, even if no more than a ‘nagging doubt’ – that an adult may have acted in a manner which:

- is not consistent with an organisation’s Code of Conduct, and/or
- relates to their conduct outside of work which, even if not linked to a particular act or omission, has caused a sense of unease about that adult’s suitability to work with children.

#### **Appropriate Conduct**

Behaviour which is entirely consistent with the organisation’s Code of Conduct, and the law.

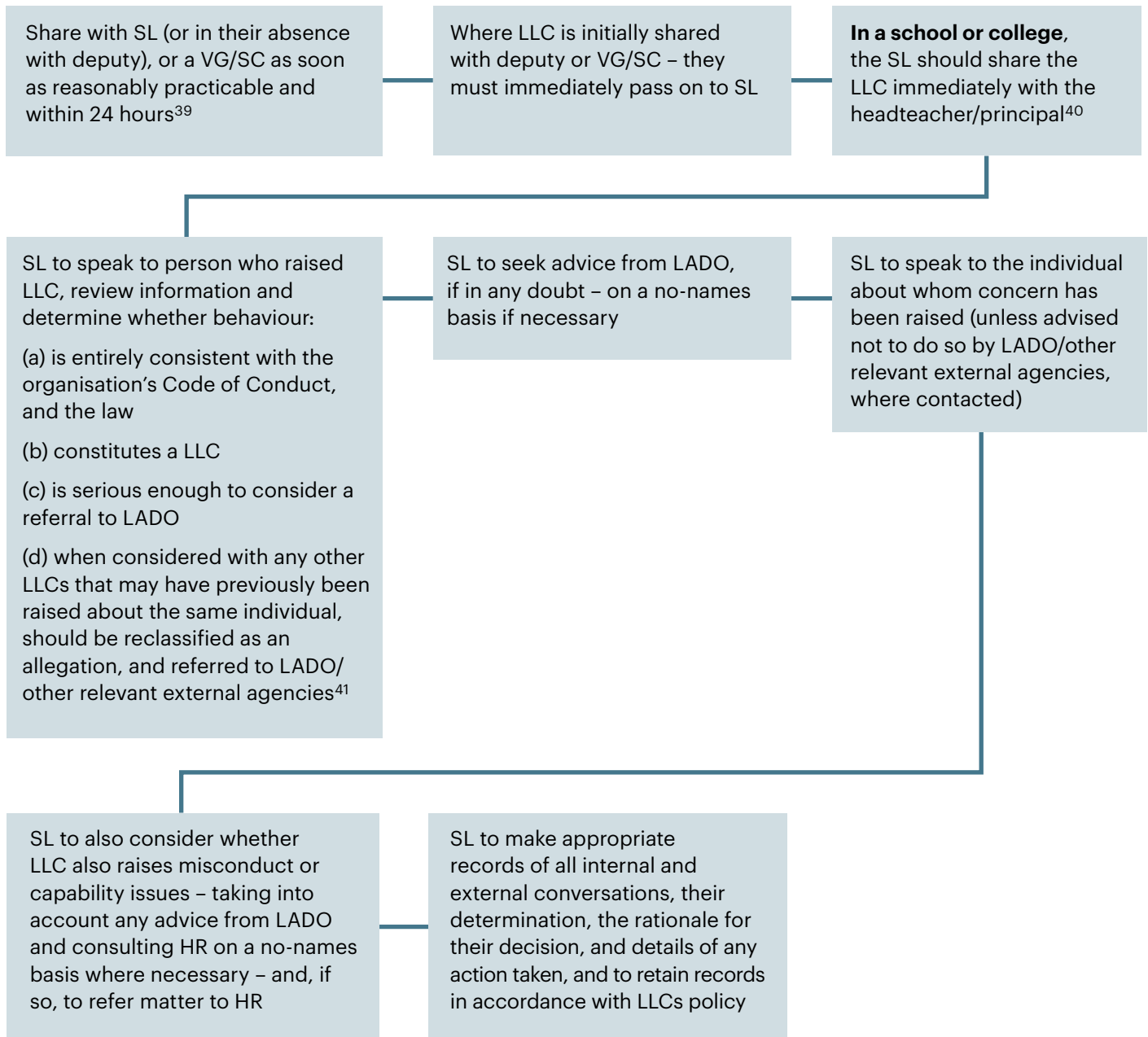
**Appendix C**

**Diagram 2: Sharing low-level concerns (LLCs) – action required by staff, safeguarding lead (SL), values guardians (VGs)/safeguarding champions (SCs)**

If member of staff has what they **believe** to be a **LLC** – they should take the below action.

If member of staff has an **allegation** – they should follow the procedure in the organisation’s Safeguarding Policy/Managing Allegations Against Staff Policy.

**ACTION REQUIRED**



<sup>39</sup> Where the LLC relates to a particular incident.

<sup>40</sup> This is in light of paragraph 50 of KCSIE. If a LLC is in fact shared with the headteacher/principal in the first instance, then they should immediately share the LLC with the SL. Whether a LLC has been shared with the SL or headteacher/principal in the first instance, the SL should remain responsible for all of the relevant actions stipulated in this guidance and this Diagram (unless the headteacher/principal considers, in the particular circumstances, that they should be responsible for any such actions and, if so, they should inform the SL accordingly).

<sup>41</sup> And in accordance with the Safeguarding Policy/Managing Allegations Against Staff Policy, and Part 4 of KCSIE and/or relevant procedures stipulated by Local Safeguarding Partnership (or LSCB if not yet transitioned).

## Appendix D

### Low level-concerns and data protection

1. The overlap between safeguarding duties and data protection in general terms – duties of record keeping, retention and information sharing – is increasingly well-understood by practitioners. It is addressed by the Data Protection Act 2018 (**DPA 2018**), by statutory and non-statutory guidance provisions within KCSIE, and by [DfE guidance](#) on Information Sharing.
  2. Although we currently have little in the way of specific DPA 2018 guidance from the Information Commissioner’s Office (**ICO**) that is tailored to safeguarding practice, and/or the relevant sectors (for example, schools, charities, sports and religious organisations), the ICO’s consultation draft **Information Sharing Code of Practice** (published 16 July 2019) does specifically cite safeguarding of children as a “clear example of a compelling reason” for personal data sharing, as well as recognising the role of regular multi-agency information sharing. The ICO has produced its guidance on the processing of special category data, which acknowledges safeguarding as part of its general guidance on “substantial public interest” conditions for processing, and provides a template for the appropriate policy document.<sup>42</sup>
  3. Making records where substantive abuse or neglect is reasonably suspected can be comfortably aligned with the principles of data protection law. However, greater difficulties in (a) confirming the applicable lawful processing ground, and (b) balancing the safeguarding interest with personal data rights, are caused where the conduct in question does not in and of itself amount to an allegation but may, nonetheless, constitute concerning, problematic or inappropriate behaviour towards children, and even more so if it is potentially seen and evaluated as part of a pattern.<sup>43</sup>
  4. The importance of sharing low-level concerns is explained in the main guidance, and the value to an organisation is dependent on such concerns being shared, recorded and retained over a period of time.
  5. However, the issues that we are aware can arise in practice are:
    - (a) staff not understanding possible indicators of organisational based grooming, and thus not sharing concerns about it (a training issue);
    - (b) a reluctance by staff to share low-level concerns which, depending on the culture of an organisation, can be perceived as a heavy handed or even inappropriate approach;
    - (c) uncertainty as to how and where information provided in the context of low-level concerns may lawfully be recorded and used, under what DPA 2018 ground, and how long it may be retained; and
    - (d) which principles or exemptions apply to subject access requests to such (personal) data, and related data subject rights around transparency, erasure, and correction.

As to (d), a common concern is that on-demand access by data subjects will be counter-productive to the intended objective and risks having a chilling effect on the rate of reporting/recording. We have considered reasons why this may not be so in the main guidance (at paragraph 7).
  6. The legal and factual backgrounds (including the General Data Protection Regulation EU 2016/679 (**GDPR**)) have been considered in a longer paper by Hugh Davies QC and Owen O’Rorke, intended for consideration by government departments as the basis for potential guidance and, possibly, a case for some class exemption from subject access rules specific to this practice to be introduced in due course by way of statutory instrument. This Appendix addresses the situation as it currently stands (August 2019).
- #### The intention and effect of the current law and guidance (in overview)
7. The DPA 2018 has made express provision, subject to certain conditions, for processing both Special Category Personal Data of a sensitive nature (SPD) and criminal records data where necessary for safeguarding purposes.<sup>44</sup> This provision (made by way of late amendment to the Data Protection Bill in March 2017) defines safeguarding widely as protecting a child (i.e. under the age of 18), or adult at risk, from neglect or physical, mental or emotional harm, or protecting their physical, mental or emotional well-being.<sup>45</sup>
  8. In our view, the clear intention of Parliament in the cited DPA 2018 provisions was to clarify the lawful conditions under which safeguarding professionals

<sup>42</sup> Information Commissioner’s Office (2019) *Special Category Data*, accessed on 25 November 2019 at <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/special-category-data/>

<sup>43</sup> A distinction is made in the main guidance between an allegation and a low-level concern, and a definition is given for each.

<sup>44</sup> Paragraph 18 of Part 2 of Schedule 1 Data Protection Act 2018 (DPA 2018).

<sup>45</sup> The safeguarding condition at paragraph 18 sits alongside other non-consent SPD and criminal data processing grounds in the DPA 2018 of relevance to safeguarding practitioners, whether new or amended from the DPA 1998. These include obligations imposed by law on employers; functions designed to protect the public from seriously improper conduct; standards of behaviour in sport; preventing or detecting unlawful acts; safeguarding the welfare of those at economic risk; providing support for individuals with a particular disability or medical condition by dedicated not-for-profits; and administration of accounts used in the commission of indecency offences involving children.

operate, and to remove any perceived barriers in data protection law for organisations in keeping children safe. This may be seen in both the new derogations from GDPR, and certain additions or amendments to the sector-specific provisions of the old Data Protection Act 1998 (**DPA 1998**).

9. However, the DPA 2018 has not released organisations or practitioners in this sector from the burdens imposed by GDPR in respect of data subject rights, transparency or accountability more generally. Indeed, the DPA 2018 has provided for some additional safeguards (such as the need for an **“appropriate policy document”** – see further, below) as part of the general requirement on organisations to map out and document the lawful basis for their personal data processing activities. This is all in line with the GDPR requirement that any such national derogations still respect the essence of the right to data protection.
10. The committee’s experience is that many organisations, and many individual practitioners, are still uncertain as to how their responsibilities for safeguarding children sit with their obligations under data protection law. Although the DPA 2018 does substantially more to assist practitioners than the DPA 1998 did, the alarmist media coverage of GDPR has left many with the impression that the task of record-keeping and information sharing has got harder since 25 May 2018. This is true to some extent, in terms of administrative burden and the pro-active need to demonstrate compliance, but proving the underlying lawfulness of any processing necessary for safeguarding is now easier than before.
11. Two opposing schools of thought can often be observed among practitioners since GDPR:
  - (a) one is to believe that “because of GDPR”, organisations should not collect, record or share certain information without consent; must delete records routinely; and are under a duty to amend or delete records when so requested by a data subject;
  - (b) the opposing view that, because child protection “trumps” data protection, safeguarding practitioners are exempt from or can safely disregard GDPR, and/or that safeguarding records are exempted from data subject rights.
12. Of these two, it is clear that (a) – a misguided excess of caution – carries the greater risk to children. However, to disapply data protection law altogether goes against the essence of individual privacy rights,

erodes necessary checks and balances, and places organisations at regulatory risk. Additionally, better-prepared organisations who have audited their approach will be better placed to deal with subject access and erasure requests.

13. An area where we believe specific guidance and reassurance is required is in the approach to the recording of potentially valuable information about adults or children – whether by sharing low-level concerns or self-reporting – that does not meet the threshold of an allegation requiring referral to statutory agencies.

#### **The tensions between low-level concerns policies and data protection law**

14. Since the DPA 2018 there ought to be little or no tension between the application of data protection law to safeguarding information and the needs, or efficacy, of accepted safeguarding practice. When it comes to sharing and recording low-level, however, there are more nuanced and marginal balancing acts for data controller organisations to consider.

#### **Legal basis for processing**

15. In legal terms, not all the personal data that might be recorded as a low-level concern (e.g. small changes in behaviour, favouritism etc.) would necessarily constitute special category personal data (SPD) in isolation. However, it is prudent to consider that all information recorded to a safeguarding file, in a safeguarding context, should be treated as SPD.
16. The effect of GDPR is that, to process SPD, a data controller must satisfy both a condition under Article 6 GDPR and one under Article 9 GDPR. It is not the purpose of this guidance to consider every possible scenario applicable to practitioners, but it seems likely that for the former most data controllers will be relying on Article 6(1)(f) – namely, that processing is necessary in their (or another’s) legitimate interests.
17. For the Article 9 condition, the DPA 2018 safeguarding provision works as follows. The necessity of “safeguarding of children and individuals at risk” (including from emotional, physical or sexual abuse and neglect) is a condition under which individuals or organisations are permitted to share, record or otherwise process SPD, even in circumstances where the person to whom such SPD relates has not explicitly (or otherwise) consented to the information being shared. That is provided that:



- (a) to obtain explicit consent could not reasonably be expected of the controller, or is not possible, or might risk undermining the safeguarding purpose;
  - (b) the use of such personal data is necessary for such a safeguarding purpose in the substantial public interest; and
  - (c) the person or organisation relying on this ground can point to an “appropriate policy document” (see again below) setting out both how its needs meet the relevant condition, and explaining its policy on retention.
18. The EU and UK case law is clear<sup>46</sup> that in this context, both for 17 and 18(b), the word “necessary” does not require that a certain action is absolutely necessary, nor the only means to achieve a purpose. It is rather a case of what is reasonably necessary, applying EU principles of proportionality: that the use of the personal data clearly supports the purpose, is not excessive nor goes beyond what is reasonably required to fulfil the aim – in this case, the protection of children (or adults at risk).<sup>47</sup>
19. Whilst this does mean that controllers ought to use the least amount of personal data necessary to achieve the aim, it should not mean that controllers have to make any compromise in the efficiency of achieving the safeguarding purpose. When applied to low-level concerns policies: if the recording, sharing and retention of the personal data is reasonably held to be necessary in serving a safeguarding purpose, then it ought in our view to fall lawfully within the DPA 2018 condition.
20. There are the following caveats to this rule of thumb:
- (a) there may be means for individuals whose personal data is recorded under the policy to object to the processing.<sup>48</sup>
  - (b) assuming that (in respect of the GDPR Article 9 condition required for the SPD) the data controller organisation is relying on the safeguarding condition under DPA 2018, it must first establish that explicit consent is not possible, or could reasonably be expected, for the controller to obtain without prejudicing the safeguarding purpose; and
  - (c) depending on the precise scope of the policy adopted by the organisation, the nature of the information held may be borderline in terms of the balance between value to the safeguarding purpose, and personal privacy intrusion – namely, the risk of “gossip” or prurience.
21. Provided that the safeguarding purpose is a valid one and those affected are fully notified of the policy, any difficulty in showing the legal basis can, in our view, be overcome by judicious means of a Data Protection Impact Assessment (**DPIA**) – a self-assessment tool – alongside relevant policies.
22. Beyond the legal basis, however, are the burdens placed on organisations by rules of accountability such as data subject rights and additional “appropriate policy documents”.
- ### The need for an Appropriate Policy Document
23. In order to rely on the DPA 2018 safeguarding provision cited above, an organisation must have an “appropriate policy document”, demonstrating that it understands how the legal basis applies to it, and setting out their rationale and period for retention. It will need to be in place when the processing is carried out (and for at least 6 months thereafter); reviewed at suitable intervals; and made available on request to the ICO.
24. As part of its November 2019 guidance on the processing of special category data, the ICO has developed an appropriate policy document template, although it highlights that using this exact form is not a requirement.<sup>49</sup> An organisation may choose to have a stand-alone policy, such as the ICO template; or it may prefer to document its use of the safeguarding data processing condition within its existing policies around safeguarding, retention and/or data protection (including any low-level concerns policy). The important point is that these policies are all internally consistent, and refer to each other where relevant.
- ### Retention of safeguarding files
25. A key element of such a policy would be **retention**. In the case of *R (C) v Northumberland County Council [2015] EWHC 2134 (Admin)*, the court:
- (a) firmly upheld the data controller council’s policy to keep safeguarding records for long periods – not simply to defend historic claims (for which limitation periods may be set aside) or allow the children concerned access in later life, but moreover for the purpose of protecting children;

<sup>46</sup> See for example Lady Hale at para. 27 in *South Lanarkshire Council v Scottish ICO [2013] UKSC 55*

<sup>47</sup> It is an unfortunate necessity of the DPA 2018 safeguarding ground that it is limited in its application to children (meaning those under 18) or adults with specific care needs, and so organisations that continue to have duties of care to individuals turning 18 may need to identify another legal ground to process relevant special category information about them. However, it may still be adequate if the sharing of information concerning an adult will have a protective function for others: especially where those others are themselves children who might come into contact with them.

<sup>48</sup> Depending on the GDPR Article 6 condition relied on by the organisation to process the personal data: e.g. if the organisation is relying on consent that may be withdrawn; or if the processing is conducted under legitimate interests (in which case it must be balanced against any overriding rights or interests of the data subject).

<sup>49</sup> Information Commissioner’s Office (2019) *Special Category Data*, accessed on 25 November 2019 at <https://ico.org.uk/media/for-organisations/documents/2616286/appropriate-policy-document.docx>

- (b) did not favour any requirement under long retention for regular historic file review, on grounds of “considerable additional burdens” to the “experienced child protection... workers” who are qualified safely to carry them out; and
  - (c) relevant to both points above, noted: “one of the primary reasons for retention is that information may take on a new significance in the light of later events”.
- 26.** Nothing in GDPR or DPA 2018 has changed the position since 2015 in terms of the principles of retention of personal data, or appropriate periods: the new law simply requires organisations to be more transparent and accountable in how this is done.
- 27.** However, organisations lack guidance in understanding what categories of safeguarding record these principles apply to. Do they concern historic case files only; and/or records of low-level concerns, and/or allegations (i.e. that require referral to statutory agencies); or might (indeed should) they apply to other files and records retained for a primary safeguarding purpose but which do not record a low-level concern or an allegation?
- 28.** Related to this question of what constitutes a safeguarding record, guidance is also lacking as to where low-level concerns should be recorded: whether as part of the ordinary child or personnel file; on the child protection or safeguarding file; or in a separate file (most likely still maintained by the Safeguarding Lead). In the context of schools and colleges, the question arises as to whether this would they fall within what should under KCSIE ordinarily be transferred on in the event a child moves schools.
- 29.** Building from paragraph 25(c) above, it is a critical element inherent in records of low-level concerns that they may take on a new significance in the light of later concerns and/or events, and hence must be retained for long periods to have real value. This is the case whether or not the significance is immediately apparent; but any “just in case” retention policy needs to be weighed against:
- (a) the possibility of relatively petty or prurient pieces of information being recorded, including by hearsay or through an excess of caution;
  - (b) the more tenuous relationship such information may have with the legal requirement of necessity set out above, particularly for individuals where no more concerning, problematic or inappropriate behaviours have manifested in the interim; and
  - (c) the likely discomfort and intrusion staff may feel in knowing that the information is being retained (whether self-reported or shared about them).
- 30.** In addition to protocols (see paragraph 11 of the main guidance), records of low-level concerns may require layered retention periods. For example:
- (a) records of low-level concerns as they relate to children (e.g. in a peer-on-peer risk context) or their parents might have limited value once the child has left the care of an organisation, and may come off the file, provided the Safeguarding Lead has taken a view about what needs to be shared with the Safeguarding Lead at the new organisation;
  - (b) low-level concerns about adults who work with children may continue to have relevance for the length of a working and/or volunteering life, and hence to future employers (etc.); but again organisations need to give careful consideration of whether to refer to any low-level concern in a reference – as discussed in the main guidance.
- It is recognised that (a) is not the focus of this guidance, but it is anticipated that the principles may in due course have wider application to all areas of safeguarding practice.
- 31.** We would recommend that, whenever staff leave an organisation (as well as considerations around the giving of references in paragraph 12 of the main guidance), the low-level concerns policy specifies that any record of low-level concerns that may be kept about such person is subject to specific review in terms of:
- (a) whether some or all of the information contained within any record may have any reasonably likely value in terms of any potential historic employment or abuse claim so as to justify keeping it, in line with normal safeguarding records practice; or
  - (b) if, on balance, any record is not considered to have any reasonably likely value, still less actionable concern, and ought to be deleted accordingly.
- ### Culture and Code of Conduct
- 32.** The challenge of getting ‘buy-in’ from staff about the benefits and application of a low-level concerns policy is not only a necessity for proper practice and a happy and functional organisation, but also a GDPR Article 13 requirement under the transparency principle: data subjects (including staff, children and parents) must be provided with clear information about how their personal data will be collected and for what purpose, and how long it may be held.

- 33.** Our experience is that, properly managed and communicated, staff typically see the benefits in self-reporting (as well as self-training and reflection), as well as the merit in a collegiate culture of sharing low-level concerns about peers where everyone understands the role they play in being watchful and responsible. To mitigate the risk of abusive or malicious sharing, as well as the pain of subject access, records must be fair and neutrally stated. This has to be approached culturally and in training for Safeguarding Leads and other staff.
- 34.** We are further of the view that, even where an apparent concern is not found to be in breach of an organisation's Code of Conduct, this may not extinguish its value as a piece of potentially relevant safeguarding information. If so, it could still be kept on the low-level concerns file: if it is reasonably necessary, justifiable and relevant for a safeguarding purpose, the lawful basis to process it remains.

#### Data subject rights

- 35.** It is one thing for an organisation to consult with its staff on and implement a low-level concerns policy. It is another to maintain the policy under the burden of data subject rights, in the event that staff object or require disclosure: single objection or erasure may undermine the record's value.
- 36. Rights of erasure or objection.** This guidance is not the place for a detailed analysis of the available justifications for refusal; but the summary position with these rights is that they generally can, and therefore ought to be, resisted (as with any other type of safeguarding record) where low-level concerns are shared and recorded fairly and in good faith for a safeguarding purpose.
- 37. Right of rectification.** The ICO takes a helpful position in terms of how organisations might deal with complaints about inaccurate information where accounts are disputed: for example, contemporaneous records, recorded in good faith, that might have value notwithstanding that the data subject disputes them. An ICO-approved response in such situations is to include a record of the data subject's objection, or contrary account, alongside the original record in a fair and neutral manner. This way its quality as evidence or information can be properly and fully assessed by those who come to review the file in the future.

- 38. Subject access.** The existing ICO Subject Access Code of Practice has not been updated since the DPA 2018, but contains a note stating that it will be soon. It is to be hoped that among those new points considered will be the new Child Abuse Data exemption (see paragraph 39a below), along with issues for certain practitioners in an education, health or social services context concerning what is termed the "Assumption of Reasonableness" (see paragraph 46 below).
- 39.** The subject access exemptions most likely to be relevant (albeit that they should not be assumed to apply in a blanket manner) are:
- (a) the rule against needing to disclose confidential references;<sup>50</sup>
  - (b) the Child Abuse Data exemption,<sup>51</sup> where a person with parental responsibility has made the request on behalf of a person under 18 (with or without the child's authority, depending on the age and maturity of the child) but the personal data consists of information as to whether that child may be at risk of, has been or is subject to child abuse (widely defined to include sexual abuse, physical and emotional neglect, ill-treatment, and non-accidental physical injury) and the data controller deems that disclosure would not be in the child's best interests. However, this only applies in that narrow context (i.e. protecting a child as against a parent) and not more generally (e.g. to deny another adult access to their own personal data to protect a child);
  - (c) if the matter concerns education, social services or medical data<sup>52</sup> and disclosure risks "serious harm" to any individual (a high bar);
  - (d) where the organisation performs certain functions designed to protect the public (e.g. from seriously improper conduct or unfitness; or where those at work may pose a risk to the health or safety of other persons), but only where disclosure is likely to prejudice the proper discharge of that function;<sup>53</sup> and
  - (e) if any third-party privacy rights<sup>54</sup> can be argued (notably those of the child) – but only to the extent they would be identifiable in relation to their own personal information in the particular record concerned, by context or otherwise. In other words, this exemption

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<sup>50</sup> Paragraph 24 of Part 4 of Schedule 2 DPA 2018

<sup>51</sup> Paragraph 21 of Part 5 of Schedule 3 DPA 2018

<sup>52</sup> See throughout Parts 3 and 4 of Schedule 3 DPA 2018

<sup>53</sup> Paragraph 7 of Part 2 of Schedule 2 DPA 2018. Please note this exemption is not easily applied to all organisations with safeguarding responsibilities: they need not be public bodies, but the function must be of a public nature and in the public interest. It is also the ICO's view, although this is now in statute, that the function should be the core activity of the organisation (i.e. regulatory in nature), and that the exemption should not be used to protect internal grievance, complaint or disciplinary functions.

<sup>54</sup> Paragraph 16 of Part 3 of Schedule 2 DPA 2018. Please note this would be of no application if only the adult himself/herself was identifiable from the record, or part thereof, even if there was concern for the safety of a particular child or children. Any separate personal data of the adult would be disclosable.

could apply if more than one person's data could be inferred from how a low-level concern is recorded (even if not explicitly named), unless it were still reasonable in all the circumstances to disclose their personal data to the requester.

- 40.** Contrary to widespread belief in some quarters, however, there is no general "safeguarding record" exemption that could be used to protect records about staff from access by those staff members. Nor, as set out in paragraph 7 of the main guidance, is this in our view needed, for the following reasons:
- (a) information that could identify specific children should not be disclosed to staff making subject access requests, and this is quite lawful to withhold under existing rules;
  - (b) similarly, the identity of the person sharing the low-level concern could also be withheld under subject access, if they have not given their consent to their own data being disclosed to the requester and it is not otherwise reasonable to do so (although it may necessarily emerge in the context of a procedure or claim under employment law). This may not be straightforward, however, if it is likely to be clear in context who shared the low-level concern. The issues here should be made clear in the low-level concerns policy, and may be for the Safeguarding Lead to discuss with the person sharing the low-level concern; and
  - (c) in our view, the policy reasons in favour of transparency with affected staff about low-level concerns – as well as the need for such concerns to be fair, accurate and (where appropriate) raised directly with the person in question – tend to outweigh any benefits of "covert" recording.
- 41.** If the low-level concerns policy is operating properly, then its contents under a subject access request should not come as a surprise to the person about whom such a concern has been recorded. There may be a risk that a request is made before a low-level concern has been adequately raised with the adult in question: but, as long as the order of things is consistent with the applicable policy, then the controller will be able to make the case for the actions taken.
- 42.** Organisations should not feel unduly burdened by introducing policies intended to assist in the protection of children. This is best approached by transparency, training, and a careful approach
- to sharing low-level concerns (as also discussed in the main guidance). Equally important, from an employment perspective (both in terms of process and staff trust), is providing clarity about how this information may be used. Collection of such data must be transparent and raised with individuals so that, if necessary, it can be challenged.
- 43.** Properly managed, a low-level concerns policy should not substantially increase the volume burden in subject access. But it is also our experience that, beyond the purely administrative burden, there may be a reluctance to share due to the embarrassment and distress (both to individuals and controllers) that a low-level concerns policy may cause, risking unwarranted reputational damage to individuals. In some organisations this understandable fear may have a chilling effect on the sharing and recording of low-level concerns.
- 44.** However, subject access can fairly be viewed as a necessary form of checks and balances for data controller organisations to record such information fairly and neutrally. Despite the considerable burdens on organisations caused by subject access, there is a strong privacy interest in supporting this right, protected (for the time being at least) in UK law as a fundamental right under Article 8(2) of the Charter of Fundamental Rights of the European Union (EU Charter). The more impactful and personal the information, as here, the greater the need for organisations to be accountable to affected individuals.
- 45. Children's rights of access or erasure.** The main guidance focuses on sharing low-level concerns about adults' behaviour towards children, not on concerns being raised about children in a peer-on-peer context, or in assessing their vulnerability. However, should identifiable data about specific children be contained in information held in a record of a low-level concern about an adult's behaviour towards them:
- (a) this is something the controller may withhold in respect of a request made by the adult in question; but
  - (b) this could be disclosable upon request by that child or (depending on age, circumstances, and the child's best interests) someone with parental responsibility for the child.
- 46.** It is worth noting that, in a schools context,<sup>55</sup> the DPA 2018 "Assumption of Reasonableness" has the effect that personal data of staff should not be

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<sup>55</sup> As well as in other contexts around social care and health. However, this rule currently lacks clarity and should perhaps be treated with caution pending further case law or commentary by the ICO.

anonymised or withheld under a subject access request made by or on behalf of a child in their care, where it would otherwise be disclosable under that child's subject access rights.<sup>56</sup>

47. For this reason, where possible, and unless this would diminish its safeguarding value, low-level concerns recorded as against an adult should be recorded separately from identifying details of the child if organisations (not limited to schools) believe that the staff member in question should fairly and safely be protected from access to their low-level concerns record by parents or pupils.
48. **Data Security.** GDPR more generally requires that data controllers have security measures (both technical and organisational) that are appropriate to the nature of the data and processing. The most critical aspect, given the highly sensitive and potentially damaging nature of the information contained in even low-level concerns, is to maintain and enforce a need-to-know-only access policy. Aside from any rights of access by individuals about whom concerns have been reported (as above), this would be limited to appropriate, trained persons with a specific and appropriate role in the safeguarding team or – potentially – those providing human resources or legal support, where lawful and necessary.
49. All controllers are not alike in resources, but the affordability of readily available password protection and encryption software means that the digital retention and, where necessary, onward sharing of such information should be made adequately secure. Such steps should already be in place for allegations reporting. Within the low-level concerns policy itself, thought must be given to the most appropriate and secure means of sharing concerns by staff with the Safeguarding Lead, or with a values guardian/safeguarding champion, without making it sufficiently difficult as to discourage reporting or self-reporting.
50. This may best be carried out by means of a face-to-face meeting (see paragraph 8.18 of the main guidance), whether or not supported by a form

such as that at **Appendix E**. That way, control and oversight of record-keeping can remain with the Safeguarding Lead. When a policy permits forms or concerns to be submitted (by whatever means) remotely, or in total anonymity, this raises more practical challenges in maintaining appropriate levels of security for organisations to consider. Electronic submissions, for example, would be better handled via a secure portal and not by allowing concerns or forms to be transmitted by – or worse, remain on – general email servers.

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<sup>56</sup> Paragraph 7 of Part 3 of Schedule 2 DPA 2018: this is the rule that there should be a starting assumption that school staff, health workers and social workers can expect no rights of privacy under subject access. However, the limits on its application are unclear and – absent ICO guidance – there is the risk that its literal interpretation would lead to inadequate protection of the rights of these adults.

## Appendix E

### Example low-level concern form

#### Low-Level Concern Form

Please use this form to share any concern – no matter how small, and even if no more than a ‘nagging doubt’ – that an adult may have acted in a manner which:

- is not consistent with [**Insert name of the organisation**] Code of Conduct, and/or
- relates to their conduct outside of work which, even if not linked to a particular act or omission, has caused a sense of unease about that adult’s suitability to work with children.

You should provide a concise record – including brief context in which the low-level concern arose, and details which are chronological, and as precise and accurate as possible – of any such concern and relevant incident(s) (and please use a separate sheet if necessary).

The record should be signed, timed and dated.

#### **Details of concern**

**Name of staff member:**

**Department & Role:**

**Signed:**

**Time & Date:**

<b>Received by</b>	<b>At: (Time)</b>	<b>On: (Date)</b>
<b>Action Taken: (Specify)</b>		

<b>Signed:</b>	<b>Time &amp; Date:</b>
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This record will be held securely in accordance with [Insert name of the organisation] low-level concerns policy. Please note that low-level concerns will be treated in confidence as far as possible, but [Insert name of the organisation] may in certain circumstances be subject to legal reporting requirements or other legal obligations to share information with appropriate persons, including legal claims and formal investigations.