



Education and Skills Committee – Consultation on the Disclosure (Scotland) Bill 2019 Response of the General Teaching Council for Scotland

1 Introduction

The General Teaching Council for Scotland (GTCS) is the statutory body established by the Public Services Reform (General Teaching Council for Scotland) Order 2011 (the 2011 Order). Its general functions include, among other things, keeping a register of teachers, establishing the standard of education, training, conduct and competence of registered teachers and investigating the fitness to teach of individuals who are, or are seeking to be, registered. The assessment of a registered teacher's fitness to teach is made both at the point at which they join the register and their fitness to teach is then regulated throughout their registration with GTCS.

A key factor in determining a registered teacher's fitness to teach is what, if any, criminal convictions they have, as well as any other relevant information. GTCS relies heavily on information provided by criminal justice agencies including Police Scotland, The Crown Office and Procurator Fiscal Service, Scottish Courts and Tribunals Service and Disclosure Scotland. GTCS notes with interest the proposed changes contained within the Disclosure (Scotland) Bill 2019 and our response is contained herein.

The areas that GTCS wishes to comment on at this stage are as follows: the simplification of the Disclosure products, including the introduction of Level 1 & 2 Disclosures, proposed limitations on the information shared via PVG, changes to the length of Scheme membership, the issuing of disclosure certificates, conditions imposed on Scheme members under consideration for listing and wider information sharing concerns.

2 Introduction of Level 2 Disclosures and Proposed Online System

GTCS notes that section 13 of the proposed Bill will replace standard and enhanced disclosures and short PVG Scheme records with a new disclosure product, a Level 2 Disclosure, which would contain much of the same information currently provided in a Standard Disclosure and PVG Scheme Record (albeit subject to some limitations discussed below).

In principle, the change in form from a Standard Disclosure/PVG Scheme Record to a Level 2 Disclosure poses no particular concern, as long as the relevant information is still being provided to regulatory bodies. GTCS accepts that the wide range of disclosure products currently available can be confusing to those using the disclosure system and a degree of clarity is welcomed.

It is also noted that it is proposed that much more information will be shared electronically. GTCS welcomes this, however it may be of assistance if regulatory bodies are consulted as to how this will be implemented in practice, well in advance, to ensure compatibility with existing processes so as to avoid any unnecessary technical difficulties.

3 Changes to Length of PVG Scheme Membership

Currently when a person joins the PVG Scheme they remain a member of the Scheme until and unless they are removed from the Scheme or they withdraw from the Scheme. The new Bill would limit Scheme membership to five years from the date of entry to the Scheme, or from the date of renewal. At the end of the five-year period the member would have to renew their membership or have their membership withdrawn.

GTCS understands that the purpose behind this change is principally twofold.

- To prevent Disclosure Scotland interfering with the privacy of persons who are no longer employed in regulated roles.
- To reduce the administrative burden on Disclosure Scotland by reducing the number of persons subject to monitoring who no longer require to be monitored.

Whilst these are laudable aims, GTCS is concerned about how this would work in practise. The proposed change creates a significant administrative burden for individuals, employers and regulators in ensuring that PVG memberships for all of their staff/registrants are renewed. It also imposes an additional financial burden on organisations and individuals.

This is especially concerning given the fact that many of those who are currently members of the Scheme are either working in a voluntary capacity or in low paying/minimum wage roles. There is also a concern that the vast majority of Scheme Members, who are law abiding members of society, are being asked to renew every five years, imposing a financial and administrative burden on persons who otherwise have no interaction with Disclosure Scotland.

There is also the matter of the memberships of those who are already Scheme members. It is currently unclear how the existing members of the PVG Scheme 'start dates' would be calculated. Given that they have already paid for what was, at the time, a permanent lifetime membership, the GTCS is concerned that it is unclear what existing Scheme members will be entitled to at the start of the new Scheme, i.e. will they be entitled to an initial five-year membership on the basis or will all existing Scheme members be expected to re-apply to the new Scheme.

If there is a large cohort with similar, or identical, start dates this is likely to cause a significant administrative burden not only on Disclosure Scotland but also on employers, professional regulators and others. Further, those who are already Scheme members will have, reasonably, anticipated that the fee paid by them on joining the Scheme was a one off, lifetime membership fee. Therefore, it would not be unreasonable to expect that those who will now have to pay additional fees could be dissatisfied with this amendment to the Scheme.

Finally, there is the matter of individuals who are registered with professional bodies but not in current practise. There are many professionals who choose to maintain their registrations when not in a regulated role. The GTCS is concerned that limiting membership to those in a regulated role at the point of renewal will result in persons registered with regulated bodies whilst no longer being Scheme members. This could result in regulators being unaware of concerning behaviour by registered professionals, and could undermine public faith in the profession.

GTCS would ask that alternative approaches are considered, such as increased efforts in raising awareness among Scheme members of the ability to remove themselves from the Scheme when they no longer carry out regulated work, or failing this, that the process of renewing is simplified as far as possible in order to ensure that it does not constitute a significant administrative burden on organisations and individuals.

4 Limitations on Information Shared via PVG

Currently when GTCS receives a PVG Scheme Record the following information is provided:

- Convictions, cautions or other alternatives to prosecution, which are not spent in terms of the Rehabilitation of Offenders Act 1974, whether the person was a child or an adult at the time of conviction.
- Convictions which are spent but fall on the A1 list of offences (previously offences which must always be disclosed). These offences must always be disclosed for 15 years (or 7.5 if the accused was under 18 at the time of conviction) after conviction, after 15 years the offences may be removed if the person to whom the disclosure relates successfully seeks an order from a Sheriff removing the information from their record.
- Convictions which are spent but fall on the B1 list of offences (offences which must be disclosed subject to rules), as long as the following conditions are met.
 - The disposal was not an admonition or absolute discharge; and,
 - The conviction is less than 15 years old; or,
 - The accused was under 18 at the time of conviction and the conviction is less than 7.5 years old.

These convictions can be removed from someone's record in advance of the time limits above if they successfully seek an order from a Sheriff removing the information from their record.

- Other Relevant Information (ORI) provided by the Police.
- Notification under Part 2 of the Sexual Offences Act 2003, whether an adult or child.

The new Bill proposes significant changes to the type of information which will be shared automatically, and to the circumstances in which other information will be shared. The following information will continue to be shared without the right to review:

- Unspent adult convictions and cautions.
- Offences on List 1 (previously A1), unless 11 years have elapsed since the date of conviction.
- Notifications under part 2 of the Sexual Offences Act 2003.

With the exception of the above, the sharing of information by Disclosure Scotland will be conditional, either in that the subject of the disclosure may challenge the inclusion of the information, or that Disclosure Scotland will *ex proprio motu* determine whether the information included is relevant to the disclosure and, if so, whether it ought to be included.

The latter category of information relates to convictions when the accused was under 18, including unspent convictions, spent List 1 convictions and spent List 2 convictions which are less than 5.5 years old and did not result in an admonition or absolute discharge (or the equivalent from a Children's Panel). Unspent childhood cautions will not be included.

Whilst GTCS welcomes efforts to ensure that young people are given every opportunity to be rehabilitated, and to not be unfairly defined by prior convictions, GTCS is concerned about the lack of clarity as to how the decision will be made to include childhood conviction information.

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Whilst GTCS welcomes efforts to ensure that young people are given every opportunity to be rehabilitated, and to not be unfairly defined by prior convictions, GTCS is concerned about the lack of clarity as to how the decision will be made to include childhood conviction information. (being anonymised, if necessary) where the disclosure is being sought for the purposes of joining a professional register. This would allow a regulatory body, such as GTCS, to present its position in relation to a particular conviction and why it considers, in the context of the profession over which it has regulatory functions, such conviction is (if that is the case) relevant and ought to appear on an individual's – who, in GTCS' case, is seeking registration as a teacher – disclosure.

Failing this, GTCS would propose that the input of professional regulatory bodies is sought to develop guidance in respect of what constitutes relevant convictions for each profession. This is something that is likely to vary somewhat between different professions and therefore it will be important that Disclosure Scotland engages with the professional bodies to ensure not only consistency but transparency in the process.

GTCS would also suggest that a degree of transparency in the operation of the review process would be welcome. This could either be in the form of the publication of anonymised decisions, or in the form of annual reports setting out the number of reviews, what the reviews related to and what number of

these reviews were successful at each stage. This would help ensure public confidence that the legal tests are being applied appropriately.

As with the provisions for childhood convictions, GTCS is concerned that the tests set out in the legislation lack specificity. Again, there is no indication of how these tests will be applied. There is no indication of whether formal thresholds will be established or whether the test will be a subjective one. If the test is subjective GTCS would be concerned about the possibility of it being applied inconsistently. GTCS would expect that there would be formal guidance provided, developed together with the relevant stakeholders, to ensure transparency and consistency in the process.

5 Issuing of Disclosure Certificates

Currently where an individual applies for a standard or enhanced disclosure, or short Scheme record, the document is provided to the individual for a short period before being sent to the registered body (i.e. the employer or regulatory body). During this period the individual has the opportunity to challenge the inclusion of certain information. If they do not intimate a wish to challenge the information then the information is shared with the registered body as a matter of course.

In the new Bill it is proposed that the information is only shared after the individual has expressly confirmed that they are willing for the information to be shared. If, after receiving the proposed Disclosure Certificate, they do not respond then the information will not be shared. GTCS is concerned that this measure may be disproportionate. Whilst GTCS understands that the inadvertent disclosure of sensitive information is to be avoided, it appears that the approach taken is excessively cautious and may result in significant practical problems.

Firstly, when an individual applies for disclosure they provide current contact details, the likelihood that these details will change in the intervening days is small. The risk that the information has therefore not been supplied to the correct individual is also small. Additionally, by applying for a Disclosure Certificate they have indicated a willingness for the information to be shared with the regulatory body, it would be fair to presume that, in the absence of evidence to the contrary, the person still wishes for the information to be shared.

Secondly, there is a considerable risk that individuals will ignore follow up communication from Disclosure Scotland, or otherwise fail to respond. This will result in the disclosure application lapsing and a further application for disclosure being made. This may result in significant delays in the processing of applications for registration with regulatory bodies, and an unintended consequence of this may also be that offers for employment are withdrawn where a PVG certificate has not been provided. There is the possibility of significant prejudice to individuals applying for disclosures.

GTCS would suggest that the prior system of presumed consent be maintained. This would still allow persons with concerns about the information contained within the disclosure certificate to challenge the information, whilst avoiding the significant administrative problems inherent in the proposed system.

Failing this, GTCS would ask that where disclosures contain no prejudicial information (i.e. where the required checks have resulted in a 'clean' disclosure) these are automatically disclosed following the prescribed period, so as to avoid inadvertent delays where there is no risk of prejudice to the individual.

6 Conditions Placed on Scheme Members Under Consideration for Listing

It is noted that the new Bill allows for certain conditions to be placed on Scheme members by Scottish Ministers where they are under consideration for listing, including conditions preventing them from carrying out regulated roles.

In principle, GTCS is supportive of this as it provides further public protection. However, GTCS is concerned that the current proposals are lacking in detail, there is little of indication of how these decisions will be reached and by whom, and whether these decisions could be subject to appeal. It is also unclear how these proposed conditions would affect interim/temporary orders sought by regulatory bodies.

It is noted that whilst the fact of a decision to impose a condition, and the details of the condition, may be shared with regulatory bodies, including GTCS, the reasons for doing so are only shared with the individual. However, GTCS considers that any allegation which is serious enough to warrant the imposition of conditions by Scottish Ministers is likely to be serious enough to warrant the imposition of a Temporary Restriction Order on the GTCS Register of Teachers to provide further protection for the public and the reputation of the profession whilst the matter in question is investigated. Therefore, GTCS considers that there would be a significant public interest in the sharing of the reasons for the suspension with regulatory bodies. This would be in line with GTCS' position that there ought to be enhanced information sharing generally among criminal justice agencies and regulatory bodies, as discussed below, and this would be a step towards improved information sharing to better ensure public protection.

7 Wider Information Sharing Concerns

GTCS considers that currently wider concerns exist around difficulties with information sharing between criminal justice agencies, including Disclosure Scotland, and professional regulatory bodies.

Whilst protection of the public is at the heart of what Disclosure Scotland and professional regulatory bodies do, there have been growing difficulties in respect of information sharing between the various bodies which, in turn, create difficulties in each body fulfilling its obligations. GTCS commends recent efforts on the part of Disclosure Scotland to work more closely with regulatory bodies and welcomes ongoing engagement to develop appropriate policies and strategies for information sharing. However, GTCS considers that this Bill offers an opportunity to establish clear and effective guidelines around information sharing, to allow both regulatory bodies and Disclosure Scotland to more effectively carry out their roles, and ultimately better protect the public and public confidence in regulated professions.

GTCS suggests that provision should be made to ensure that Disclosure Scotland shall share any new information which is added to the Scheme record of an individual carrying out a regulated role, with the relevant regulatory body, at the point at which it is added.

As it stands, the only points at which GTCS is informed that new information is added is when a new disclosure is requested (i.e. when someone changes employment). This means that years can pass between checks and that GTCS is otherwise reliant on registrants themselves disclosing any relevant charges and convictions. This has the potential of placing the public at a continuing risk of harm and undermining the overarching aim of public protection. This is unlikely to be remedied by measures such as amending the length of Scheme membership to a five-year period, as GTCS would suggest that receiving information about a Scheme member once every five years is unlikely to provide sufficient reassurance and may prevent GTCS from taking timeous action.

Further, even where a Scheme member is placed under consideration for listing, the information provided to GTCS is limited to the fact that they are under consideration and in rare cases the source of the information. This is simply insufficient to allow GTCS to carry out its function of protecting the public and public faith in the profession as there is often very limited scope to identify routes of investigation to allow GTCS to commence a meaningful investigation.

By allowing information to be shared at the point at which it is added to the Scheme member's record Disclosure Scotland would not be sharing any more information than would otherwise be shared at the point when an application for disclosure is submitted. By joining the PVG Scheme a member consents to their suitability for Scheme membership being monitored, it would not be disproportionate to expand this to include consent to sharing information with other relevant bodies.

It may be helpful to have regard to the difference in roles between employers and professional regulatory bodies when considering the issue of data sharing. Professional regulators act as gatekeepers for the professions and are entrusted by the public to protect vulnerable members of the public and to maintain public faith in the profession. They are in most instances established through statute and have clearly defined roles acting in the public interest. As public bodies professional regulatory bodies are required to act in a lawful manner, in compliance with the Human Rights Act 1998, and having regard to a wider duty of fairness. Decisions made by regulatory bodies in respect of fitness to teach/practise are subject to a right of appeal.

All of these factors suggest that the role carried out by regulatory bodies is fundamentally different to that carried out by employers. It is the position of GTCS that given that professional regulatory bodies act in the public interest there is a stronger argument for sharing relevant information in a timeous manner than there might be for employers, or other interested parties. It may be advisable to create a distinction within the legislation between ordinary registered bodies (such as employers) and professional regulatory bodies if this would allow for greater information sharing.

8 Conclusion

GTCS welcomes the broad aims of the legislation and recognises that the current system is in need of reform. However, as detailed above, GTCS remains concerned that there is a lack of clarity in respect of some of the key aspects of the proposed legislation. Whilst the rights to privacy of individual Scheme members are clearly a compelling concern, they must be balanced against wider public interest in ensuring that the most vulnerable members of Scottish society are not exposed to unnecessary risk. GTCS is concerned that the Bill, as currently drafted, may have tipped the balance to create a system which could be said to overly protect the rights of individual Scheme members at the expense of the wider public interest and protection of those covered by the vulnerable groupings.

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