

T: 0300 244 4000
E: scottish.ministers@gov.scot

Clare Adamson MSP
Convener
Education and Skills Committee
Scottish Parliament
EDINBURGH
EH99 1SP

15 November 2019

Dear Convener,

I am writing to you in respect of the Committee's letter dated 5th September regarding the Disclosure (Scotland) Bill, specifically the making of regulations concerning conditions imposed on scheme members under consideration for listing.

I am unable to provide any greater clarity at this early stage about the anticipated timescales for the making of these regulations however, I think it would be beneficial to take this opportunity to provide some information on the steps my officials are taking in co-developing these conditions with stakeholders.

As the Committee is aware, conditions can be made under the new section 13A of the PVG Act, as inserted by section 77 of the Bill. These conditions refer to the action the state may take when an individual is being considered for listing. The policy intent of these provisions is to further increase safeguarding by addressing any risk that an individual being considered for listing may pose if they were otherwise able to continue to work freely in a regulated role while that consideration takes place. This is particularly important when one considers that many members of the PVG Scheme are not registered with a professional body; the controls that a regulator may impose in circumstances where a serious question mark exists about suitability to practice are simply not available. In other circumstances, a regulatory body might have curtailed the ability of an individual to work in a specific professional area but cannot exert control on the individual doing work outside the professional area, for example the GTCS may stop a teacher from teaching but cannot prevent them from volunteering with children in other contexts. It is these gaps that the new PVG conditions will close.

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Annex A attached is a discussion paper to be used when engaging with stakeholders to help formulate discussion. It sets out a number of key thresholds and principles that will need to be considered in the development of these conditions, and also sets out examples of how these conditions might be formulated. This engagement with stakeholders is starting imminently, with a meeting with a number of regulatory bodies scheduled to take place on 21st November. Annex B lists those bodies invited to the session. Once we have had this initial discussion, we will work with those involved to develop the best way forward and to engage further other stakeholders.

I would be happy to update the Committee on this work as it progresses and provide clarity on timelines for regulations when I have it.

I hope that the Committee finds this information helpful and I am happy to provide any further information if it would assist the Committee.

Yours sincerely

MAREE TODD

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Conditions imposed on scheme members under consideration for listing

Draft Policy Note

Purpose

To engage and collaborate with stakeholders in the development of conditions and how these might work in practice. This paper sets out some background to the policy thinking, along with some examples. These are for discussion only, not what we propose should go in regulations at this stage.

Background

Conditions are referred to in the Disclosure (Scotland) Bill (“the Bill”) in the context of an intervention the state may make when a scheme member is being considered for barring under the Protection of Vulnerable Groups Scheme.

The purpose of imposing such conditions is to address the concern that an individual who is being considered for barring may work freely in a regulated role whilst the consideration is ongoing. This may take several months.

If a PVG Scheme member under consideration for barring is also a member of a regulatory body it may be that the regulatory body has used its own powers to suspend the professional registration of the individual or imposed some other condition that limits their ability to freely practise in the specific professional area covered by the body. However, many people who qualify for mandatory PVG Scheme membership will not belong to such a regulatory body, and even if they do the body may only restrict them in their specific professional area; for example a suspended teacher may still volunteer with the Scouts without breaching any regulatory restrictions.

The Bill therefore seeks to achieve an important safeguarding outcome by giving Ministers the power to impose conditions in certain circumstances. Where a scheme member is being considered for listing and Ministers consider it necessary for the protection of the public or otherwise in the public interest, they may impose certain types of conditions on the individual. This might be appropriate, for instance, **when there is no regulatory body** with the power to impose limitation or restrictions, or where the nature of the conduct leads Ministers to determine that conditions should be sought **covering all regulated roles with children, adults or both groups**, extending the reach or augmenting existing controls imposed by a regulatory body.

There are a number of key aspects of this policy development that will be broadly outlined in this paper. These are:

- underlying threshold and principles for when conditions will be appropriate,
- the nature of the conditions themselves and the behaviours that they may legitimately seek to control,
- how collaboration with regulatory bodies should work in the context of the state being in a position to seek such conditions.

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Threshold and Principles

Article 6 of ECHR enshrines the right to a fair trial. Put simply, the Scottish Parliament may not pass law that violates the ECHR and any law that is subsequently found to do so by the courts ceases to be law and the activity that it provides for may be impacted, or possibly have to cease entirely.

Imposing conditions on an individual necessarily takes place before the consideration for barring has been concluded, and potentially before the individual has had the opportunity to make representations. It is clear that imposing restrictions as part of the consideration for listing process has implications for individuals' civil rights. However, the imposition of conditions is not tantamount to barring and does not pre-empt the outcome of the consideration process. Nevertheless, given the potential for interference with the article 6 right it is vital that Ministers act proportionately and reach a fair and robust conclusion before imposing conditions.

In certain circumstances there may be justifiable interference with the ECHR rights. Put simply, when the rights of the individual are outweighed by the rights of the public to be safe. Imposing conditions is intended to happen as a justifiable interference with article 6 rights. Establishing this justification will be important in every case; a full assessment must be given to the circumstances of every case and a proper and fair process is followed to determine when it is right to seek to impose conditions. There should be a minimum intervention presumption with conditions; do the least possible in terms of article 6 interference to secure the justifiable public protection aims of the intervention.

At the very outset, deciding to impose a condition must result from a reasonable belief by Ministers that the individual may act in a harmful way in a regulated role if a condition is not imposed. Such a reasonable belief is likely to arise if Ministers have information which indicates that the individual has engaged in conduct that caused harm to a child or protected adult (whether in the context of a regulated role or not), which was serious enough to justify a conclusion that they might commit similar conduct in the future. Section 13A(1)(b) of the Disclosure Bill states that Ministers may impose conditions on the scheme members that they **consider necessary for the protection of the public or otherwise in the public interest**.

If Scottish Ministers consider that the threshold set out above is exceeded then they may decide to impose conditions straight away. However, for conditions to remain in force for any length of time, Ministers would have to apply to the Sheriff Court to have the conditions confirmed (the new section 13A(4) inserted by the Bill).

The formulation of Conditions

The Bill gives examples of the types of conditions that Ministers may prescribe in regulations, but it is expected that these will be in some way codified rather than being tailored for each circumstance. Only conditions which Ministers have prescribed in regulations can be imposed, so there will need to be a clear list of possible conditions that can be adapted in individual cases to fit a potentially wide range of circumstances.

To achieve this we must establish some categories for conditions to exist within. These are:

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1. Conditions to restrict what **kinds** of regulated roles Person A may seek or do, for example must not work as a football scout. This covers circumstances where the regulated role is a very specific context and where, because of the past employment history of the individual, there is no reasonable justification for extending the restriction more widely.
2. Conditions to restrict the **characteristics of the children or protected adults** that Person A may carry out a regulated role in respect of, for example must not carry out a regulated role with children under 12 years old.
3. Conditions that set out the **circumstances** within which a regulated role can be done, for example must carry out their role in a specific type of premises or be supervised by a competent person (who is a scheme member not under consideration for listing) as they carry out their role.
4. Conditions to ensure that the individual **notifies** any person for whom they will do a regulated role that they are under consideration for barring before they commence the role. This is for non-organisational employers i.e. personal employers only as the Bill ensures the notification by Disclosure Scotland of conditions to any employer known to Disclosure Scotland that scheme member is connected to.

Some examples are provided below for discussion and debate.

- You must not work as a sports scout or agent where the scouting is in respect of children under the age of 18.
- You must not work in any regulated role as a youth leader where you will encounter children under the age of 18 by dint of your regulated role.
- You will not work as a private music tutor except under the direct supervision of a PVG Scheme Member who is not under consideration for listing and only at business premises where such a tuition service is being offered.
- You must not do any regulated role where, by dint of your regulated role, you will encounter adults who lack capacity.
- You must not act as a personal assistant to any person with a physical disability or provide any care services to such a person in their home.
- You must not carry out a regulated role where you handle or manage the finances or financial affairs of a child or protected adult or exercise any financial functions on their behalf.

Collaboration with Regulatory Bodies

It is clear that regulatory bodies carry out important functions that protect the public from harm. It will often be sufficient to rely on the powers of a regulatory body where otherwise a condition would be sought. For example, in circumstances where a doctor has assaulted a patient the GMC may have suspended them while it investigates. If the doctor has no other types of regulated role in their background it may be excessive to impose a further condition. Ministers may therefore conclude that the public interest test for imposing a condition under the PVG Act is not met.

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