

Agenda item:	12
Report title:	Criminal disclosure at the point of registration
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Action:	To note

Executive summary

Our current policy on criminal disclosure at the point of registration complies with the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013 (the 2013 Order) (the E&W scheme).

In February 2016 the Scottish Government introduced changes to the criminal disclosure system in Scotland. As a result there are now a number of significant differences between the Scottish system and the E&W scheme. We considered that an obligation to comply with both schemes would result in a different standard of criminal disclosure being applied to particular groups of applicants, and this would impact on our ability to ensure that we only register doctors who are fit to practise.

Given these issues we obtained legal advice to clarify if we are required to reflect the specific legislation in Scotland. We also engaged directly with Disclosure Scotland and the other UK healthcare regulators to discuss the impact of the changes and diverging criminal disclosure legislation on the effective regulation of healthcare professionals.

The legal advice is clear that the regulation of health professionals is a matter reserved to Westminster and we are correct in requiring all applicants to comply with the E&W scheme on criminal disclosure.

Recommendations

The Strategy and Board is asked to note:

- a** The legal advice and agree that our current criminal disclosure policy is correct.
- b** The engagement activities undertaken and our commitment to update relevant key interests on our position.

Changes to criminal disclosure legislation in England and Wales and Scotland

- 1 Our approach to criminal disclosure at the point of registration was amended in early 2014 to reflect changes made by the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013 (the 2013 Order).
- 2 The 2013 Order (the E&W scheme) introduced a new category of protected cautions and convictions. This amended the previous system of automatic disclosure which allowed organisations such as the GMC to require applicants to fully disclose all offences. Under the 2013 Order offences become 'protected' depending on the nature of the offence, the age of the offender and when the offence was committed.
- 3 All applicants seeking GMC registration, regardless if they are from the UK, Europe or elsewhere are required to self-disclose their criminal history*. [Question 1](#) on the Fitness to Practise declaration form and the accompanying [guidance](#) explain the factors which determine whether an offence is protected under the 2013 Order. Applicants are advised not to disclose offences which are protected and to seek independent legal advice if they are unsure.
- 4 In February 2016 the Scottish Government implemented changes to the criminal disclosure system in Scotland. This included changes made by the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2015 (the 2015 Order) to introduce a category of protected convictions.
- 5 The 2015 Order (the Scottish scheme) however is different from the E&W scheme in a number of significant ways (see Annex A).
- 6 Criminal disclosure is an important consideration when determining an applicant's fitness to practise. We identified that a legal requirement to apply both schemes would present us with patient safety concerns and operational difficulties. The variations between the schemes would mean applying different standards to the level of disclosure required for an applicant to gain registration. Such a requirement would also add further complexity to the registration process as we would have to develop criteria and processes to determine which scheme applicants should self-disclose under.
- 7 In light of the issues involved we sought legal advice to clarify if there is a requirement on the GMC to take account of the specific criminal disclosure legislation in Scotland.

* We do not routinely require applicants to provide disclosure certificates from one of the UK's disclosure authorities (Disclosure & Barring Service, Disclosure Scotland, Access NI).

Legal advice

- 8 The legal advice clarifies that the Scottish scheme is applicable only in Scots law and that the regulation of health professionals is a matter reserved to Westminster under Head G2 of Schedule 5 to the Scotland Act 1998.
- 9 Counsel's view is that we should continue to apply the E&W scheme equally to all applicants seeking registration. The GMC is a UK wide regulator and determines questions of registration and fitness to practise on a UK wide basis. We do not administer a regime specific to Scotland and even in a case where an applicant was resident or working in Scotland or received convictions only in Scotland, the disclosure of such offences to the GMC would be made under the E&W scheme.
- 10 Officials from Disclosure Scotland also recognise our legislative basis and agree that the implementation of the Scottish scheme does not require any change in our approach to criminal disclosure at the point of registration.
- 11 Based on Counsel's advice we will update our criminal disclosure policy to make it clear that as a UK wide regulator with powers derived from Westminster we apply the E&W scheme equally to all applicants.
- 12 In considering the impact of this issue we have identified two areas of registration where the Scottish scheme is relevant: the information we provide to Scottish medical students will highlight that the GMC's criminal disclosure requirements are different from Scottish medical schools; and our guidance for advisers and Assistant Registrars will highlight that Disclosure Scotland certificates may not contain offences self-disclosed by an applicant following the guidance we provide on the E&W scheme.

Engagement

- 13 The legislation governing criminal disclosure has changed substantially since 2013 and we are aware that the E&W scheme is subject to a number of ongoing legal challenges. These may result in further changes to our current policy.
- 14 In addition to meeting with Disclosure Scotland we raised the potential impact of the Scottish scheme and wider issues presented by diverging criminal disclosure legislation across the UK with the Chief Executives of the other healthcare regulators.
- 15 As a result we have set up an informal network with representatives from all the regulators to share information and updates on this issue.
- 16 We will advise Disclosure Scotland and the other healthcare regulators on our continued application of the E&W scheme to all applicants.

12 – Criminal disclosure at the point of registration

12 – Annex A

Variations in criminal disclosure legislation

- 1** The GMC's current criminal disclosure policy at the point of registration complies with the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013 (the 2013 Order) (the E&W scheme).
- 2** This table below identifies the key differences between the E&W scheme and recent changes to criminal disclosure legislation in Scotland which included changes to the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2015 (the 2015 Order) (the Scottish Scheme).

Listing of offences	England & Wales scheme (2013 Order)	Scottish scheme (2015 Order)	Comment
Most serious offences	Always disclosed if on 'Listed offences'.	Always disclosed if on 'Offences which must always be disclosed' list.	No second 'Rules' list applies in the E&W scheme. Under E&W
All other offences	Always disclosed until within protected age/ time limits.	Only disclosed if on 'the Rules' list and not within protected age/ time limits.	scheme all spent offences have to be disclosed unless within protected age/ time limits. Offences not on either Scottish scheme list will not be disclosed.
Multiple offences			
	If convicted of a second offence then all convictions are disclosed.	A conviction is treated as if it is the only one. If multiple offences exist protected age/ time limits will be applied	This aspect of the E&W scheme is subject to challenge and may result in a change.
Protected Cautions			
Under 18	After 2 years	Not disclosed	Scottish Order applies only to convictions. Spent cautions in E, W & NI will not be disclosed.
Over 18	After 6 years	Not disclosed	
Protected convictions			
Under 18	Disclosed after 5.5 years	Disclosed after 7.5 years	Timeframes for disclosure of convictions under Scottish scheme are longer than E&W scheme.
Over 18	Disclosed after 11 years	Disclosed after 15 years	