

CRIMINAL JUSTICE AND LICENSING (SCOTLAND) ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 5 - Criminal Justice

Section 93 – Lists of jurors

459. This section makes amendments to sections 84 and 85 of the Criminal Procedure (Scotland) Act 1995. Subsection (2)(b) makes provision to allow jurors to be selected for service in criminal trials in the sheriff court not only from the sheriff court district in which a trial is being held, but also, at the discretion of the sheriff principal, from any other district or districts in that sheriffdom. The amendments in subsection (3) ensure that, once the list of jurors has been prepared, any jurors on the list who reside outside the sheriff court district where the trial is to be held are cited by the clerk for the district in which the trial is to take place.
460. This section also makes an amendment to the Criminal Procedure (Scotland) Act 1995 to allow the clerks of court to use lists of jurors for trials other than those for which they were originally required. This second change is achieved in subsection (2)(d) by the repeal of section 84(7) of the 1995 Act, which links lists of jurors with particular trials.

Section 94 - Upper age limit for jurors

461. This section provides that there shall be no upper age limit for jurors serving on criminal juries in Scotland.
462. This involves amendment to section 1 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 introducing a new subsection (1A) in respect of criminal proceedings. This amendment will allow individuals over 65 years of age to be cited for jury service on criminal trials in Scotland. The upper age limit for jurors serving on civil trials remains unchanged at 65 years of age.

Section 95 – Excusal from jury service

463. Some of those who may be listed for jury service may be entitled to excusal as of right. They fall into categories set out in the [Law Reform \(Miscellaneous Provisions\) \(Scotland\) Act 1980 \(c.55\)](#) in Schedule 1, Part III. This section makes changes to the 1980 Act to ensure that people who are listed for jury service who wish to apply for excusal as of right do so within 7 days of receiving the first notice that they may have to serve, unless they are 71 or over or serving military personnel.
464. The first step in the citation process is that the sheriff principal may require any person in one of his sheriff court districts who appears to be qualified for jury service to confirm their personal details in writing (under section 3(2) of the Jurors (Scotland) Act 1825). At the same time they are notified that they may be called for jury service, and they are asked to advise of any holiday dates and confirm whether they are ineligible for

or disqualified from service. The earliest opportunity to seek excusal as of right would be on receipt of this notice. Subsection (3) introduces a new section, section 1A, into the 1980 Act which requires someone who wishes to be excused from jury service as of right to apply for that excusal within 7 days of receiving this notice, unless they are over 71 or serving military personnel.

465. A new section 1A requires to be created as the 1980 Act applies both to civil and criminal juries, whereas this Act is concerned only with matters of criminal justice. Section 1A therefore refers to criminal proceedings only. Subsection (2) makes other amendments restricting the effect of section 1(2) and (3) of the 1980 Act, which sets out the circumstances where potential jurors can currently apply for excusal as of right, to civil proceedings only.
466. A requirement to apply for excusal as of right within 7 days of receipt of the revisal notice could be operationally difficult and hard to apply for people in the forces, particularly where they are serving in remote places. The requirement is therefore disapplied for people who are listed in Group C of Part III of Schedule 1 of the 1980 Act, who are currently full-time serving members of the armed forces, the Women's Royal Naval Service, Queen Alexandra's Royal Naval Nursing Service or any Voluntary Aid Detachment serving with the Royal Navy by the new section 1A(2) of the 1980 Act, which is inserted by subsection (3). Not only does the 7 day requirement not apply, but the individual concerned is also not required to apply for excusal personally: his or her commanding officer may do so where the officer considers it would be prejudicial to the efficiency of the force for that person to be absent from duty.
467. Similarly it may not be fair or practicable to enforce a requirement to apply for excusal as of right within 7 days for those who have attained the age of 71. This requirement is therefore disapplied in the case of those in the relevant paragraph of Group F of Part III of Schedule 1 to the 1980 Act (see Section 96 below), who are those who have attained the age of 71. Instead persons in this category have not yet been formally cited they may apply for excusal by written notice to the sheriff principal at any time. Where they have been formally cited they may apply for excusal by written notice to the clerk of court at any time up to the date on which that person is first cited to attend, or by attending at court in compliance with the citation and applying for excusal at that point. In any of these cases such persons shall be entitled to excusal as of right.
468. Since most categories of individuals entitled to be excused as of right are being required to seek excusal within 7 days of receipt of the revisal notice, the change in subsection (4) applies the offence of falsely claiming to be excusable as of right from jury service, which is contained in section 3(1)(a) of the 1980 Act, to that earlier stage of the citation process.

Section 96 - Persons excusable from jury service

469. This section makes two changes to paragraph (a) of Schedule 1, Part III, Group F of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980. The first concerns the period of entitlement to excusal from criminal jury service in Scotland. This section makes provision to reduce the exemption period from 5 to 2 years for individuals who attend court but who are not subsequently balloted to sit on a jury. Currently the system makes no distinction between those who attend at court as required but do not then get picked from the ballot to serve, and those who attend and are selected by ballot to form part of a jury in a case.
470. It is not the intention that this should be a retrospective change; rather it will apply from the commencement date of this section of the legislation. This subsection has no impact on the power that a judge has, for example following particularly long or difficult trials, to direct that jurors be excused from service for any period up to and including excusal for life.

471. The second change adds persons who have attained the age of 71 to the categories of people who are excusable as of right from jury service. Thus, although following the changes made by section 68 there is no upper age limit to serve as a juror in a criminal trial, if someone who is over 71 is notified that they may be called for jury service or they are cited, he or she does not have to serve but may claim excusal as of right. They may do so at any time up to the first day of the trial to which they are cited, by applying in writing, or by personal application at the trial itself, as provided for by section 95. A person aged 71 or over therefore, would only have to undertake jury service if he or she wished.
472. Those who have not reached the age of 71 would not be made excusable of right by this section, and the effect of the change in section 94 therefore is that those between 65 and 70 years of age who are called to perform jury service in criminal proceedings would have to serve from the commencement of this provision. The upper age limit for service as a juror in a civil trial of 65 years, and the respective provisions relating to excusal as of right, remain unchanged.

Section 97 - Data matching for detection of fraud etc.

473. **Section 73** of, and Schedule 7 to, the Serious Crime Act 2007 provided the national audit agencies in England, Wales and Northern Ireland with the power to match data, and provides statutory provision for an existing data-matching scheme known as the National Fraud Initiative. The National Fraud Initiative is a UK-wide data matching scheme conducted for the purpose of assisting in the prevention and detection of fraud.
474. **Section 97** of this Act amends the Public Finance and Accountability (Scotland) Act 2000 (“the 2000 Act”) to provide equivalent provisions enabling the National Fraud Initiative to be carried out in Scotland on a statutory basis. The main amendment consists of the insertion by section 97(3) of this Act of a new Part 2A (Data Matching) into the 2000 Act consisting of sections 26A to 26G.
475. **Section 26A(1)** provides for Audit Scotland to carry out data matching exercises or to arrange for another organisation to do this on its behalf. Subsection (2) defines what a data matching exercise is. It involves the comparison of sets of data, for example, the taking of two local authority payroll databases and matching them. Matching exercises may identify fraudulent activity as having taken place. Subsection (3) defines the purposes for which a data matching exercise can be exercised. These purposes are assisting in the prevention and detection of fraud, assisting in the prevention and detection of crime other than fraud, and assisting in the apprehension and prosecution of offenders. Subsection (4) provides that data matching may not be used to identify patterns and trends in an individual’s characteristics or behaviour which suggest nothing more than his potential to commit fraud in future. This is designed to prevent the Audit Scotland from creating individual “profiles” of future fraudsters.
476. **Section 26B(1)** provides that a person may disclose data to Audit Scotland for the purposes of a data matching exercise. This could include private sector bodies such as mortgage providers who wish to be part of the exercise. There is no compulsion on any of these bodies to take part in a data matching exercise. Subsection (2) provides that the disclosure of information does not breach (a) any duty of confidentiality owed by a person making the disclosure or (b) any other restriction on the disclosure of information, however imposed. Subsection (3) provides that nothing relating to voluntary provision of data authorises any disclosure which (a) contravenes the Data Protection Act 1998, or (b) is prohibited by Part 1 of the Regulation of Investigatory Powers Act 2000, or (c) allows the disclosure of data comprising or including patient data. Subsection (4) defines patient data as meaning data relating to an individual which is held for medical purposes and from which the individual can be identified. Subsection (5) defines medical purposes. Subsection (6) provides that this section does not limit the circumstances in which data may be disclosed apart from this section. Subsection (7)

provides that data matching exercises may include data disclosed by a person outside Scotland.

477. **Section 26C(1)** enables Audit Scotland to require the disclosure of information to conduct a data matching exercise. Subsection (2) sets out which persons may be required to disclose data under subsection (1). They are those bodies whose accounts are subject to audit by the Auditor General, or are sent to him for auditing, local authorities, Licensing Boards and their officers, office-holders or members. Subsection (5) creates an offence and accompanying penalty for non-compliance with this requirement.
478. **Section 26D** sets out the circumstances in which information relating to a data matching exercise, including the results of such an exercise, may be disclosed by or on behalf of Audit Scotland, and the persons and bodies to whom the data may be disclosed. Subsection (6) imposes special restrictions on the disclosure of information if it includes patient data (as defined in subsection (7)). Subsection (8) places restrictions on the further disclosure of information disclosed under subsection (2) and allows the further disclosure in certain specified circumstances. Subsection (9) creates an offence of disclosing information where the disclosure is made other than as authorised by subsections (2) and (8), and sets out the penalty.
479. **Section 26E(1)** makes clear that Audit Scotland will be able to publish a report on its data matching exercises notwithstanding the limitation on disclosure as is provided under section 26D. Subsection (2) provides that a report that is published under section 26E may not include information relating to a particular person if (a) the person is the subject of any data included in the data matching exercise; (b) the person can be identified from the information; and (c) the data is not otherwise in the public domain. Subsection (3) provides that Audit Scotland may publish a report in such a manner as it considers appropriate for bringing it to the attention of those members of the public who may be interested. Subsection (5) preserves the existing powers of an auditor to publish information under Part 2 of the 2000 Act or Part 7 of the Local Government (Scotland) Act 1973.
480. **Section 26F(1)** provides that Audit Scotland must prepare and keep under review a code of data matching practice. Subsection (2) sets out that all those involved in this process must have regard to the code of data matching practice. Subsection (3) requires Audit Scotland to consult all those bodies or office holders who must provide data, the Information Commissioner, and such other bodies as Audit Scotland thinks appropriate before preparing or altering the code of data matching. Subsection (4) places a duty on Audit Scotland to publish the code from time to time.
481. **Section 26G(1)** provides a power for the Scottish Ministers to add public bodies to those listed in new section 26C(2) by order. The Scottish Ministers may also, by that subsection, modify the application of Part 2A to any body so added, and may remove bodies from section 26C(2). Subsection (2) provides that any order made under section 26G can include any incidental, consequential, supplemental or transitional provision the Scottish Ministers think fit. Subsection (3) defines the meaning of public body. Subsection (4) provides that a public body, whose functions are both public and private in nature, is a public body only to the extent of its functions which are public in nature.
482. **Section 97(2)** amends section 11 of the 2000 Act to allow Audit Scotland to impose, by Statute, reasonable charges in respect of the exercise of its functions in connection with a data matching exercise, and for these charges to be imposed on those who supply data for a data matching exercise and/or those who receive the results of such an exercise.

Section 98 - Sharing information with anti-fraud organisations

483. The Serious Crime Act 2007 (“the 2007 Act”) allows public authorities (within the meaning of section 6 of the Human Rights Act 1998) throughout the UK to disclose

information as a member of a specified anti-fraud organisation for the purposes of preventing fraud or a particular kind of fraud.

484. Sections 68 to 72 of the 2007 Act provide the framework for the scheme. The information may be information of any kind, including personal and documentary information. Sections 68(5) and (6), 69(3) and 71(4) of the 2007 Act provide that the information sharing scheme, by which certain information may be shared for the purposes of preventing fraud, shall extend to reserved information but not to information the subject matter of which is devolved (“devolved information”) held by public authorities with devolved functions (“Scottish public authorities”). By repealing these sections of the 2007 Act (by virtue of section 98 of this Act), Scottish public authorities will be permitted to disclose devolved information, for the purposes of the prevention of fraud or a particular kind of fraud, to a specified anti-fraud organisation.
485. Section 68(5) and (6) of the 2007 Act, excludes Scottish public authorities from the information sharing scheme in respect of devolved information. Section 98 of this Act repeals sections 68(5) and (6) of the 2007 Act and as a result will allow Scottish public authorities to disclose and share such devolved information with anti-fraud organisations in the same way as public authorities may do in relation to reserved information.
486. Section 69(1) of the 2007 Act makes it an offence for a person to further disclose protected information which had been disclosed by a public authority member of an anti-fraud organisation or otherwise in accordance with any arrangements made by such an organisation. “Protected information” is any revenue and customs information disclosed by HM Revenue and Customs which reveals the identity of the person to whom the information relates, and specified information disclosed by other public authorities. Section 69(3) provides that this offence does not apply where the original disclosure was by a relevant public authority (i.e. an authority not covered by section 68) and related to devolved matters. As the power in section 68 is being extended to cover devolved information of Scottish public authorities, this exclusion can be removed and the offence in section 69(1) will apply to all protected information.
487. Section 71 of the 2007 Act provides that the Secretary of State must prepare, and keep under review, a code of practice with respect of the disclosure, for the purposes of preventing fraud or a particular type of fraud, of information by public authorities. Section 98 of this Act repeals section 71(4) of the 2007 Act so that the code of practice will apply for disclosures of devolved information made for the purposes of the prevention of fraud by Scottish public authorities. Section 71(4) of the 2007 Act provides that this does not apply in relation to disclosures, relating to devolved information, by Scottish public authorities. This section of the Act also repeals, in part, section 71(6) of the 2007 Act to remove the now redundant definition of “relevant public authority”.

Section 99 - Closure of premises associated with human exploitation etc.

488. This section makes amendments to the Antisocial Behaviour etc. (Scotland) Act 2004 and provides for the closure of premises associated with the commission of “exploitation offences” such as human trafficking and child sexual abuse. Subsection (1) inserts new subsections (3A) and (3B) into section 26 of the 2004 Act. The inserted subsections (3A) and (3B) set out the grounds on which a senior police officer may authorise the service of a closure notice in cases involving an exploitation offence.
489. Subsection (2) amends the provisions in section 27 of the 2004 Act to take account of the form and service of a closure notice in cases involving an exploitation offence.
490. Subsection (3) makes amendments to section 30 of the 2004 Act and inserts new subsections (2A) and (3A). The inserted subsection (2A) sets out the conditions that must be met before the sheriff can make a closure order in respect of premises associated with the commission of an exploitation offence. The inserted subsection (3A) provides

that, in determining whether or not to make a closure order, a sheriff shall have regard to any vulnerability of a victim of an exploitation offence.

491. Subsection (4) inserts new subsections (1A) and (3A) into section 32 of the 2004 Act. The inserted subsection (1A) enables a sheriff to extend the duration of a closure order for a period not exceeding the maximum period where it is necessary to prevent the commission of an exploitation offence. The inserted subsection (3A) sets out the conditions which must be satisfied before a senior police officer can make an application to extend the period for which a closure order has effect in cases involving an exploitation offence.
492. Subsection (5) amends section 33 of the 2004 Act in order to provide for the revocation of a closure order, following an application, in cases involving an exploitation offence.
493. Subsection (6) amends section 36 of the 2004 Act in order to provide for the making of appeals in respect of closure orders which have been given an extension in cases involving an exploitation offence.
494. Subsection (7) inserts a new section 40A into the 2004 Act and sets out the offences which may be considered as exploitation offences for the closure of premises under the 2004 Act.

Section 100 - Sexual offences prevention orders

495. **Section 100** makes a number of amendments to the provisions of the Sexual Offences Act 2003 (“the 2003 Act”) which relate to sexual offences prevention orders (SOPOs).
496. Subsections (1) and (2)(a) make provision concerning the criteria which currently exist in some cases before a person may become subject to the notification requirements under the 2003 Act, and before a SOPO can be made. Courts in Scotland can make a SOPO when dealing with an offender for an offence listed in Schedule 3 to the 2003 Act. For some offences listed in Schedule 3 there are conditions, which are based on the sentence or age of the persons involved in the offence, in place which currently limit the application of the scheme which provides for the making of a SOPO. Section 141 of the Criminal Justice and Immigration Act 2008 amended the 2003 Act for England and Wales and Northern Ireland to provide that these conditions do not restrict the making of a SOPO in cases where the conditions are not met. Section 100(1) and (2)(a) extends the application of the amendment made by section 141 of the 2008 Act so that it applies in Scotland.
497. Subsection (2)(b) corrects a minor error in section 109 of the 2003 Act. It ensures that section 107(2) will apply in applications for interim SOPOs. That section of the 2003 Act provides that prohibitions may be included in an order are those necessary for the purpose of protecting the public or any particular members of the public from serious sexual harm from the defendant, applies to interim SOPOs as well as full SOPOs.
498. Subsection (2)(c) inserts new section 111A into the Sexual Offences Act 2003. New subsections 111A(2)-(3) have effect of extending the permitted content of a SOPO, and an interim SOPO, so that the court can impose requirements as well as such other terms in the order, whether prohibitions, restrictions, or other terms, as it considers appropriate so as to protect the public by preventing, restricting or disrupting the involvement of the subject of the order in sexual crime.
499. Subsection (2)(d) amends section 112 of the Sexual Offences Act 2003 to provide that a SOPO may be made at the instance of the court or on the motion of the prosecutor.

Section 101 - Foreign travel orders

500. This section amends the provisions on foreign travel orders (“FTO”) in Part 2 of the Sexual Offences Act 2003 (“the 2003 Act”).

501. Subsections (2) and (3) amend sections 115 and 116 of the 2003 Act by increasing the age of a child from under 16 to under 18. The effect of subsection (2) is that a court can impose a FTO on a qualifying offender if that offender is considered to pose a risk to a child who is outside the United Kingdom who is aged under 18.
502. The effect of subsection (3) is that it alters the criteria determining which sex offenders are to be regarded as “qualifying offenders”. A qualifying offender is a sex offender against whom a court may impose a FTO, provided all the other criteria set out in sections 114 to 116 of the 2003 Act are met. The amendment means that those who have committed certain sexual offences against children under 18, rather than offences against children under 16 will be regarded as “qualifying offenders”.
503. Subsection (4) amends section 117 of the 2003 Act to increase the maximum duration of any FTO specified in section 117(2), from six months to five years. Therefore, a court has the discretion to impose a FTO on a qualifying offender for any period of time up to a maximum of five years.
504. Subsection (5) inserts a new section 117B into the 2003 Act to require offenders who are subject to a FTO imposed under section 117(2)(c), that prohibits them from travelling anywhere in the world, to surrender their passports at a police station in Scotland specified in the order. Such offenders must also surrender any new passports which they acquire throughout the duration of a FTO.
505. This new section also requires the police to return any passport as soon as reasonably practicable after the relevant FTO has ceased, unless that passport is a foreign passport or a passport issued by an international organisation and it has been returned by the police to the authorities outside the United Kingdom which issued the passport.
506. Subsection (6) amends section 122 of the 2003 Act to create new offences in Scots law of failing to comply with a requirement to surrender a passport in Scotland, by virtue of section 117B(2), and in England, Wales, and Northern Ireland by virtue of section 117A(2) of the 2003 Act. Section 117A of the 2003 Act was inserted by section 25 of the Policing and Crime Act 2009. Subsection (6) also makes clear that the sheriff court has jurisdiction to deal with those offences. This means a person who fails to surrender a passport in England, Wales and Northern Ireland can be prosecuted for this offence if that person comes to Scotland.

Section 102 – Sex offender notification requirements

507. **Section 102** amends provisions in Part 2 of the Sexual Offences Act 2003 (“the 2003 Act”) which concern the sex offender notification requirements. Subsection (2) gives the Scottish Ministers the power to bring forward regulations which set out how frequently an offender, who does not have a sole or main residence in the United Kingdom, must verify their details to the police. The Scottish Ministers cannot make regulations which allow this class of sex offenders to verify their information to the police at intervals which are less than once a year. Subsection (6) provides that the powers conferred on the Scottish Ministers to make an order or regulations under sections 83, 84, 85, 86, 87 or 130 of the 2003 Act can make different provision for different purposes and include supplementary, incidental, consequential, transitional, transitory or saving provisions. As a consequence, subsections (3) to (5) repeal sections 86(4), 87(6) and 96(4) of the 2003 Act.

Section 103 - Risk of sexual harm orders

508. **Section 103** amends provisions of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 which concern risk of sexual harm orders. The amendments are similar to those provided by section 100 of this Act for SOPOs and have the effect of extending the permitted content of a risk of sexual harm order so that the court can impose requirements on persons who are made subject to such orders.

Previously, like SOPOs, risk of sexual harm orders could only impose prohibitions on such persons.

Section 104 - Risk of sexual harm orders: spent convictions

509. This section inserts a new paragraph (bc) into section 7(2) of the Rehabilitation of Offenders Act 1974. It provides that nothing in section 4(1) of that Act is to affect the determination of any issue or prevent the admission or requirement of any evidence relating to a person's previous convictions or to circumstances ancillary thereto in any proceedings under sections 2, 4, 5 and in any appeal under section 6 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (proceedings in relation to Risk of Sexual Harm Orders).
510. This provision therefore allows evidence of previous convictions which are spent for the purposes of the Rehabilitation of Offenders Act 1974 to be led in proceedings for Risk of Sexual Harm Orders in Scotland.

Section 105 – Obtaining information from outwith United Kingdom

511. Prior to this section of the Act being commenced, the Scottish Criminal Cases Review Commission (SCCRC) cannot issue, or apply for, a letter to request assistance from outwith the United Kingdom because its investigations are not within the scope of the Crime (International Co-operation) Act 2003 (“the 2003 Act”).
512. **Section 105** of this Act creates a bespoke power for the SCCRC to apply to a judge of the High Court to request assistance in obtaining information from outwith the United Kingdom for the purposes of carrying out its functions.
513. Section 7 of the 2003 Act sets out the authorities which may make requests for assistance, and in which circumstances and form requests may be made. Section 8 of the 2003 Act deals with requests for assistance from the United Kingdom and sets out to which authorities requests may be sent. Section 9 of the 2003 Act sets out what may be done with the evidence obtained in relation to a request for assistance from abroad under section 7 of this Act.
514. **Section 105** of this Act inserts new section 194IA into the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”). Subsection (4) of inserted section 194IA applies section 8 of the 2003 Act to requests for assistance from abroad by the SCCRC in the same way as it applies to section 7 of the 2003 Act, so that, requests for assistance are sent to a foreign court or authority designated by government of that country, or Interpol or EuroJust in cases of urgency.
515. Subsection (5) of inserted section 194IA applies provisions of section 9 of the 2003 Act to requests for assistance from abroad by the SCCRC in the same way as they apply to section 7 of the 2003 Act. The effect is that information may not without the consent of the appropriate overseas authority be used for any purpose other than specified in the request and when information is no longer required for that purpose (or any other purpose for which consent has been obtained) it must be returned to the appropriate overseas authority, unless that authority indicates that it need not be returned.

Section 106 – Grant of authorisations for surveillance

516. This section amends the Regulation of Investigatory Powers (Scotland) Act 2000 (“the 2000 Act”) in relation to surveillance operations, including joint surveillance operations.
517. Subsection (2) amends section 10 (authorisations for intrusive surveillance) of the 2000 Act. Previously, the persons who may grant authorisations for the carrying out of intrusive surveillance were the chief constable of a police force and the Director General of the SCDEA. Section 10 is amended so as to include the Deputy Director General of the SCDEA as a person who may grant an authorisation for intrusive surveillance.

518. Subsection (3) inserts a new section 10A into the 2000 Act which makes provision about who may grant authorisations for the use of directed surveillance, Covert Human Intelligence Sources (“CHIS”) and intrusive surveillance in a joint surveillance operation. Subsection (8) inserts a definition of “joint surveillance operation” into section 31 of the 2000 Act; such an operation is one involving at least two police forces in Scotland working together, or at least one police force in Scotland and the Scottish Crime and Drug Enforcement Agency (“the SCDEA”) working together.
519. The new section 10A of the 2000 Act provides that the persons who are designated for the purpose of granting an authorisation for directed surveillance, CHIS and intrusive surveillance in a joint surveillance operation are the same people who are designated for the purposes of sections 6, 7 and 10 of the 2000 Act. In terms of an order made by the Scottish Ministers under section 8(1)¹ of that Act, to grant authorisations for directed surveillance and CHIS where the operation is not a joint surveillance operation: in relation to the SCDEA, that person is an officer of the rank of at least Superintendent or Grade PO7 Authorising Officer (Inspector in an urgent case); in relation to a police force that person is an officer of the rank of at least Superintendent (Inspector in an urgent case). The authorisation level for intrusive surveillance is a chief constable of a Scottish police force, the Director General of the SCDEA and, as is explained above, the Deputy Director of the SCDEA
520. Subsections (4) and (5) make consequential amendments as a result of the addition of the Deputy Director General of the SCDEA as a person who may grant authorisations for the carrying out of intrusive surveillance (including a joint surveillance operation). Subsection (4) amends section 11(3) of the 2000 Act so as to make it clear that the Deputy Director General of the SCDEA can only grant an authorisation for the carrying out of intrusive surveillance where the application is made by a police member of that Agency. Subsection (5) amends section 12A(1) of the 2000 Act so as to include the Deputy Director General of the SCDEA within the ambit of that section which deals with the grant of authorisations for intrusive surveillance in cases of urgency. Subsection (6) adds the rank of the Deputy Director General of the SCDEA to the definition in section 14 of the 2000 Act of the ‘most senior relevant person’ to whom a Surveillance Commissioner must make a report should he or she decide not to approve an intrusive surveillance authorisation. Subsection (7) amends section 16 of the 2000 Act to add the rank of Deputy Director General of the SCDEA to the list of ranks who may appeal to the Chief Surveillance Commissioner about a decision made by a Surveillance Commissioner.

Section 107 – Authorisations to interfere with property etc.

521. This section amends section 93 of the Police Act 1997 (“the 1997 Act”) so as to make equivalent amendments in relation to authorisations for interference with property as those which have been made by virtue of section 106 in relation to authorisations for surveillance.
522. Subsection (2)(a) inserts subsections (3B) to (3E) into section 93 of the 1997 Act. Subsections (3B) to (3C) make provision about authorisations to interfere with property where there is a joint operation. Subsection (3E) defines a “joint operation” in the same way as it is defined for the purposes of the 2000 Act.
523. These provisions when read together ensure that in the case of a joint operation, the chief constable of a Scottish police force involved in the operation may authorise the persons mentioned in subsection (3D) to take action under section 93(1) of the 1997 Act. The persons mentioned in subsection (3D) are constables of any of the police forces involved in the joint operation (including action which might be outwith the area of

¹ That Order is currently the [Regulation of Investigatory Powers \(Prescription of Offices, Ranks and Positions\)\(Scotland\) Order 2000 \(S.S.I. 2000/343\)](#) (as amended by the [Regulation of Investigatory Powers \(Prescription of Offices, Ranks and Positions\) \(Scotland\) Amendment Order 2009 \(S.S.I. 466/2006\)](#))

*These notes relate to the Criminal Justice and Licensing (Scotland) Act 2010 (asp 13)
which received Royal Assent on 6 August 2010*

- operation of the constable's own force) and if the SCDEA is involved in the operation, a police member of that Agency.
524. Similarly, where the SCDEA is involved in the joint operation, the Director General or the Deputy Director General of the SCDEA may authorise the persons mentioned in subsection (3D) to take action under section 93(1) to interfere with property.
525. As the 1997 Act extends to England and Wales also, subsection (3C)(a)(i) is designed to ensure that the amendments will only catch Scottish police forces.
526. Subsection (2)(b) amends subsection (5)(j) of section 93 of the 1997 Act so as to include the Deputy Director General of the SCDEA alongside the Director General as an "authorising officer" who may authorise interference with property. Subsection (2)(c) includes the rank of Deputy Director General of the SCDEA at section 93(6)(cc) of the Police Act. This is to define the area for which the Deputy Director General can approve authorisations for property interference.
527. Subsection (3)(c) inserts subsections (6) and (7) into section 94 (authorisation given in the absence of authorising officer) of the 1997 Act. These two new provisions read together make it clear that where the SCDEA is the lead Agency in a joint operation and the Director General or the Deputy Director General are not available then an application for an authorisation to interfere with property may be made to the chief constable of one of the forces involved in the joint operation.
528. Subsection (3)(a) and (b) make amendments consequential upon the insertion of new subsections (6) and (7) into section 94 of the 1997 Act.

Section 108 - Amendments of Part 5 of Police Act 1997

529. This section amends Part 5 of the [Police Act 1997 \(c.50\)](#) ("the 1997 Act"). The 1997 Act is the legislation under which criminal record certificates (basic, standard and enhanced disclosures) are issued for recruitment and other purposes. The day to day functions of the Scottish Ministers under Part 5 of the 1997 Act are carried out by Disclosure Scotland, an executive agency of the Scottish Government.
530. [Section 108](#) makes three amendments to the 1997 Act: the first makes provision for sex offender notification requirements to be included on enhanced criminal record certificates; the second provides an order making power to amend 5 definitions used in Part 5 of the 1997 Act; and the third clarifies the power to charge fees in connection with registration in the register of registered persons kept under section 120 of the 1997 Act.
531. [Section 108\(2\)](#) makes provision for the fact that a person is subject to notification requirements under Part 2 of the [Sexual Offences Act 2003 \(c.42\)](#) ("the 2003 Act") to be included on enhanced criminal record certificates (commonly referred to as "enhanced disclosure") issued under section 113B of the 1997 Act.
532. Section 112 of the 1997 Act makes provision as to criminal convictions certificates (commonly referred to as "basic disclosure"). Section 113A of the 1997 Act makes provision as to criminal record certificates (commonly referred to as "standard disclosures"). Section 78 of the Protection of Vulnerable Groups (Scotland) Act 2007 ("the 2007 Act") will, when commenced, amend sections 112 and 113A of the 1997 Act to make provision for notification requirements under Part 2 of the 2003 Act to be included in basic and standard disclosures.
533. Section 49 of the 2007 Act makes provision for notification requirements under Part 2 of the 2003 Act to be included in scheme record disclosures under the 2007 Act.
534. [Section 108\(2\)](#) brings provision for enhanced disclosure into line with that for basic, standard and scheme record disclosures, correcting an anomaly in the 1997 Act and reflecting the long-standing policy intention.

535. **Section 108(3)** inserts a new section 113BA into Part 5 of the 1997 Act that will enable Scottish Ministers, by order, to amend the definitions of the expressions: “criminal conviction certificate” (basic disclosure) in section 112(2); “central records” in sections 112(3) and 113A(6); “criminal record certificate” (standard disclosure) in section 113A(3); “relevant matter” in section 113A(6); and “enhanced criminal record certificate” (enhanced disclosure) in section 113B(3).
536. **Section 113BA(2)** restricts the use of the order making power. An order can only be made to enable certificates to include information held outside the United Kingdom, or in connection with enabling that to be done. Section 113BA(3) provides that any order will be a class 1 instrument, i.e. it cannot be made unless it has been laid in draft and approved by resolution of the Scottish Parliament.
537. It is intended that the order making power will be used to enable disclosure certificates to include relevant information from outside the United Kingdom (e.g. information relating to convictions for offences outside the United Kingdom) where that information is provided to the Scottish Ministers on the basis that it may be used for recruitment purposes.
538. The third amendment to the 1997 Act is at section 108(4) and the effect is to insert two new subsections into section 120ZB.
539. An application for either a standard or an enhanced disclosure certificate must be countersigned by a person whose name is listed in the register kept by Scottish Ministers under section 120 of the 1997 Act. Section 120ZB, inserted into the 1997 Act by section 81 of the Protection of Vulnerable Groups (Scotland) Act 2007, allows regulations to be made about this registration.
540. **Section 120ZB(2A)** clarifies the fee charging power in section 120ZB(2)(a). It provides that, in particular Ministers may charge fees in respect of applications to be listed in the register, this will allow fees for registration itself and for the nomination of counter-signatories. Different fees may be charged in different circumstances, annual or recurring fees may be charged and fees may be charged in advance or arrears.
541. It is intended that the power will be used to provide different fees for different situations. For example, a different charge is likely to be made for inclusion in the register as compared with an application from a registered person to have another counter-signatory added to act on behalf of them.
542. Lastly, section 120ZB(2B) will enable Ministers to disregard an application for inclusion in the register if the fee for that application is not paid.

Section 109 – Spent alternatives to prosecution: Rehabilitation of Offenders Act 1974

543. This section inserts two new sections (8B and 9B) and a new Schedule 3 into the Rehabilitation of Offenders Act 1974 (“the 1974 Act”). The 1974 Act provides protection to people who are convicted of a criminal offence and receive a prison sentence of 2.5 years or less. After a certain period of time, which varies according to the length of sentence passed, these convictions become “spent” and the offender is considered to be rehabilitated. The amendment will extend the protection under the 1974 Act to include individuals who have been given an alternative to prosecution (ATP) in respect of an offence in Scotland. It also provides protection to individuals who have been given anything corresponding to an ATP in respect of an offence under the law of a country or territory outside Scotland.

The new section 8B(1) of the 1974 Act defines an ATP for the purposes of these provisions. In Scotland a person has been given an ATP in respect of an offence in the following circumstances:

- they have been given a warning by a constable or a procurator fiscal;

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which received Royal Assent on 6 August 2010*

- they have accepted or are deemed to have accepted a conditional offer to pay a fixed penalty issued under section 302 of the 1995 Act or a compensation offer issued under section 302A of the 1995 Act, and this includes, by implication, acceptance or deemed acceptance of a combined fixed penalty and compensation offer which can be made under section 302B of the 1995 Act;
 - they have had a work order made against them under section 303ZA of the 1995 Act, which offers the individual the opportunity of undertaking unpaid work;
 - they have been given a fixed penalty notice under section 129 of the Antisocial Behaviour etc. (Scotland) Act 2004; or
 - they have accepted an offer from a procurator fiscal to undertake an activity or treatment or to receive services.
544. The definition of an ATP includes any disposal made in a jurisdiction outside Scotland which corresponds with one of the Scottish ATP's contained within this list.
545. The new section 9B of the 1974 Act is essentially replicating section 9 of the 1974 Act (unauthorised disclosure of spent convictions) but makes provision for the unauthorised disclosure of ATP's. Section 9 of the 1974 Act provides some protection for the rehabilitated offender and there are criminal sanctions where an individual discloses information outwith the course of their duties or improperly obtains information on spent convictions. Under the new section 9B, an individual found guilty of disclosing information which relates to a person being given an ATP which has become spent outwith the course of their official duties will be liable on summary conviction to a fine not exceeding level 4 on the standard scale. Where a person improperly obtains information which concerns a person being given an ATP in terms of subsection (8) they will be liable on summary conviction to a fine not exceeding level 5 on the standard scale, or to imprisonment for a term not exceeding 6 months, or to both.
546. The new section 9B(6) of the 1974 Act provides the Scottish Ministers the power to make an Order to except the disclosure of information on ATP's which originates from an official record in particular cases or classes of cases from the offence of unauthorised disclosure. There is a similar power in section 9(5) of the 1974 Act in relation to the unauthorised disclosure of spent convictions. This power will be subject to the affirmative procedure.
547. The new Schedule 3 to the 1974 Act essentially mirrors the provisions in sections 4, 5, 6 and 7 of the 1974 Act with appropriate modifications to apply them to ATP's. Paragraph 1 of the new Schedule 3 defines when an ATP becomes spent. Warnings issued by a procurator fiscal or a constable or a fixed penalty notice issued under section 129 of the Antisocial Behaviour etc. (Scotland) Act 2004 all become spent at the time they are given. All other ATP's will become spent after 3 months.
548. Sub-paragraphs (5) and (6) of paragraph 1 of the new Schedule 3 to the 1974 Act explain what will happen to the rehabilitation period if an individual is subsequently prosecuted and convicted of the offence for which the ATP was given. If a person is given an ATP (other than a fiscal or police warning) in respect of an offence and is then prosecuted and convicted of the offence, the rehabilitation period for the ATP will end at the same time as the rehabilitation period for the offence. Further to this, with the exception of fixed penalty notices issued under section 129 of the Antisocial Behaviour etc. (Scotland) Act 2004, if the conviction occurs after the end of the 3 month rehabilitation period, the ATP will be treated as not being spent until the rehabilitation period for the offence ends. This can arise, for example, where a person is subsequently prosecuted as they accepted an ATP, but then fail to adhere to its terms.
549. Paragraph 2 of the new Schedule 3 to the 1974 Act provides a definition of "ancillary circumstances" in relation to an ATP. Paragraph 3 sets out what protection is afforded to persons in relation to their spent ATP's and any ancillary circumstances in civil

proceedings. Paragraph 4 provides that if a person who has a spent ATP is asked a question seeking specific information other than during court proceedings that may lead to the disclosure of the ATP or any ancillary circumstances, they are not required to answer it. Under paragraph 5, any obligation imposed by a rule of law or provisions in an agreement or arrangement to disclose information does not extend to spent ATP's and ancillary circumstances, and a person cannot be dismissed or excluded from any office, profession, occupation or employment, or be prejudiced in any way as a result of having a spent ATP or for failing to disclose this information.

550. Paragraph 6(a) of the new Schedule 3 to the 1974 Act provides the Scottish Ministers the power to make an Order to exclude or modify the application of the provision in paragraph 4 (2) and (3) that a person is not required to acknowledge the existence of a spent ATP or ancillary circumstances when they are asked for information other than during court proceedings and must not be prejudiced for their failure to provide this information. This will mirror the order making power in section 4(4)(a) of the 1974 Act. Orders made under that provision have specified various offices and types of employment where the employer can ask questions about spent convictions. Paragraph 6(b) of the new Schedule 3 provides the Scottish Ministers the power to provide for exceptions to the provision in paragraph 5 that a person is not required to disclose a spent ATP or ancillary circumstances under a rule or law or agreement. Therefore where excepted in an order, the obligation imposed on a person will extend to requiring disclosure of an ATP. This will mirror the order making power in section 4(4)(b) of the 1974 Act.
551. Paragraph 8 of the new Schedule 3 to the 1974 Act provides for limitations on the effect of rehabilitation under the 1974 Act for an ATP in a similar way to section 7 of that Act for convictions, and sets out the circumstances where the protection under certain provisions of the 1974 Act will not apply. For example, previous convictions, spent or otherwise, must be disclosed in criminal proceedings. This paragraph also gives power to the Scottish Ministers, by the application of section 7(4) of the 1974 Act to Schedule 3, to exclude the application of paragraph 3 of that Schedule in relation to any specified proceedings, by order. This power will be subject to the affirmative procedure.

Section 110 – Medical services in prison

552. **Section 110** amends the Prisons (Scotland) Act 1989 and the Criminal Justice and Public Order Act 1994 so as to remove the duty on the Scottish Ministers to provide medical services in state run Scottish Prisons and the duty on the contractor to provide these services in contracted out prisons. As a result, the responsibility for providing medical services in all prisons falls to NHS Health Boards under general health legislation.
553. The intention is that subordinate legislation could be used, if considered necessary, to introduce specific provision required to ensure that primary health care services in prisons are equivalent to those available outside prisons. The relevant powers to introduce any such subordinate legislation are found in general health legislation with no further powers being created in section 110 of this Act for this purpose.
554. The amendments made by section 110 require the Scottish Ministers and directors of contracted-out prisons to designate one or more medical officers for each prison, and limits who can be designated as a medical officer. The amendments have the effect that medical officers will no longer be deemed to be prison officers. The other amendments made by section 110 ensure that medical officers designated under these new powers have much the same status within the prison as medical officers appointed under current powers do, for example in relation to searches and restrictions on the disclosure of information.

Section 111 - Assistance for victim support

555. This section allows the Scottish Ministers to make grants for the purposes of the provision of assistance to victims, witnesses or other persons affected by a criminal

offence. This extends the power to make grants under section 10 of the Social Work (Scotland) Act 1968, which permits grants to be made to national organisations or innovative projects, but which excludes grants to local authorities.

Section 112 - Public defence solicitors

556. This section amends section 28A of the Legal Aid (Scotland) Act 1986 ("the 1986 Act") to place the Public Defence Solicitors Office ("the PDSO") on a permanent footing. The PDSO was established in 1998 to provide criminal defence services from solicitors employed by the Scottish Legal Aid Board ('the Board') on a trial basis.
557. Section 28A of the 1986 Act currently provides for regulations to be made for the purpose of carrying out a feasibility study. It also provides for the laying of a report before Parliament by 31 December 2008. The report was laid on 23 December 2008 [SG/2008/259]. This section removes these provisions as the PDSO is to be permanent.
558. Regulations have been made under section 28A of the 1986 Act². These regulations make provision for the employment of solicitors by the Board to provide criminal legal assistance.

Section 113 - Compensation for miscarriages of justice

559. The Scottish Government operates two schemes for the payment of compensation as a result of a miscarriage of justice. The statutory scheme under section 133 of the Criminal Justice Act 1988 ("the 1988 Act") provides for compensation to be paid in certain circumstances. The decision as to whether compensation is payable is for Scottish Ministers but the amount of the award is quantified solely by an independent assessor. An ex gratia scheme covering other types of cases has also operated for a number of years with successful cases treated in the same way as statutory ones by the assessor.
560. Subsection (1)(a) inserts a new subsection (1A) into section 133 of the 1988 Act which gives Scottish Ministers an order-making power to specify further sets of circumstances in which compensation may be payable. This power will be used to replace the existing ex gratia scheme by placing it on a statutory footing with the existing statutory scheme. It is intended to correspond to the existing ex gratia criteria. The seriousness of the offence for which the individual was charged or detained, but not convicted, will be taken account of when assessing compensation (subsection (1)(c)). This is consistent with the way the assessor takes into account the seriousness of the offence when assessing compensation under the statutory scheme where the individual had been convicted.
561. Subsection (1)(b) inserts subsections (2AA) and (2AB), that impose a time limit of 3 years for applications to be made for compensation. It also allows a discretionary power for the Scottish Ministers to waive that time limit where it is in the interests of justice to do so, or where there are exceptional circumstances. The 3 year time limit is consistent with civil limitation periods for personal injury claims.
562. Subsection (1)(d) inserts subsection (4B), that requires the Independent Assessors have particular regard to any guidance issued by the Scottish Ministers. However, it is not intended for the guidance to impinge on the independence of the assessor when making a decision on the quantum of a claim but is designed to promote consistency in decision making.
563. Section 133(5) of the 1988 Act states that a conviction being "reversed" (one of the criteria for eligibility for compensation) shall be taken to mean as referring to a conviction being quashed in certain circumstances. Section 188 of the Criminal Procedure (Scotland) Act 1995 allows for a conviction and sentence or both to be set

² The Scottish Legal Aid Board (Employment of Solicitors to Provide Criminal Legal Assistance) Regulations 1998 (SI 1998/1938) as amended by the Scottish Legal Aid Board (Employment of Solicitors to Provide Criminal Legal Assistance) Amendment Regulations 2008 (SSI 2003/511)

aside by way of a minute from the prosecutor to the court without an appeal being heard but in such circumstances this would not entitle a successful appellant to seek compensation for a miscarriage of justice. Subsection (1)(e) amends section 133(5) of the 1988 Act to make appropriate changes to the 1988 Act to allow someone who has had their conviction set aside by way of section 188(1)(b) of the 1995 Act to be considered for compensation.

564. Subsection (1)(f) inserts new subsection (6A), which makes an amendment to the 1988 Act so that those persons who are subject to a probation order or discharged absolutely are eligible to seek compensation in accordance with the Act. The order-making power in this section is exercisable by statutory instrument subject to annulment in pursuance of a resolution of the Scottish Parliament.
565. Subsection (2) removes a redundant reference to the Criminal Injuries Compensation Board in Schedule 12 to the 1988 Act.

Section 114 - Financial reporting orders

566. The Serious Organised Crime and Police Act 2005 (“the 2005 Act”) introduced the use of Financial Reporting Orders (FRO). Those persons subject to an FRO are required to report their financial dealings over a specified period of time as directed by the court. In Scotland they can only be applied when someone is convicted of the common law offence of fraud or an offence specified in Schedule 4 to the Proceeds of Crime Act 2002.
567. [Section 114](#) amends section 77 of the 2005 Act by inserting a new subsection (4A). The inserted subsection (4A) sets out the two ways in which an FRO can be made. It makes it clear that either a prosecutor may apply to the court to make an FRO or the court may make such an order at its own instance.

Section 115 - Compensation orders

568. Under section 249 of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”), where a person is convicted of an offence, the court may make an order requiring him to pay compensation for any personal injury, loss or damage caused directly or indirectly, or alarm or distress caused directly, to the victim.
569. A court cannot make a compensation order in respect of loss suffered in consequence of the death of any person; or injury loss or damage due to an accident involving a motor vehicle on the road, except where the damage is treated as having arisen out of the theft of the car by the convicted person.
570. The maximum amount which may be awarded under a compensation order by a sheriff or stipendiary magistrate in summary proceedings is £10,000 (“the prescribed sum”). The maximum amount which can be awarded by a Justice of the Peace is an amount not exceeding level 4 on the standard scale (£2,500). In solemn proceedings there is no limit on the amount which may be awarded.
571. Subsection (1)(a)(i) amends section 249(1) of the 1995 Act. This allows courts to make compensation orders in relation to deaths or road accidents, subject to the following amendments.
572. Subsection (1)(a)(ii) amends section 249(1) to clarify that a compensation order must be paid in favour of the victim.
573. Subsection (1)(b) inserts a new subsection (1B) into section 249, which provides that compensation may be paid to a victim or a person who is liable for funeral expenses. A new subsection (1C) is also inserted, which defines a victim as either the person who has suffered injury, loss or damage, or a relative who has suffered a bereavement caused by an offence being committed. “Relative” has the same meaning as in Schedule 1 of the Damages (Scotland) Act 1976.

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which received Royal Assent on 6 August 2010*

574. Subsection (1)(c) inserts new subsections (3A), (3B) and (3C) into section 249. Subsection (3A) allows a compensation order to be made in cases where a road accident has been caused by an uninsured driver, provided no other type of compensation is payable. Subsection (3B) provides that where a compensation order is made following damage to a stolen vehicle or an accident with an uninsured driver, then that compensation may include some or all of the cost of the loss of preferential insurance rates. Subsection (3C) provides that a compensation order may be made in respect of loss suffered as a result of bereavement and funeral expenses in connection with a person's death, except where the death was as a result of a road accident.
575. Subsection (1)(d) amends subsection (4) of section 249. This provides that unless subsections (3) – (3C) allow a compensation order to be made, then compensation orders shall not be made in respect of loss relating to a death or, injury, loss or damage relating to a road accident.
576. In some exceptional cases, statute provides that summary courts may impose a maximum fine, the amount of which exceeds “the prescribed sum” (i.e. the statutory maximum) of £10,000 set out by section 225(8) of the 1995 Act. Subsection (1)(f) inserts a new subsection (8A) into section 249 of the 1995 Act. Section (8A) allows the sheriff, in cases where an exceptionally high fine may be imposed, to make a compensation order up to the same amount.
577. Subsection (2) amends section 251 of the 1995 Act. It repeals paragraph (a) of subsection (1) of section 251 and removes the power of the court to reduce or discharge the compensation order when the injury, loss or damage has been held in civil proceedings to be less than it was taken to be for the purposes of the compensation order. This removes any explicit link with civil proceedings.
578. Subsection (2)(b) inserts a new subsection (1A) into section 251 of the 1995 Act. Subsection (1A) allows the court to review the compensation order at any time before it has been fully complied with and gives the court the power to increase the order if materially new information about the means of the offender has become available or the offender's financial circumstances have improved.