

## EXECUTIVE NOTE

### THE POLICE ACT 1997 (CRIMINAL RECORDS) (REGISTRATION) (SCOTLAND) REGULATIONS 2010

SSI 2010/383

#### Powers under which Instrument is made

1. The Police Act 1997 (Criminal Records) (Registration) (Scotland) Regulations 2010 (“the Registration Regulations”) are made by the Scottish Ministers in exercise of powers conferred by sections 118(2A)(e), 119(7), 120ZB(1), (2)(a) to (e) and (h) to (j), (2A) and (3)(a), 120A(7), 124A(4), 125(5) and 126(1) of the Police Act 1997 (“the 1997 Act”).

#### Parliamentary procedure

2. This Scottish Statutory Instrument is a class 5 instrument subject to the negative resolution procedure at the Scottish Parliament.

#### Summary of policy proposals

##### The Police Act 1997

3. Under Part 5 of the Police Act 1997, the Scottish Ministers may carry out criminal record checks. There are currently three levels of checks: the criminal conviction certificate (basic disclosure); the criminal record certificate (standard disclosure); and the enhanced criminal record certificate (enhanced disclosure). Most enhanced checks are carried out for the purpose of assessing the suitability of a person for working with vulnerable groups. Around 700,000 people in Scotland work with vulnerable groups, either through their paid employment or as volunteers. Since April 2002, the Scottish Government and BT have worked in partnership as Disclosure Scotland to provide criminal record checks for Scotland. Since then, over 5 million applications have been made for basic, standard and enhanced disclosures. In the 2008/09 financial year<sup>1</sup>, 360,000 enhanced disclosures were processed for the purposes of working with vulnerable groups.

##### The Protection of Vulnerable Groups (Scotland) Act 2007

4. The Protection of Vulnerable Groups (Scotland) Act 2007 (“the 2007 Act”), when it is fully commenced, will provide for a new vetting and barring scheme. This means that the use of disclosure checks under the 1997 Act for work with children and protected adults will end. They will be replaced by new types of disclosure requests under the 2007 Act. For ease of reference, the Scottish Government is referring to this as the PVG Scheme.

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<sup>1</sup> This is the financial year on which the RIA is based. The figure for the 2009/10 financial year is 350,000 enhanced disclosures.

5. The PVG Scheme will be managed and delivered by Disclosure Scotland as an executive agency, which will also continue to deliver the other types of disclosure (which will still be available under the 1997 Act for checks which are not for the purposes of work with children or protected adults). For more information about how the PVG Scheme will work, see the guidance document<sup>2</sup> and training materials published on the Disclosure Scotland website which can be accessed through: [www.infoscotland.com/pvgscheme](http://www.infoscotland.com/pvgscheme)

## The Registration Regulations

### A. Provision relating to registration

#### *Powers in the Police Act 1997*

6. Sections 120, 120ZB, 120A and 124A of the 1997 Act make provision about registration. An application for either a standard or an enhanced disclosure certificate under the 1997 Act and some forms of disclosure request under the 2007 Act 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, which was inserted into the 1997 Act by section 81 of the 2007 Act, allows regulations to be made about this registration. Section 120ZB is itself amended by section 79(3) of the Criminal Justice and Licensing (Scotland) Act 2010 and the effect is to insert two new subsections into section 120ZB. The amendments clarified the fee charging power in section 120ZB. Section 120ZB now 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 countersignatories. Different fees may be charged in different circumstances, annual or recurring fees may be charged and fees may be charged in advance or arrears.

#### *Purpose of having a system of registration*

7. Disclosures issued by Disclosure Scotland may contain sensitive and personal information, including convictions, cautions and other relevant information. In order to protect the rights and privacy of individuals to whom this information relates, it is important that this information is handled appropriately by those organisations to whom it is released. That is an important reason for having a system of registration.
8. Disclosure Scotland manages the registration process. Individuals and the relevant personnel in organisations applying to be registered will be vetted by Disclosure Scotland and they must put in place robust procedures for handling disclosure records securely. There is a Code of Practice<sup>3</sup> and accompanying Explanatory Guide (available from the Disclosure Scotland website) which covers the handling of disclosure information and sets out in detail what registered persons need to do. Disclosure Scotland carries out audits of registered persons to check they are complying with the Code of Practice.

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<sup>2</sup> *Protecting Vulnerable Groups Scheme: Guidance for Individuals, Organisations and Personal Employers*, The Scottish Government, June 2010.

<sup>3</sup> Published by the Scottish Ministers under section 122 of the 1997 Act (a revised version to account for introduction of the PVG Scheme was laid at the Scottish Parliament on 4 November 2010).

### *Interaction with the PVG Scheme*

9. An organisation must be a registered person under the 1997 Act to receive two of the three types of disclosure record under the 2007 Act: the Scheme Record<sup>4</sup> or Scheme Record Update<sup>5</sup>. (This is Condition D in section 55 of the 2007 Act.) Therefore, organisations requiring access to Scheme Records and Scheme Record Updates must either:
  - (a.) register with Disclosure Scotland, which will enable them to countersign disclosure applications (under the 1997 Act) or make disclosure requests (under the 2007 Act); or
  - (b.) enrol with a registered person that can provide countersignatory services for them (known as an umbrella body).
10. Organisations that are already registered with Disclosure Scotland for the purposes of accessing enhanced disclosures do not need to re-register to access Scheme Records and Scheme Record Updates under the PVG Scheme. However, there are changes to the types of role and positions which are eligible for disclosure. For example, some work in child care positions under POCSA will not be regulated work with children. It may be that some organisations that accessed enhanced disclosure will not be entitled to Scheme Records.
11. Organisations that are not currently registered persons may need to register to access Scheme Records and Scheme Record Updates under the PVG Scheme. Such organisations have not previously required enhanced disclosure but now (intend to) have individuals doing regulated work for them. Their need to register may be because:
  - (a.) the organisation is new;
  - (b.) the organisation has changed what it does;
  - (c.) the introduction of the adults' list means that the organisation wants to request disclosures in respect of the adults' workforce for the first time; or
  - (d.) the definitions of regulated work with children and regulated work with adults capture (some of) their workers for the first time.
12. Alternatively, organisations can secure the services of an umbrella body to act as a registered person on its behalf. CRBS is the principal umbrella body for the voluntary sector.

### *Overview of the Registration Regulations*

13. It is an important part of the delivery of the PVG Scheme and the issuing of standard and enhanced disclosures under the 1997 Act that Scottish Ministers carry out certain checks prior to allowing sensitive information to be shared with a third party such as the subject of the application's employer. The Registration Regulations allow Disclosure Scotland to:
  - (a.) gather information about and check the background of persons applying to be registered persons, and of persons nominated by registered persons and

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<sup>4</sup> The Scheme Record (the term used in guidance) is the disclosure of the scheme record under section 52 of the 2007 Act.

<sup>5</sup> The Scheme Record Update (the term used in guidance) is the disclosure of the short scheme record under section 53 of the 2007 Act.

- prospective registered persons for the purpose of countersigning standard or enhanced applications under the 1997 Act or making declarations under the 2007 Act;
- (b.) hold information about registered persons and countersignatories;
  - (c.) refuse to include in the register people deemed unsuitable to be registered persons, and to specify a period which must elapse before they can reapply for inclusion in the register;
  - (d.) refuse to accept as a nominated individual a person who is not a suitable person in accordance with matters specified in the Registration Regulations;
  - (e.) cancel the registration of persons who become unsuitable, and the nomination of individuals who become unsuitable, and to specify a period which must elapse before they can reapply (or be renominated) for inclusion in the register; and
  - (f.) prescribes the fee to be charged for initial registration and nomination of countersignatories and, with effect from 1 April 2011, the requirement for an annual subscription, reflecting the number of countersignatories.
14. The Registration Regulations replace the existing Police Act 1997 (Criminal Records) (Registration) (Scotland) Regulations 2006 (SSI 2006/97), which are revoked at regulation 14. The Registration Regulations make provision in connection with the register maintained by the Scottish Ministers under Part 5 of the 1997 Act.

#### *The register*

15. Each organisation which is a registered person needs to have an individual who is Disclosure Scotland's primary point of contact within that organisation; that individual is sometimes known as the lead signatory. Other people in the organisation who can countersign disclosures are known as countersignatories. Regulation 3 sets out the information that Disclosure Scotland will include in the register in respect of the lead signatory and countersignatories.
16. When an individual is accepted as a countersignatory, they are issued with their registered person's ID code and their own personal ID number which they must include on each disclosure application they countersign. This ID number should not be used by anyone else or for any other purpose. The ID number is only valid where it is used in conjunction with the countersignatory's authorised signature. The registered person must keep Disclosure Scotland up to date with any changes to personal details of countersignatories in their organisation.

#### *Nomination of countersignatories*

17. Regulation 4 sets out the procedure to be followed and the information to be provided when a person is nominated as a countersignatory.

#### *Removal from the register of persons who are no longer likely to wish to countersign applications or make declarations in relation to disclosure requests*

18. Regulation 5 sets out the steps that the Scottish Ministers must go through to remove someone from the register if that person is no longer countersigning applications for standard or enhanced disclosures under the 1997 Act or making disclosure requests under the 2007 Act. It also allows the Scottish Ministers to remove a person's name

from the register if they are satisfied that the person is dead or is incapable of acting as a countersignatory for any other reason, e.g. through mental disorder.

#### *Refusal of inclusion in and removal from register – further provision*

19. Regulation 6 sets out the steps that the Scottish Minister have to go through to remove someone from the register because: the person is no longer suitable; the person has allowed disclosure information to become available to another person who is unsuitable; the person has failed to comply with the Code of Practice; or the person has failed to comply with the condition at regulation 11(1).
20. Suitability checks of the registered person and any other countersignatories are ongoing. If information comes to light that questions the suitability of an individual to remain a registered person or countersignatory, then that individual's right to registration or to countersign disclosure applications may be revoked.

#### *Prescribed bodies*

21. When an individual applies to be a registered person or countersignatory, the same police forces and law enforcement agencies are approached for other relevant information as would be the case had the individual applied for an enhanced disclosure<sup>6</sup>. Regulation 7 sets out those bodies to whom Scottish Ministers must pay an appropriate fee in respect of such information, supplementing provision at section 120A(3) and (4) of the 1997 Act which makes provision for the UK territorial police forces.

#### *Fees*

22. Regulations 8, 9 and 10 prescribe the fees to be charged for inclusion in the register. Until 31 March 2011, the cost of registering is a one-off charge of £150 and a further £10 for every countersignatory. From 1 April 2011, all new registered persons will pay an annual subscription for registration. There will be minimum annual charge of £75 for registration and that will cover the lead signatory and up to four countersignatories. Adding a new countersignatory during the course of the subscription year will cost £15 each, irrespective of how many existing countersignatories exist for the organisation. Removing a countersignatory or ending registration will not incur a fee. Where applicable, an additional fee of £15 will be payable annually in respect of the fifth and each subsequent countersignatory.
23. Existing registered persons will be migrated over to the new arrangements in a managed process, moving over to paying an annual subscription on the first anniversary of their registration on or after 1 April 2011.
24. The purpose of introducing an annual subscription for registration is to place a duty on organisations on an annual basis to confirm the registration of all of their countersignatories, which will allow Disclosure Scotland to maintain accurate records and so reduce the possibility of fraudulent disclosure requests from individuals who

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<sup>6</sup> See the definition of "relevant police force" in regulation 8 of the Police Act 1997 (Criminal Records) (Scotland) Regulations 2010 (SSI 2010/168).

are no longer employed in that capacity. Applying a small charge to the re-registration will provide an incentive to organisations to remove inactive countersignatories while the overall cost of re-registrations should, for most organisations, be small (89% of organisations currently registered with Disclosure Scotland have four or fewer countersignatories).

#### *Persons who re-apply for inclusion in the register*

25. Regulation 11 prescribes the time that must pass before a person can reapply for inclusion in the register. If the person has been removed under regulation 5, then 28 days must have elapsed before he or she can reapply or be re-nominated by a registered person. If, however, the person has been refused registration or removed from the register for one or more of the reasons covered by section 120A(1) or (2), or 122(4) of the 1997 Act, then the period that must elapse before they can reapply is 2 years.

#### *Conditions of registration*

26. Regulation 12 prescribes two conditions of registration. Firstly that a registered person which is a body corporate or unincorporate must always have a lead signatory listed in the register. If they do not, and the Scottish Ministers become aware of that fact, then their registration will be suspended and no further disclosure applications (under the 1997 Act or the 2007 Act) will be processed until a registered person is in place. The second condition is that the fees payable under the Regulations must be paid within 14 days of the Scottish Ministers requiring payment and failure to do so will result in the organisation's registration being suspended with the consequence that no further disclosure applications (under the 1997 Act or the 2007 Act) will be processed.

#### *B. Amendments to the Criminal Records Regulations (SSI 2010/168)*

27. The Police Act 1997 (Criminal Records) (Scotland) Regulations 2010 (SSI 2010/168) consolidate and replace the existing Police Act 1997 (Criminal Records) (Scotland) Regulations 2006 (SSI 2006/96)<sup>7</sup>, principally to reflect the end of the use of enhanced disclosure for work with children and adults at risk as they are replaced by new types of disclosure check under the 2007 Act. The Registration Regulations make two changes to SSI 2010/168 to put beyond doubt: the limits of the information which the Scottish Ministers may require from the General Register Office for Scotland; and the payment of fees to the Serious Organised Crime Agency.

#### *Evidence of identity: General Register Office for Scotland*

28. Section 118 of the 1997 Act requires individuals making disclosure or registration applications to satisfy the Scottish Ministers as to their identity. It is important that the Scottish Ministers have a range of options in place to verify the identity of individuals and sections 118(2) and 118(2A) can be used towards that end. Section

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<sup>7</sup> Amended five times since coming into force on 1 April 2006, by SSI 2006/521, SSI 2007/112, SSI 2008/6, SSI 2009/40 and SSI 2009/216.

118(2A) enables the Scottish Ministers to use information given to them by the personal data holders named in the section and to prescribe others.

29. Section 118(2A) lists four personal data holders from whom Ministers can gather information to verify a person's identity: the Identity and Passport Service; the Driver and Vehicle Licensing Agency; the Driver and Vehicle Licensing Agency Northern Ireland and Ministers of the Crown, in connection with the keeping of records of national insurance numbers. In addition, section 118(2A)(e) provides a power for Ministers to prescribe other personal data holders. Regulation 15 of SSI 2010/168 prescribes the General Register Office for Scotland ("GROS") for the first time.
30. Regulation 15(a) of SSI 2010/168 allows the Scottish Ministers to "obtain such information as [they think] is appropriate from data held [by GROS]". GROS have expressed concern that there may be a public perception that the Scottish Ministers might *require* closed census data.
31. The purpose of prescribing the General Register Office for Scotland is not to collect all the information that it holds about every disclosure applicant but to use their data in some cases where establishing the identify of an applicant is difficult. There has never been any intention to oblige the GROS to provide census information to Disclosure Scotland. Regulation 15 of SSI 2010/168 is concerned solely with the supply of information to Disclosure Scotland for the purpose of confirming a person's identity. Census information, on the other hand, is designed to provide statistical information about the whole population, and it is based on a self-completion questionnaire which is not subsequently checked to confirm the accuracy of the identity information it contains. It is, therefore, not useful for identity purposes.
32. Personal census information is released only after 100 years, because it has been collected under a promise of strict confidentiality. This has been reinforced by sections 38 and 58 of the Freedom of Information (Scotland) Act 2002 which exempts personal census information from disclosure until after a 100 year closure period. It is important that everybody completes a census questionnaire and the release of information could act as a deterrent. For this reason, the Census Act 1920 requires "lawful authority" for the release of census data. It is unlikely that regulation 15(a) of SSI 2010/168 provides such "lawful authority" but regulation 13(a) of the Registration Regulations puts this beyond all doubt by limiting the range of information which can be requested from GROS to records of births, marriages, deaths and adoptions.
33. Note that GROS is also prescribed in the Protection of Vulnerable Groups (Scotland) Act 2007 (Prescribed Personal Data Holders and Prescribed Place and Manner for the Taking of Fingerprints) Regulations 2010 (SSI 2010/192) for the purposes of the PVG Scheme. However, the same issue does not arise in SSI 2010/192 because there is no obligation imposed on GROS to provide the information requested by the Scottish Ministers.

*Fees payable: SOCA*

34. Regulation 16(2) of SSI 2010/168 makes provision for fees to be paid in respect of information in respect of convictions, cautions and other information for the purposes

of basic, standard or enhanced disclosure or registration to be a registered person from services police forces, the British Transport Police, the Civil Nuclear Constabulary, the Serious Organised Crime Agency (“SOCA”), the Scottish Crime and Drug Enforcement Agency and the Child Exploitation and Online Protection Centre (“CEOP”). Regulation 13(b) of the Registration Regulations amends regulation 16(2) of SSI 2010/168 to make clear that payment is made to SOCA (not the Board of SOCA) for information received from SOCA. Since CEOP is an affiliated unit with operational independence from the SOCA, payment would also be made to SOCA by Disclosure Scotland for information from CEOP.

## **Consultation**

35. A Scottish Government consultation "*Protection of Vulnerable Groups (Scotland) Act 2007 Scottish Vetting and Barring Scheme -Consultation on Policy Proposals for Secondary Legislation*" took place between 1 November 2007 and 12 February 2008. The purpose of the written consultation was to allow respondents to inform the detail of policy proposals for secondary legislation. It set out a number of options for each major issue as well as seeking general comments on the proposals. The Scottish Government received 199 responses to the consultation.
36. The consultation was supported by seven PVG consultation events in cities across Scotland attended by 875 people and nine events provided by the Central Registered Body in Scotland (CRBS) attended by 176 people from November 2007 through to January 2008. The CRBS events were not formal consultation events, but were supported by the Scottish Government and intended to complement the PVG consultation events. The CRBS events reached rural communities and delegates were primarily from the voluntary sector.
37. The analysis of the consultation was published in the "*Protection of Vulnerable Groups (Scotland) Act 2007, Scottish Vetting and Barring Scheme, Analysis of consultation on policy proposals for secondary legislation*" on 27 June 2008 and the Scottish Government's Response was published in the "*Scottish Government response to the analysis of consultation on policy proposals for secondary legislation*" on 6 October 2008.
38. In June 2009, the Scottish Government hosted a series of eight information events to bring organisations up to speed with implementation activities and provide an opportunity to consider and discuss aspects of the PVG Scheme. The events were attended by around 1300 people from organisations that are registered with Disclosure Scotland, have a regulatory role, or that represent groups and/or organisations that work with vulnerable groups. Although not part of a formal consultation exercise, the opportunity was taken to seek feedback on policy developments around regulated work and the structure of the guidance.
39. During consideration of the Protection of Vulnerable Groups (Scotland) Bill at the Scottish Parliament, the previous administration gave commitments to consult on a number of the more significant SSIs in draft. The current administration reaffirmed this commitment in the consultation paper published in November 2007. The more significant SSIs were published for consultation in draft from 10 November 2009 to 2



February 2010, including the regulations setting out the fees for the PVG Scheme<sup>8</sup>. Some 108 responses were received to the consultation, including comments desiring to know the revised fees for registration. The Scottish Government's response to the 2009 consultation was published in the "*Scottish Government response to the consultation on significant draft SSIs, RIA and guidance*".

### *Issues specific to the Registration Regulations*

40. Much of the provision in the Registration Regulations is a necessary continuation of provision in SSI 2006/97. In the 2007 consultation, the Scottish Government proposed setting a minimum number of countersigned applications which registered persons would be required to submit in order to remain on the register<sup>9</sup>. The purpose in doing this was to try to reduce the number of registered persons requiring very few disclosures each year. However, consultees were generally opposed to this proposal and the Scottish Government, having reconsidered the matter, decided instead to replace the registration fee with an annual subscription based on the number of countersignatories registered to that organisation. This would achieve the desired objective of having a register that was accurate and up-to-date. To do this, it was necessary to amend section 120ZB to allow for annual subscriptions and this was effected by section 79(3) of the Criminal Justice and Licensing (Scotland) Act 2010. The new fees for registration as part of an annual subscription were published in the Scottish Government's response to the 2009 consultation and regulations 8, 9 and 10 deliver these proposals.
41. The amendments to SSI 2010/168 have not been subject to public consultation. Neither provision has any policy impact. The provision in respect of GROS has been developed at the request of, and in consultation with, GROS. Provision in respect of payment to SOCA is a technical matter.

### **Financial effects and Regulatory Impact Assessment**

42. The *Protection of Vulnerable Groups (Scotland) Act 2007 - Secondary Legislation - Partial Regulatory Impact Assessment (RIA No. 2007/40)* was published on 15 November 2007 to accompany the consultation on secondary legislation. Although comments were invited, no specific comments were made in respect of the RIA. A revised draft RIA (RIA No. 2009/03) was published to accompany the significant draft SSIs published for consultation on 10 November 2009. Responses to the consultation exercise have been taken into account in finalising the RIA. The final RIA (also RIA No. 2009/03) can be found at: [www.scotland.gov.uk/pvglegislation](http://www.scotland.gov.uk/pvglegislation)

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<sup>8</sup> The Protection of Vulnerable Groups (Scotland) Act 2007 (Fees for Scheme Membership and Disclosure Requests) Regulations 2010 (SSI 2010/167).

<sup>9</sup> See section 2.5 of the 2007 consultation paper, changes to registration of registered persons.