EXPLANATORY MEMORANDUM TO

THE POLICE ACT 1997 (CRIMINAL RECORD CERTIFICATES: RELEVANT MATTERS) (AMENDMENT) (ENGLAND AND WALES) ORDER 2020.

2020 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument amends the definition of "relevant matter" as it has effect in England and Wales in section 113A of the Police Act 1997. A relevant matter is a matter which must be disclosed by the Disclosure and Barring Service in response to an application for a criminal record certificate or an enhanced criminal record certificate. This instrument removes youth cautions (which includes youth reprimands and warnings) and the multiple conviction rule from the scope of the definition. The multiple conviction rule provides that where a person has more than one conviction, all their convictions (regardless of their nature) will be disclosable on criminal record certificates.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 This entire instrument applies to England and Wales only.

3.3 The instrument does not have any minor or consequential effects outside England and Wales.

3.4 In the view of the Department, for the purposes of Standing Order No. 83P of the Standing Orders of the House of Commons relating to Public Business, the subject-matter of this entire instrument would be within the devolved legislative competence of the Northern Ireland Assembly if equivalent provision in relation to Northern Ireland were included in an Act of the Northern Ireland Assembly as a transferred matter and the Scottish Parliament if equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament.

3.5 The Department has reached this view because the Order applies to England and Wales only and relates to devolved matters in Scotland and Northern Ireland.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales.

4.2 The territorial application of this instrument is set out in Section 3 under "Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws).

5. European Convention on Human Rights

5.1 Victoria Atkins, Minister for Safeguarding has made the following statement regarding Human Rights:

"In my view the provisions of the Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) (England and Wales) Order 2020 are compatible with the Convention rights."

6. Legislative Context

6.1 Part V of the Police Act 1997 ("the 1997 Act") governs the disclosure of criminal record information by the Disclosure and Barring Service ("DBS") in England and Wales. Sections 113A and 113B of the 1997 Act identify the circumstances in which the DBS must issue a criminal record certificate ("CRC") and an enhanced criminal record certificate ("ECRC") respectively, recording a person's convictions and cautions, including spent convictions and cautions.

6.2 CRCs and ECRCs must include relevant matters recorded on the Police National Computer. Relevant matter is defined in section 113A(6) of the 1997 Act for the purposes of sections 113A and 113B so as to require the disclosure of (i) convictions and cautions for any of a list of more serious offences contained in section 113A(6D); (ii) convictions which resulted in a custodial sentence; (iii) current convictions and cautions; and (iv) all convictions where the person has more than one conviction (known as the 'multiple conviction rule').

6.3 Section 113A(7) of the 1997 Act, provides the Secretary of State with a power to amend by Order the definition of relevant matters falling to be disclosed. In response to the judgment in R (P, G and W) v Secretary of State for the Home Department & Secretary of State for Justice [2019] UKSC 3, this instrument amends the definition of relevant matter in two respects. It amends section 113A(6) so as to remove the 'multiple conviction rule' so that, where a person has more than one conviction, it will no longer result in the automatic disclosure of all of their convictions. It also amends sections 113A(6) and 113A(6E) so as to provide that cautions for a serious offence listed in s113A(6D) and current cautions will only fall to be disclosed where the person was aged 18 or over on the date it was given. The result of these amendments is that cautions (which includes warnings and reprimands) administered to young offenders will no longer be subject to automatic disclosure on CRCs and ECRCs.

6.4 A further instrument, the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2020 will make corresponding changes to the related statutory scheme governing the disclosure of criminal record information so that, subject to the terms of that scheme, a person will no longer be under an obligation to disclose such matters when asked about them.

7. Policy background

What is being done and why?

7.1 The criminal records disclosure regime provides information through DBS certificates to employers about an individual's criminal record to help them consider a person's suitability for certain roles, principally those working closely with children and vulnerable adults or roles requiring a high degree of public trust. Employers use the

information provided through a DBS certificate as part of their recruitment process when considering the suitability of applicants for eligible roles or work. The provision of this information supports effective safeguarding while balancing the aims of offender rehabilitation.

7.2 Disclosure rules set out in Part V of the Police Act 1997 determine what convictions and cautions, including spent convictions and cautions, are disclosed on certificates. The changes made by this instrument to the rules are being made to address the Supreme Court judgment in the case of *P and others*, that found two aspects of the regime - the multiple conviction rule and the disclosure of reprimands and warnings administered to young offenders - to be disproportionate and incompatible with Article 8 of the European Convention on Human Rights (the right to a private life).

7.3 In respect of reprimands and warnings, the Court regarded disclosure of these as a 'category error' because such disposals are designed to avoid any deleterious effect on a young person's subsequent life, and so their disclosure to a potential employer would be inconsistent with that purpose. In respect of the multiple conviction rule, the Court accepted the legitimate aim that a multiplicity of convictions may indicate a criminal propensity likely to be relevant to the suitability for a sensitive occupation. However, it considered that the rule as framed could not be regarded as a necessary and proportionate way of achieving that aim. The rules, as now amended, seek to appropriately achieve the aim of disclosing criminal records indicating a propensity to offend.

7.4 Accordingly, this instrument amends the disclosure rules to remove automatic disclosure of youth cautions, reprimands and warnings and the requirement to disclose all convictions if more than one conviction is recorded on central records (the multiple conviction rule). Reprimands and warnings were replaced in 2013 with youth cautions and so the change ensures that all such disposals administered to young offenders will be removed from automatic disclosure on criminal record certificates under the rules.

7.5 The changes will mean that some criminal record information that would have previously been disclosed on CRCs and ECRCs will no longer be automatically disclosed.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 This instrument does not create a need for consolidation.

10. Consultation outcome

Public consultation has not been conducted as amendments are in response to the findings of the Supreme Court. These amendments are to ensure that the disclosure of criminal records is compatible with Article 8 of the ECHR.

11. Guidance

11.1 The DBS issue guidance to employers and applicants on the disclosure process and rules and this will be updated to reflect the changes made by this instrument.

12. Impact

12.1 There is no impact, or no significant, impact on business, charities or voluntary bodies.

12.2 The impact on the public sector is limited to the DBS implementing the necessary operational change and changes to IT systems.

12.3 An Impact Assessment has not been prepared for this instrument as no significant impact on the private, voluntary or public sector is foreseen.

13. Regulating small business

13.1 The Order does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The regulation does not include a statutory review clause as there is no regulatory impact to business activity.

15. Contact

15.1 Caroline Antell at the Home Office Tel: 0207 035 5756 or email: Caroline.Antell@homeoffice.gov.uk can answer any queries regarding the instrument.

15.2 Shehla Husain, Deputy Director for Public Protection, at the Home Office can confirm that this Explanatory Memorandum meets the required standard.

15.3 Victoria Atkins, Minister for Safeguarding at the Home Office can confirm that this Explanatory Memorandum meets the required standard.