EXPLANATORY MEMORANDUM TO

THE POLICE ACT 1997 (CRIMINAL RECORD CERTIFICATES: RELEVANT MATTER) (AMENDMENT) (ENGLAND AND WALES) ORDER 2023

2023 No. 1153

1. Introduction

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

2. Purpose of the instrument

2.1 This SI amends the definition of 'relevant matter' in section 113A of the Police Act 1997, so that it includes unspent convictions and unspent cautions. 'Relevant matter', if recorded in police central records, must be disclosed on a standard or enhanced criminal record certificate issued by the Disclosure and Barring Service (DBS). The amendments made by this Instrument ensure that an unspent conviction or an unspent caution will always be disclosed on these types of DBS certificate.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales.

4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales.

5. European Convention on Human Rights

5.1 The 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 Matter) (Amendment) (England and Wales) Order 2023 are compatible with the Convention rights."

6. Legislative Context

6.1 The requirements for the information which must be disclosed on standard and enhanced DBS certificates is set out in provisions within Part V of the Police Act 1997, which sets out the legal framework for disclosure. Before 2013, this required that all convictions and cautions held on central records (ie the Police National Computer) had to be disclosed on DBS standard and enhanced certificates.

6.2 In 2013, the Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) (England and Wales) Order 2013, defined 'relevant matter', the latter being a matter which must be disclosed by the DBS in response to an application for a standard or enhanced DBS criminal record check. The 2013 amendments, in Section

113A of the Act, defined 'relevant matter' in relation to matters on central records, setting out 'filtering rules', ie whether they are current (within a given length of time since conviction/issue of caution), whether they are included on a list of serious violent and/or sexual offences, whether they received a custodial sentence, and/or whether the person had one or more conviction. This enabled the filtering of old and minor convictions and cautions, so that they became 'protected' and do not automatically appear on standard or enhanced criminal record certificates.

6.3 Further changes were made to the definition of 'relevant matter' in 2020, when the Police Act 1997 (Criminal Records Certificates: Relevant Matters) (Amendment) (England and Wales) Order 2020 amended the definition to remove the reference to 'more than one conviction' ('the multiple conviction rule') and to youth cautions. The effect of this and the corresponding Ministry of Justice SI, the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2020, was that youth cautions, reprimands and warnings were no longer subject to mandatory disclosure on standard or enhanced criminal record certificates. Also, where a person has more than one conviction, it removed the requirement for all of their convictions to be automatically disclosed on standard and enhanced certificates.

6.4 The legislation outlined above prescribe what is disclosed on standard and enhanced criminal record certificates. However, disclosure on basic DBS certificates is governed by different provisions, by the application of rehabilitation periods as outlined in the Rehabilitation of Offenders Act 1974 which determine whether a conviction or caution is spent or unspent; basic DBS certificates automatically disclose only unspent convictions and cautions. Basic DBS checks can be used for any purpose; however, Part V of the Police Act 1997 and the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 set out eligibility requirements for the higher-level standard and enhanced checks, reflecting the sensitivity of the role and types of work with children and vulnerable adults. The filtering rules within the Police Act 1997, section 113A, are applied to any conviction/caution information held on central records, so that all convictions and cautions, subject to those rules, can be automatically disclosed on the standard and enhanced checks used for the most sensitive roles.

6.5 This SI adds to the filtering rules within Section 113A of the Police Act 1997, so that all unspent convictions and cautions (subject to rehabilitation periods outlined in the Rehabilitation of Offenders Act 1974), held on central records, will be automatically disclosed on standard or enhanced DBS certificates, alongside other convictions and cautions which meet the filtering rules (ie current convictions/cautions, custodial sentence and/or specified offence). The Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 does not require amendment as it already stipulates the right for employers to ask about an individual's unspent convictions or cautions for the more sensitive roles.

7. Policy background

What is being done and why?

7.1 This SI will align the separate rules which determine what criminal record information is automatically disclosed on basic DBS checks on the one hand, and what is disclosed on the higher-level standard and enhanced DBS checks on the other, so that higher-level checks will never disclose less criminal record information than is disclosed on a basic DBS check.

7.2 Currently, the rules that determine what criminal record information is disclosed on basic DBS checks is based on rehabilitation periods laid out in the Rehabilitation of Offenders Act, stipulating that only unspent convictions and cautions are disclosed on this type of check, which can be used for any role or purpose. Different filtering rules determine what criminal record information is disclosed on the higher-level standard and enhanced DBS checks, which may be requested where an individual is seeking to work in roles that require a high level of public trust or involve working closely with children or vulnerable adults. These filtering rules do not currently include any reference to whether a conviction or caution is spent or unspent, but rather to it being 'current' (eg within last 11 years if an adult conviction), having had a custodial sentence, or for a serious violent or sexual offence. However, there are a few types of criminal record or disposal which can be unspent under the first set of rules for basic checks, whilst being 'protected' from disclosure under the filtering rules for standard and enhanced checks, which is not in line with the intent that higher-level checks should always include any disclosure made on the lower-level checks, as the former are required for the most sensitive roles. These types of records include youth conditional cautions (for three months before they become spent), repeat convictions affected by the drag-through rule[1], and relevant orders[2].

7.3 This SI will rectify this so that an unspent conviction or caution will always be disclosed on a standard or enhanced check, until it becomes spent. This is in line with the intended hierarchy of disclosure within the levels of DBS checks, which align to the levels of trust and vulnerability within the roles for which they can be used, eg standard checks for solicitors, enhanced checks for teachers, care workers and doctors.

8. European Union Withdrawal and Future Relationship

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 No consolidation is planned. The amendments made by this SI are not extensive, and therefore we consider that consolidation of Section 113A or the Act is not required.

10. Consultation outcome

10.1 There is no statutory requirement to consult on these changes. The Home Office is working with DBS to ensure that this change and the timing for this to come into effect, is widely understood by those it may affect.

[1] Under the Rehabilitation of Offenders Act 1974, eligible convictions or cautions become 'spent' after a specified period of time, known as the 'rehabilitation period'. Repeat offences will affect the rehabilitation period. Under the 'drag-through rule', if an individual is convicted of a further offence within the rehabilitation period of an earlier conviction, in most instances this will mean that neither conviction will become spent until the rehabilitation period with the latest date has ended.

[2] Relevant orders include conditional discharge orders, restraining orders, hospital orders, bind overs, referral orders, care orders and any order imposing a disqualification, disability, prohibition or other penalty. Relevant orders relevant to this submission are those with a time period of 'unlimited', 'indefinitely' or 'until further order', thus remaining unspent.

11. Guidance

11.1 Home Office guidance (DBS filtering guidance - GOV.UK (www.gov.uk)) will be updated to include the additional filtering rules, made by this SI.

12. Impact

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

12.2 There is no, or no significant, impact on the public sector.

12.3 A full Impact Assessment has not been prepared for this instrument because this SI will just ensure that the system of DBS checks will disclose information in line with applicants' and employers' expectations, across all types of criminal record or disposal, with low level of impact per business.

13. Regulating small business

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

14. Monitoring & review

14.1 The Home Office will continue to engage with DBS as these changes are implemented.

15. Contact

15.1 Alison Ryan at the Home Office, email: Alison.Ryan1@homeoffice.gov.uk can be contacted with any queries regarding the instrument.

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

15.3 Minister Dines, Parliamentary Under Secretary of State at the Home Office can confirm that this Explanatory Memorandum meets the required standard.