**EXPLANATORY MEMORANDUM TO**

**THE POLICE ACT 1997 (CRIMINAL RECORD CERTIFICATES: RELEVANT MATTERS) (AMENDMENT) (ENGLAND AND WALES) ORDER 2013**

**2013 No. 1200**

**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" in section 113A of the Police Act 1997. The definition of "relevant matter" sets out what needs to be disclosed by the Disclosure and Barring Service in response to an application for a criminal record certificate or an enhanced criminal record certificate under Part 5 of the Police Act 1997.

**3. Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 None

**4. Legislative Context**

4.1 This instrument is being made following a Court of Appeal judgment. In *R(T) v Chief Constable of Greater Manchester and Others* [2013] EWCA Civ 25, the Court held that the Police Act 1997 and the Rehabilitation of Offenders Act 1974 (Exceptions Order) 1975 are incompatible with Article 8 of the European Convention on Human Rights (ECHR) in that they provide for the disclosure to employers of all spent convictions and cautions on a blanket basis, as well as allowing them to ask about and take into account such convictions and cautions. The Court found that the regime is disproportionate because even historic and minor convictions and cautions (which may not be relevant to the position being applied for) must be disclosed and may be taken into account. This instrument introduces new rules for the disclosure of criminal record information which take into account factors including the type of offence committed, the disposal imposed and the person's age when then the disposal was imposed.

4.2 The Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013, which is laid at the same time as this Order, introduces provisions into the Exceptions Order so that some spent convictions and cautions, which would otherwise be covered by the Exceptions Order, do not have to be disclosed and cannot be taken into account in employment decisions. In addition, non-recordable service offences

are removed from the ambit of the Exceptions Order so that, once spent, they need not be disclosed and cannot be taken into account for any employment purposes regardless.

## 5. Territorial Extent and Application

5.1 This instrument applies to England and Wales. The Scottish Government and Northern Ireland Government, whilst not included in this instrument, are considering their response to the Court of Appeal's judgment in *R(T) v Chief Constable of Greater Manchester and Others* [2013] EWCA Civ 25 in order to decide what changes, if any, should be made within their territories and if so, in what terms.

## 6. European Convention on Human Rights

6.1 Lord Taylor of Holbeach, Lords Minister and Minister for Criminal Information 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 2013 are compatible with the Convention rights."

## 7. Policy background

What is being done and why

7.1 This Order amends the definition of "relevant matter" in section 113A of the Police Act 1997. As mentioned above, the definition of "relevant matter" sets out what is disclosed by the Disclosure and Barring Service in response to an application for a criminal record certificate or an enhanced criminal record certificate.

7.2 This Order remedies a declaration of incompatibility with Article 8 of the Convention in relation to what is disclosed on such certificates. As mentioned, that declaration was made by the Court of Appeal in the case of *R(T) v Chief Constable of Greater Manchester and Others* [2013] EWCA Civ 25. In that case, the Court of Appeal made a declaration under section 4 of the Human Rights Act 1998 to the effect that neither the disclosure provisions of the Police Act 1997 nor the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 are compatible with Article 8 of the European Convention on Human Rights. This was because these provisions impose a blanket statutory regime requiring disclosure (by the Disclosure and Barring Service under the Police Act 1997 and by individuals to employers under the 1975 Order) of all cautions held on the police national computer. The Court held that this was disproportionate and went beyond the legitimate aims of protecting employers and vulnerable individuals. Furthermore, the Court declared that the 1975 Order is ultra vires the enabling Act for this reason.

7.3 The Order sets the following rules for the disclosure of convictions in a criminal record certificate and an enhanced criminal record certificate as defined in Part 5 of the Police Act 1997:

- Convictions for serious sexual and violent offences will always be disclosed;
- Convictions which resulted in a custodial sentence will always be disclosed;
- In relation to all other convictions for persons aged 18 or over, convictions which fall within an 11 year period ending with the day on which the certificate is issued will be disclosed;
- In relation to all other convictions for person aged under 18, convictions which fall within a 5 year and 6 month period ending with the day on which the certificate is issued will be disclosed.

7.4 The caveat to the above is that persons with more than one conviction will have all their convictions disclosed.

7.5 In relation to cautions, the Order sets the following rules for disclosure in a criminal record certificate and an enhanced criminal record certificate:

- Cautions for serious sexual and violent offences will always be disclosed;
- In relation to all other cautions for persons aged 18 or over, cautions which fall within a 6 year period ending with the day on which the certificate is issued will be disclosed;
- In relation to all other cautions for person aged under 18, cautions which fall within a 2 year period ending with the day on which the certificate is issued will be disclosed.

Consolidation

7.6 This instrument does not amend another instrument.

## 8. Consultation outcome

8.1 The amendment being made is in response to a Court of Appeal judgment which requires the Government to take action. There has been consultation across Government Departments to ensure that the non-disclosure of certain cautions and convictions by the Disclosure and Barring Service does not undermine the ability to provide criminal record data that is reasonably required by those persons which use the Disclosure and Barring Service.

## 9. Guidance

9.1 Guidance on the effect of these Orders will be made available on Government websites and to stakeholders.

## 10. Impact

10.1 The impact on business, charities or voluntary bodies is negligible.

10.2 The impact on the public sector is a cost incurred in amending the Disclosure and Barring Service information technology software to operate the filtering process.

10.3 An Impact Assessment has not been prepared for this instrument because no impact on the private or voluntary sector is foreseen. The impact is on the public sector as described in paragraph 10.2 above.

## 11. Regulating small business

11.1 The legislation does not apply to small business.

## 12. Monitoring & review

12.1 The impact of these Orders will be kept under review.

## 13. Contact

Kevin Walsh at the Home Office on telephone number 0207 035 0875 or email: Kevin.walsh1@homeoffice.gsi.gov.uk can answer any queries regarding the instrument.