EXPLANATORY MEMORANDUM TO

THE POLICE ACT 1997 (CRIMINAL RECORDS) (AMENDMENT NO. 2) REGULATIONS 2012

2012 No. 2114

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 These Regulations provide that enhanced criminal record certificates will remain available for those activities and roles which will no longer be in the list of activities and roles which a person who is barred from working with vulnerable groups must not do. They also reduce the number of circumstances in relation to which the fact that somebody is barred will appear on their enhanced criminal record certificate. They also make some amendments to the list of purposes for which an enhanced criminal record certificate may be requested.

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

3.1 None.

4. Legislative Context

4.1 The Police Act 1997 permits individuals to apply for certificates detailing their criminal record. Criminal conviction certificates, which have not been commenced in England and Wales, largely contain details of convictions and conditional cautions which are unspent under the terms of the Rehabilitation of Offenders Act 1974. Criminal record certificates largely contain details of convictions, cautions, reprimands and final warnings, whether or not they are spent, and are available for those purposes set out in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 ('the Exceptions Order'). Enhanced criminal record certificates largely contain, in addition to the information contained on a criminal record certificate, information which a chief officer of police reasonably believes to be relevant to the purpose for which the certificate was requested and, in the opinion of that chief officer, ought to be included on the certificate. They are available for those purposes which are both set out in the Exceptions Order and prescribed in the Police Act 1997 (Criminal Records) Regulations 2002 (as amended) ('the 2002 Regulations').

4.2 The Safeguarding Vulnerable Groups Act 2006 ('SVGA') specifies a set of activities and work which comprise 'regulated activity', which a person who is barred from working with vulnerable groups must not do. Information that a person is on the list(s) of those barred, and some similar information,

must be included on an enhanced criminal record certificate if it is requested in connection with certain purposes, as prescribed in the Police Act 1997 (Criminal Records) (No 2) Regulations 2009 (as amended) ('the 2009 Regulations'). The Protection of Freedoms Act 2012 ('PoFA') reduces the scope of regulated activity.

4.3 Considering a person's suitability to engage in regulated activity relating to children, and the same in relation to adults, are two of the purposes prescribed in the 2002 Regulations. If the 2002 Regulations were not amended, the change to the definition of regulated activity would mean that those activities and work which will no longer be in regulated activity would no longer be eligible for enhanced criminal record certificates. The Government's policy is that those activities and work should remain eligible for enhanced certificates, and assurances were given to this effect during the debates on the Protection of Freedoms Bill: http://www.publications.parliament.uk/pa/cm201011/cmpublic/protection/110503/pm/110503s01.htm [column 548]. These Regulations preserve that eligibility by specifying that the definition of regulated activity, for the purposes of the 2002 Regulations, is that which precedes the commencement of the PoFA provisions which narrow the scope of regulated activity. The Government's policy is also that the information about whether or not a person is barred should be included on enhanced criminal record certificates only for the purposes of assessing somebody's suitability to work in (the new definition of) regulated activity and a few other circumstances, and this commitment was given during debates on the same Bill: http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm111011/debtext/111011-0002.htm [columns 233-4]. These Regulations therefore amend the 2009 Regulations so as to narrow the list of purposes in relation to which an enhanced certificate must contain that barring information.

4.4 These Regulations also remove three purposes from, and add one purpose to, the list of those purposes in relation to which an enhanced criminal record certificate may be requested. They also revoke a regulation whose enabling power is repealed by the PoFA.

4.5 These Regulations stand alongside the Rehabilitation of Offenders Act 1974 (Exceptions) (Amendment) (England and Wales) Order 2012 which, amongst other things, provides that those activities and work which will no longer be within regulated activity will remain eligible for criminal record certificates and, together with these Regulations, provides that they will remain eligible for enhanced criminal record certificates.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- What is being done and why

7.1 The Police Act 1997 provided a mechanism by which an individual could apply to see details of their criminal record, without having to approach a police force directly. The Criminal Records Bureau ('CRB') was established in 2002 as an executive agency of the Home Office, to operate that disclosure process. The Act provides for three types of check: criminal conviction certificates (commonly known as 'basic checks'), which have not yet been commenced in England and Wales; criminal record certificates (commonly known as 'standard checks'); and enhanced criminal record certificates (commonly known as 'enhanced checks'). Criminal record certificates largely contain all convictions, cautions, reprimands and final warnings, whether or not they are 'spent' under the terms of the Rehabilitation of Offenders Act 1974. They may be requested for those purposes set out in the Exceptions Order – for example, for the purposes of employment as a traffic warden or as a probation officer. An application must be countersigned by a person who is on the register maintained by the CRB for that purpose, such as a staff member of a local authority. Enhanced criminal record certificates contain all of the information which is available on a criminal record certificate, as well as information which a chief officer of police reasonably believes to be relevant to the purpose for which the certificate was requested and, in the opinion of that chief officer, ought to be included on it. This is sometimes known as local police information. Enhanced certificates are available for those purposes which are both set out in the Exceptions Order, and listed as a prescribed purpose in the 2002 Regulations – for example, obtaining or holding a gambling licence.

7.2 Two of the purposes in relation to which enhanced criminal record certificates may be requested are considering a person's suitability to work in regulated activity relating to children, or the same for regulated activity relating to adults. Regulated activity is a set of activities and work – for example, health care provided by, or under the direction or supervision of, a health care professional, or (in the case of work with children) most work in a school – which a person who is barred from working with vulnerable groups, under the terms of the SVGA, must not do. As part of the Government's policy to scale back the disclosure and barring arrangements to more proportionate levels, the PoFA scales back the scope of regulated activity. The Government's policy is that those activities and work which are being removed from regulated activity should remain eligible for enhanced criminal record certificates, to enable employers and voluntary organisations to have information which may inform their decisions about recruitment and employment. These Regulations give effect to that policy.

7.3 The Police Act 1997 requires that 'suitability information' must also be included on an enhanced criminal record certificate if the certificate is requested for one of the purposes set out in the 2009 Regulations. Following the changes made by the PoFA, suitability information will comprise

information that someone is barred, or that they are subject to one of the disqualification regimes which preceded the SVGA. The Government's policy is that such information should be available only in relation to regulated activity and a few exceptions, because barred list information is relevant largely to regulated activity.

7.4 These Regulations therefore remove eligibility for a certificate including suitability information relating to children for all purposes except those connected with regulated activity, adoptive parents and adult members of their household, prospective and actual foster parents and adult members of their household, those who wish to provide childcare (including adults who are living or who (in some cases) are or will be working on premises where that childcare is or will be provided), adults living in the household of a person who lives on the premises where that person provides regulated activity relating to children, the licensing of taxi and private hire vehicle drivers, and work in the CRB. They also remove eligibility for a certificate including suitability information relating to adults for all purposes except regulated activity, the licensing of taxi and private hire vehicle drivers and work in the CRB. (In this paragraph, 'adult' means a person aged 16 or over, except in the case of adult members of the household of a prospective or actual adoptive parent, where it means a person aged 18 or over.)

7.5 The Regulations also provide that those who are working in controlled activity will no longer be eligible for enhanced criminal record certificates only because they are in controlled activity (relating either to children or to adults). Controlled activity is a category of work ancillary to regulated activity, involving, for example, access to sensitive records, in relation to which employers have been required to check whether a person is barred before deciding whether to employ them. It is repealed by the PoFA. Eligibility for enhanced certificates is also removed for staff working in the Department for Education or in the Office for Standards in Education, Children's Services and Skills who have access to sensitive or personal information about vulnerable adults, although those who have access to information about children will remain eligible. The Regulations also provide eligibility for enhanced certificates for adult household members of individuals who are engaging in regulated activity relating to children and some other areas of work involving contact with children, where both individuals live on the premises where that work would normally take place.

- Consolidation

7.6 The Home Office does not consider it necessary to consolidate legislation at this time.

8. Consultation outcome

8.1 In the main, the changes in this instrument are consequential upon or form part of the changes announced in the Government's Remodelling Review of the Vetting and Barring Scheme, published in February 2011. That review involved consultation with a range of parties.

9. Guidance

9.1 Information on the changes in the PoFA to which the changes in this instrument relate is available on departmental websites and is being communicated proactively to interested parties, including in a series of road shows which were held around the UK in June and July 2012.

10. Impact

10.1 The impact on business, charities and voluntary bodies of the changes in the PoFA to which the changes in this instrument relate was set out in the impact assessment of Part 5 of the Protection of Freedoms Bill. The changes are deregulatory overall.

10.2 The changes in these Regulations will have some impact on the public sector, in that they make some changes to the information which the CRB will be required to provide, but, as the main effect is largely to retain existing eligibility for criminal record certificates, the impact will not be significant.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The impact assessment for Part 5 of the Protection of Freedoms Bill explored the impact on small firms of the changes to which the changes in this instrument relate. It found that there would be no disproportionate impact on small firms.

12. Monitoring & review

12.1 The scope of eligibility for criminal record certificates, and other aspects of the barring arrangements, will remain subject to internal review.

13. Contact

Stewart Baxter at the Home Office Tel: 020 7035 3265 or email: Stewart.Baxter2@homeoffice.gsi.gov.uk can answer any queries regarding the instrument.