EXPLANATORY MEMORANDUM TO

[The Police Act 1997 (Criminal Records) (Amendment No 2) Regulations (Northern Ireland) 2012]

SR 2012 No. 321

1. Introduction

1.1. This Explanatory Memorandum has been prepared by the Department of Justice ("the Department") to accompany the Statutory Rule (details above) which is laid before the Northern Ireland Assembly.

1.2. The Statutory Rule is made under sections 113B(9), 113BA(1) ,113BB(1), and 125(1) and (5) of the Police Act 1997("the 1997Act") as modified by sections 126A of that Act and is subject to the negative resolution procedure.

2. Purpose

2.1. These Regulations amend the Police Act 1997 (Criminal Records)(Disclosure) Regulations (Northern Ireland) 2008 ("the 2008 Regulations"). The Regulations in the first instance, amend Regulation 8 of the 2008 Regulations which defines "relevant police force". The main purpose of is to limit the occasions where details of an application for enhanced disclosure is given to the Police Service of Northern Ireland (PSNI) to those where PSNI appears to be holding relevant information, the applicant lives or has lived in the Republic of Ireland or the work with children takes place at the applicant's home address.

2.2. The second purpose of the Regulations is to amend the 2008 Regulations to take account of the changes to regulated and controlled activity as defined in Safeguarding Vulnerable Groups (NI) Order 2007 ("the SVG Order"), as a consequence of amendments in the Protection of Freedoms Act 2012 ("POFA 2012"). In particular these amendments provide eligibility to apply for enhanced criminal record checks for those persons within the new SVG Order definitions of regulated activity with children and adults, and also for those persons previously defined in regulated activity with children and adults as defined within the SVG Order who are no longer regarded as working in regulated activity as a consequence of amendments to the definition of regulated activity by the POFA 2012. The Regulations also propose to retain the ability to obtain enhanced criminal record checks for those previously in controlled activity as defined by the SVG Order even though this category of activity is abolished by POFA 2012. The Regulations also seek to remove the ability to obtain suitability information as defined in sections 113BA and113BB of Part V of the 1997 Act for enhanced criminal record checks for those who were previously in regulated and controlled activity.

2.3. Finally, the Regulations also seek to create an eligibilty for enhanced criminal record checks for those providing advocacy services for adults through a service created under any enactment or commissioned by a Health and Social Care body.

2.4. The Department discharges its functions under the 2008 Regulations through AccessNI.

3. Background

3.1. The definition of "relevant police force" in the 2008 Regulations requires AccessNI to send applications for enhanced criminal record checks to PSNI on the basis of Northern Ireland address information supplied by the applicant (address based searching). In turn PSNI search information available to them and determine in line with Section 113B (4) of the Police Act 1997 whether they have any information that might be relevant to the application and ought to be disclosed to AccessNI and on disclosure certificates.

3.2. AccessNI as part of its searching regime, currently checks the Northern Ireland criminal record (CRV), the Police National Computer (PNC) (which contains convictions, cautions and other information from GB) and the iPLX database. The iPLX database "flags" those individuals on which local police information is held. The Criminal Records Bureau (CRB) in England and Wales undertook detailed research into whether significantly more information is found by address-based searching than would have been found by solely relying on searches of PNC and iPLX. They found this was not the case. Given this evidence and having conducted its own research, AccessNI take the view there is minimal risk to safeguarding by amending the current legislative requirement which requires AccessNI to send all applications with a Northern Ireland address in the address history section of the application form, to PSNI.

3.3. The amendment to Regulation 8 of the 2008 Regulations means that AccessNI would now only refer applications to PSNI where it considered information about an individual is held on CRV, PNC (for example pending prosecutions) or where it is evident that PSNI had further information about the individual (i.e., they have been "flagged" on iPLX). AccessNI will also refer applications to PSNI where the applicant lives or has recently lived in the Republic of Ireland. This enables PSNI using exisitng cross border policing arrangements to ascertain whether an Garda Siochana have any relevant information about the applicant that might be relevant and ought to be disclosed under Section 113B(4) of Part V of the 1997 Act. Finally AccessNI will refer applications to PSNI where the applicant proposes to work with children at their home address. This enables PSNI to consider whether there is information that might be relevant and ought to be disclosed under Section 113B(4) of Part V of the 1997 Act appropriate to the address, rather than the applicant (for example someone living or regularly visting that address who may pose a danger to the children there).

3.4. In all other cases, AccessNI will determine that no information is available and issue the certificate without further checks.

3.5. The outcome of this change will be that there will be reduced turnaround times for approximately 60% of applications and there will be an annual police cost saving of approximately £100,000.

3.6. The 2008 Regulations provide eligibility for enhanced criminal record checks for those working in regulated activity and controlled activity as defined by the SVG Order. A Government review of the previous Vetting and Barring Scheme, which extended to Northern Ireland and published in February 2011, concluded that the definition of regulated activity was too widely drawn and that the concept of controlled activity should be abolished. These recommendations have been implemented through POFA 2012.

3.7. Effectively, regulated activity will apply to a reduced number of individuals working with children and adults. It is proposed that the new definitions of regulated activity will be commenced on 10 September 2012. Those within the new definition of regulated activity will be required to apply for and obtian an enhanced criminal record check. However, it is recognised that a significant number of individuals (45% of current applicants) who were previously in regulated activity will no longer be regarded as working in regulated activity under the new definition. In turn they would no longer be able to be eligible to apply for an enhanced criminal record check. This would provide an unacceptable safeguarding risk and so these Regulations provide eligibility (though there is no requirement), for those within the previous definition of regulated activity with children and vulnerable adults to apply for an enhanced criminal records check. This would reduce the safeguarding risk

3.8. The definition of controlled activity as it was previously set out in the SVG Order is abolished by POFA 2012. This would remove the eligibility of those working in such activities from obtaining an enhanced criminal record check This too would be detrimental to the safeguarding regime. The Regulations therefore provide eligibility to apply for enhanced criminal record checks to those working within the previous definition of controlled activity.

3.9. The POFA 2012 amendments to the SVG Order provide that only those working within the new definition of regulated activity can be barred from such activity by the Independent Safeguarding Authority. The Independent Barring Board was established by section 1 of the Safeguarding Vulnerable Groups Act 2006 and was re-named as the Independent Safeguarding Authority in the SVG Order by section 81(3)(o)of the Policing and Crime Act 2009. The Independent Safeguarding Authority will be replaced by a new body known as the Disclosure and Barring Service when section 87 of, and Schedule 8 to, the 2012 Act come into operation. An enhanced criminal record check will set out whether an individual is barred from working with children, adults or both. This is known as suitability information and provision to supply this on enhanced criminal record checks is contained within sections 113BA and 113BB of Part V of the 1997 Act. Given the change to regulated activity set out in POFA 2012 to the SVG Order, eligibility for suitability information on an enhanced criminal record check must now be restricted to those applying for positions that fall within the new definition of regulated activity. Therefore the Regulations remove the ability to obtain suitability information for those applying for enhanced criminal record checks under the previous definitions of regulated and controlled activity.

3.10. The Regulations also remove the eligibility to apply for enhanced criminal record checks for those who were working on a regular basis with children and vulnerable adults, but not sufficiently frequently or intensively to be regarded as being in regulated activity (for example a Sunday School teacher on a rota which required them to only look after children once every three weeks). Such individuals are now regarded as posing a lower threshold of risk to children and vulnerable adults. It is expected that employers will safeguard children and vulnerable adults in these positions through appropriate policies and procedures that do not include a criminal records check.

3.11. At present in England and Wales, those providing representative services or advocacy services for vulnerable adults, where a statutory duty to provide such services exists or a statutory body commissions such services, are eligible for an enhanced criminal record check. They are not eligible for such a check in Northern Ireland. These services are not regarded as regulated activity under the new definitions set out in the POFA 2012. This amendment will allow people to apply for an enhanced criminal record check if they are providing representative or advocacy services to adults that have a substantial learning or physical disability, a physical or mental illness or mental disorder, chronic or otherwise, including an addiction to alcohol or drugs, ora significant reduction in physical or mental capacity. This will enhance the safeguarding of some of the most vulnerable in our society and provide reassurance to their families and close relatives and to those commissioning such services. The check will also provide suitability information.

4. Consultation

4.1. The following sets out the position with regard to consultation in each area of the Regulations

4.2. AccessNI did not specifically consult about proposals to limit the referral of cases to PSNI involving applicants with Northern Ireland addresses to those where it is believed additional information is available. This is primarily an internal processing issue and AccessNI has established there is minimal risk to safeguarding. The outcome will be quicker disclosures to customers. AccessNI customers will be informed about the change before implementation.

4.3. AccessNI did not consult about the changes to eligibility for enhanced criminal record checks. The changes are being made solely as a consequence of changes within POFA 2012. The Department of Health, Social Services and Public Safety secured the appropriate legislative consent motions in the Northern Ireland Assembly to enable the changes in POFA 2012 to apply to Northern Ireland.

5. Equality Impact

5.1. Consideration has been given to compliance with section 75 of the Northern Ireland Act. An assessment was conducted before AccessNI commenced operations which indicated there was no differential impact on any of the section 75 groups. As this change to legislation does not make

any material difference to the system of issuing disclosure certificates the initial assessment remains appropriate

6. Regulatory Impact

6.1. These changes will have minor Regulatory Impact. Currently those working in regulated activity and controlled activity are required to obtain an enhanced criminal record check. The proposed change means that only those working within the new definitions of regulated activity with children and adults will be required to obtain an enhanced criminal record check, though those previously within the previous definitions of regulated activity and controlled activity may obtain an enhanced criminal record check. It is expected that around 45% of those currently required to obtain an enhanced criminal check will have this obligation removed, but replaced with the ability to apply for and obtain an enhanced criminal record check.

6.2. While it is not anticipated there will be a reduction in the number of applications for enhanced criminal records check as employers value the information on such certificates (90% of those responding to the AccessNI 2012 customer survey), a requirement will be removed for a number of employers and voluntary organisations in respect of certain employees.

7. Financial Implications

7.1. There will be a reduction in PSNI costs in assessing applications. This is estimated to be approximately £100,000 per annum. The PSNI workload is expected to diminish in that 60% of current applications will no longer be referred to PSNI. However the remaining 40% of applications that will be sent are more likely to have information that might be relevant and ought to be disclosed under Section 113B of Part V of the 1997 Act. Therefore the reduction in PSNI costs is expected to be limited to around 30-40% of current costs.

7.2. There is an initial cost to AccessNI of approximately £30,000 to amend the current system of referral of cases to PSNI. This will be offset by the savings in police costs.

8. Section 24 of the Northern Ireland Act 1998

8.1. The Department has considered its obligations under section 24 of the Northern Ireland Act 1998 and is satisfied that these Regulations are not incompatible with Convention rights, nor are they incompatible with Community law, do not discriminate against a person or class of person on the grounds of religious belief or political opinion, and do not modify an enactment in breach of section 7 of the Northern Ireland Act 1998.

9. EU Implications

9.1. There are no EU implications.

10. Parity or Replicatory Measure

10.1. Similar legislation to enable those previously regarded as in regulated and controlled activity to continue to apply for and obtain enhanced criminal record checks will be taken forward at the same time in England and

Wales. Only those in the new definition of regulated activity may obtain suitability information.

10.2. In all other parts of the UK (ie CRB and Disclosure Scotland), legislation has been enacted which limits the numbers of applications sent to police forces in a similar way to that proposed by AccessNI.

11. Additional Information

11.1. Not applicable