EXPLANATORY MEMORANDUM TO

THE POLICE ACT 1997 (CRIMINAL RECORDS) (AMENDMENT) REGULATIONS 2010

2010 No. 817

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

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This instrument, made under Part V of the Police Act 1997 ("the Police Act"), amends the purposes for which an enhanced criminal record certificate can be applied for under section 113B of the Police Act and also prescribes the cases in which people making an application for an enhanced criminal record certificate may receive suitability information in respect of children and/or vulnerable adults under sections 113BA and 113BB of the Police Act.

2.2 The amendments reflect new categories of eligibility for enhanced criminal record certificates which are being added to the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 ("the Exceptions Order").

2.3 The amendments are also being made in support of regulations currently before Parliament made under the Safeguarding Vulnerable Groups Act 2006 ("SVGA") which specify the circumstances in which employers ("responsible persons") may permit individuals to undertake work in England and Wales which is a controlled activity as defined in sections 21 and 22 of the SVGA.

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

3.1 These Regulations come into force on 1st April 2010, in breach of the convention that negative resolution instruments should be laid at least 21 days before the coming into force date in order to enable sufficient time for Parliamentary scrutiny.

3.2 As explained above, these Regulations are being made in support of affirmative resolution regulations made under the SVGA. The SVGA regulations (along with the amendments to the Exceptions Order) were debated in the House of Commons on 15th March 2010. It was only on 15th March 2010 that it was confirmed that the affirmative resolution regulations had been allocated a debate slot in the House of Lords on 23rd March 2010. Therefore the doubt over whether the affirmative resolution regulations would be able to come into force on 1st April 2010 was not resolved in time for these Regulations to be laid for 21 days before 1st April 2010. On balance it was considered preferable to delay the making of these Regulations until that doubt was resolved, rather than to make them and risk the possibility that they would have to be revoked.

3.3. The date on which the Vetting and Barring Scheme (VBS) will begin to regulate those in a controlled activity has always been publicised as being 1st April 2010, both in terms of VBS publicity and also in response to questions asked in Parliament (e.g. during the House of Commons debate on 15th March 2010).

3.4 The SVGA regulations oblige an employer to obtain an enhanced criminal record certificate or notification in respect of those seeking to work in a controlled activity from 1st April 2010. The Police Act 1997 (Criminal Record) (Amendment) Regulations 2010 need to come into force on 1st April 2010 in order to enable those employers to sign an accurate declaration under section 113B of the Police Act, namely that the application is required for "a prescribed purpose".

.

4. Legislative Context

4.1 Part V of the Police Act provides for the issuing of criminal conviction, criminal record and enhanced criminal record certificates. A criminal record certificate contains details of all of an individual's convictions, cautions, reprimands and warnings, irrespective of whether those convictions are spent under the Rehabilitation of Offenders Act 1974 ("ROA"). An enhanced criminal record certificate also contains non conviction information provided by the police. The link between the Exceptions Order and the Police Act is established under sections 113A and 113B of the Police Act. Section 113A provides that an application for a criminal record certificate must be accompanied by a statement that the 'certificate is required for the purposes of an exempted question'; in other words, for a purpose that falls within the Exceptions Order. Section 113B, which provides for enhanced criminal record certificates states that the registered person must make a statement that the certificate is required for the purposes of an 'exempted question asked for a prescribed purpose'.

4.2 These Regulations amend the Police Act 1997 (Criminal Records) Regulations 2002 (SI 2002/233) by amending the list of 'prescribed purposes' for which an enhanced criminal record certificate may be obtained.

4.3 These Regulations also prescribe further cases in which people making an application for an enhanced criminal record certificate may receive suitability information in respect of children (under section 113BA of the Police Act) or vulnerable adults (under section 113BB of the Police Act).

5. Territorial Extent and Application

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

7.1 The objective of Part V of the Police Act, under which the Criminal Records Bureau ("CRB") operates, was to widen access to criminal record checks to the private, public and voluntary sectors. The CRB provides an effective means through which employers, voluntary organisations and others can obtain details of an individual's criminal history and other information as part of their recruitment process.

7.2 The CRB (acting on behalf of the Secretary of State), currently issues two levels of Disclosure: criminal record certificates and enhanced criminal record certificates. Under the new Vetting and Barring Scheme, eligibility for Enhanced Disclosures has changed. The primary reason is because, under the new scheme, all those who are engaging in a "regulated activity" are eligible for an Enhanced Disclosure. Regulated activity, defined in Schedule 4 to the SVGA, includes positions which involve frequent and intense contact with children and/or vulnerable adults. This is to be contrasted with controlled activity which includes positions, not being a regulated activity, which allows the opportunity for contact with children and/or vulnerable adults or access to sensitive records on children and/or vulnerable adults.

7.3 The VBS will be the first centralised system for all those working with children and vulnerable adults. It responds to recommendations to improve safeguarding made in the Bichard report on the Soham murders. It replaced List 99 which barred unsuitable people from working in education, the Protection of Children Act list which barred unsuitable people from working with children (known as POCA) and the Protection of Vulnerable Adults list which barred unsuitable people from working in care positions with vulnerable adults (known as POVA). These three barred lists have been replaced by a children's barred list and an adults' barred list, for England and Wales, maintained by the Independent Safeguarding Authority (ISA) under the SVGA.

7.4 The amendments made in these Regulations include two new purposes for which applications for Enhanced Disclosures can be made and prescribe the cases in which suitability information in relation to children and vulnerable adults must be included on an Enhanced Disclosure. These are as follows:

- **Controlled Activity** – Controlled Activity under the SVGA covers a tightly-defined range of specified activities that provide either an opportunity for contact with children or vulnerable adults, or access to certain personal records on individuals in those groups, for example support staff for employers in sectors such as further education, local authorities or the health service.

- **Further Education** – This covers work within a Further Education institution as defined under the Education Act 2002 where the normal duties of that work involve regular contact with persons aged 18 or under.

7.5 Suitability information includes, as listed in sections 113BA and 113BB of the Police Act 1997, information as to whether the individual is barred from

engaging in "regulated activity" relating to children or vulnerable adults or is subject to monitoring in relation to such regulated activity.

7.6 The regulations made under the SVGA (affirmative resolution regulations currently before Parliament) that link to these Regulations require a responsible person (normally an employer), before permitting someone to undertake work in England which is a controlled activity, to be satisfied that the individual is not included on the list of those barred from "regulated activity".

7.7 The employer needs to know if the person is barred or not, because controlled activity comprises certain work for specified employers involving contact with a vulnerable group or access to their sensitive records, and the Government wants the employer, if the person is barred from regulated activity with that vulnerable group, to be able to take an informed decision and ensure that appropriate safeguards are in place.

7.8 The SVGA regulations also modify Part V of the Police Act so that where it is established that an individual is not barred there is no duty on the Secretary of State to issue either a criminal record certificate or an enhanced criminal record certificate.

7.9 Any Further Education (FE) institution which is not "exclusively or mainly for the provision of full-time education to children" is not an "establishment" specified under SVGA for the purpose of the definition of "regulated activity". In any FE college which is not a specified establishment, but which has some students who are under 18, only those staff who undertake "activities" specified under paragraph 2(1) of Schedule 4 to the SVGA are in "regulated activity" – i.e. those teaching or having sole charge of children. So the staff in that college who teach only adults, and the office or catering or facilities staff, who are on site every day when those students who are children are around, are not engaging in regulated activity, but in many cases will have contact with children. The amendment relating to FE in these regulations therefore provides the eligibility for an Enhanced Disclosure with a check of the barring lists to all those within an FE institution where the work involves regular contact with persons under 18.

8. Consultation outcome

8.1 There was a public consultation on various aspects of the VBS in November 2007, with the Government's response being published in May 2008. The Government response can be viewed at www.dcsf.gov.uk/consultations.

8.2 The CRB has also been in continuous consultation with CRB customers and stakeholders over the implementation of the VBS.

9. Guidance

9.1 Comprehensive guidance about the operation of the VBS has been published during 2009. It is essential that both the workforce to whom the Vetting and Barring Scheme will apply and their employers are aware of the requirements of

the scheme in relation to registration to work in regulated activity, checking applicants for posts and the implications of being barred. Guidance is under development in consultation with stakeholders. At the same time, marketing and communications campaigns are publicising the scheme to stakeholders, by means of direct mailing, a programme of road shows and various other methods.

10. Impact

10.1 The CRB does not differentiate its service between sectors. However the impact of these regulations will in the main be on the public sector as is expected that most entrants to controlled activity and within the FE sector will be working for public sector employers.

10.2 An Impact Assessment has not been prepared for this instrument there is a separate Impact Assessment for the overall VBS which CRB are supporting. The existing published Assessment for the overall VBS by the Minister is at: www.dfes.gov.uk/ria/index.cfm?action=assessments.view&i_assessmentID=73

10.3 This Impact Assessment is currently under review and an updated version will be published once this review is completed.

11. Regulating small business

11.1 The legislation will apply to small business but the main impact of the regulations will apply to the public sector. Therefore impact on small businesses will be minimal.

12. Monitoring & review

12.1 This provision will be reviewed and monitored as part of the CRB's general regulation reviews.

13. Contact

Helen Ryan at the Criminal Records Bureau Tel: 0151 224 6676 or e-mail: helen.ryan@crb.gsi.gov.uk can answer any queries regarding the instrument.