

PROTECTION OF FREEDOMS ACT 2012

EXPLANATORY NOTES

THE ACT

Commentary on Sections

Part 5: Safeguarding vulnerable groups, criminal records etc.

Chapter 2 of Part 5: Criminal Records

Section 79: Restriction on information provided to certain persons

329. *Subsection (1)* repeals section 93 of the 2009 Act which, if commenced, would have inserted a new section 112(2A) into the 1997 Act. That section would have required the Secretary of State to send a copy of a criminal conviction certificate (which includes only any unspent convictions) to any named employer in the application. This change is in line with the changes made in *subsection (2)*.
330. *Subsection (2)* repeals sections 113A(4) and 113B(5) and (6) of the 1997 Act. When a person applies for a standard certificate or an enhanced certificate, the Criminal Records Bureau (“CRB”) issues the relevant certificate not only to the applicant but also, by virtue of sections 113A(4) and 113B(6) of the 1997 Act, sends a copy of the certificate to the registered body which countersigned the application. A registered body will normally be the applicant’s employer or prospective employer or other organisation acting on behalf of an employer. The simultaneous issue of the certificate to an applicant and a registered body does not afford the applicant the opportunity to review and, if necessary, challenge the information contained in a certificate before it is released to an employer. The repeal of sections 113A(4) and 113B(6) removes the provisions that require a copy of a certificate to be sent to the registered body so that the certificate is issued to the applicant only, allowing the applicant to make appropriate representations to the CRB regarding the information released without the disputed information already having been seen by the employer.
331. Section 113B(5) of the 1997 Act enables sensitive (non-conviction) information which might be relevant to an employer to be provided to a registered body without it being copied to the applicant. Such a procedure is adopted, for example, where the police are engaged in an ongoing criminal investigation and the premature release of the relevant information to an applicant for an enhanced criminal record certificate might compromise that investigation. The repeal of section 113B(5) removes the statutory obligation to disclose the relevant information to the registered body in these circumstances. However, it would remain open to the police, using their common law powers to prevent crime and protect the public, to pass such information to a potential employer where they considered it justified and proportionate.
332. *Subsection (3)* inserts a new section 120AC into the 1997 Act that will allow registered bodies to continue to be able to track online the progress of an application for a criminal record certificate or an enhanced criminal record certificate, including whether it has been issued and for the registered body to be informed that the certificate does not

contain any relevant information when that is the case (in effect, that the certificate is 'clear').

333. Subsection (3) also inserts a new section 120AD into the 1997 Act to provide that the CRB must in certain circumstances send a copy of the certificate to the registered body. Those circumstances are when the new updating service has advised that a new certificate should be applied for, such a certificate has been applied for, and the applicant has not, within the prescribed period, sent a copy of it to the relevant person. A copy would be sent to the registered body only if a request is made within the prescribed period and none of the prescribed circumstances apply.

Section 80: Minimum age for applicants for certificates or to be registered

334. Under sections 112(1), 113A(1), 113B(1), 114(1) and 116(1) of the 1997 Act, the Secretary of State is required to issue a criminal conviction certificate, criminal record certificate, enhanced criminal record certificate, criminal record certificate (Crown employment) and enhanced criminal record certificate (judicial appointments and Crown employment) respectively to any individual who makes an application in the prescribed manner and form and pays the prescribed fee - that is, the Secretary of State has no discretion to refuse an application submitted by a person below a certain age. *Subsection (1)* amends the provisions of the 1997 Act so that the duty on the Secretary of State to issue the relevant certificate only applies where the applicant is aged 16 years or over.
335. *Subsection (2)* amends section 120(4) of the 1997 Act so that registered persons who countersign applications for criminal record certificates and enhanced criminal record certificates must be aged 18 years or over.

Section 81: Additional grounds for refusing an application to be registered

336. **Section 81** amends the arrangements governing the CRB to extend the provision determining the grounds on which the CRB can refuse to register an organisation as a "Registered Body" (that is, a body responsible for the processing and the counter-signature of applications for criminal record certificates) to include the power to refuse to register an organisation that has previously been removed from the register as a result of a breach of the CRB Conditions of Registration.

Section 82: Enhanced criminal record certificates: additional safeguards

337. Under section 113B(4) of the 1997 Act an enhanced criminal record certificate may include, in addition to details of any convictions or cautions, other information which, in the opinion of a relevant chief officer of police might be relevant to an employer's decision on whether the applicant is suitable for the role concerned. *Subsection (1)* of section 82 (taken together with *subsection (3)*) makes two material changes to section 113B(4). First, it amends the test to be applied by a chief officer when determining whether additional, non-conviction information should be included in an enhanced criminal record certificate. In place of the current test of information which, in the opinion of the chief officer 'might be relevant' and ought to be included in the certificate, subsection (1) substitutes a higher test of information which the chief officer 'reasonably believes to be relevant' and which in the chief officer's opinion ought to be included in the certificate.
338. The second change to section 113B(4) affected by subsection (3) relates to the chief officer of police whom the Secretary of State is required to approach to ascertain whether he or she holds any relevant non-conviction information on the applicant for a certificate. At present, such an approach must be made to the chief officer of every relevant police force. A 'relevant police force' is defined in Regulation 10 of the Police Act 1997 (Criminal Records) Regulations 2002 ([SI 2002 233](#) as amended) as any police force which holds information about the applicant (whether conviction or non-conviction information); there may be two or more such police forces which

will independently come to a decision about what, if any, non-conviction information about the applicant might be relevant and ought to be included in the enhanced criminal records certificate. By virtue of the amendments to section 113B(4) and (9) made by *subsection (1)(a)* and subsection (3) the Secretary of State will be able to approach any 'relevant chief officer'; in this way one chief officer can be assigned to take a decision on the disclosure of non-conviction information held by any number of police forces. It would be open to the Secretary of State to appoint one chief officer to act as the relevant chief officer in respect of all applications for enhanced criminal record certificates or to appoint a small number of chief officers, for example, one per region, to undertake the role on behalf of all forces.

339. *Subsection (2)* inserts a new subsection (4A) into section 113B of the 1997 Act. New section 113B(4A) enables the Secretary of State to issue guidance to relevant chief officers about the discharge of their functions under section 113B(4) to provide relevant non-conviction information about an applicant for an enhanced criminal record certificate; a relevant chief officer is required to have regard to any such guidance.
340. Under section 117 of the 1997 Act, an applicant in receipt of a criminal conviction certificate, criminal record certificate or enhanced criminal record certificate who disputes the accuracy of the information contained in such a certificate may make an application in writing to the Secretary of State for a new certificate. The Secretary of State may consider the application and, if of the opinion that the information is inaccurate, will issue a new certificate. *Subsection (4)* of section 82 inserts new subsection (1A) into section 117, which allows parties other than the applicant to make such an application, which must also be in writing.
341. *Subsection (5)* inserts new section 117A into the 1997 Act, which provides that a dispute can be raised in relation to an enhanced criminal record certificate in relation to the non-conviction information supplied by a relevant chief officer. The person may apply to the independent monitor (appointed under section 119B of the 1997 Act) to determine whether that information is relevant or ought to be included in the certificate. The independent monitor must ask an appropriate chief officer of police to review whether the information concerned is relevant and ought to be included on the certificate. If, following that review, the independent monitor decides that the information either is not relevant or should not be included in the certificate, the independent monitor must inform the Secretary of State, who must issue a new certificate which excludes that information. In exercising their review functions, both the chief officer and the independent monitor must have regard to the guidance published by the Secretary of State under section 113B(4A) of the 1997 Act.

Section 83: Up-dating certificates

342. This section inserts new section 116A into the 1997 Act. One of the main features of the current CRB system is that a criminal record certificate or an enhanced criminal record certificate is a snapshot in time showing only what conviction and other relevant information was recorded on police and law enforcement databases as of the date a certificate was issued. This means that the reliance an employer can place on the information contained in a certificate diminishes with the lapse of time following the issue of a certificate, which impedes the 'portability' of a certificate between roles (that is, the ability of an employee or volunteer to present a certificate obtained for one job or voluntary position to a second employer or voluntary organisation).
343. New section 116A of the 1997 Act introduces a procedure for updating certificates on a continuous basis. An applicant for a criminal conviction certificate, criminal record certificate or enhanced criminal record certificate may subscribe to the updating arrangements at the time an application for a certificate is submitted and thereafter re-subscribe to those arrangements on an annual basis. The update arrangements will only be put in place in respect of an applicant for a certificate and thereafter renewed on payment of an initial fee and subsequently of an annual fee to be prescribed by

regulations made under new section 116A(4) and (5) (by virtue of section 125 of the 1997 Act such regulations are subject to the negative resolution procedure). The annual fee will be set at a level necessary to recover the costs of the service and will be offset by the removal of the need to make repeat applications for a criminal record certificate. Under the update arrangements the CRB will not, as such, provide any new conviction or other relevant information to the subscriber to the updating arrangements. Instead, by virtue of the definition of ‘up-date information’ in new section 116A(8), in response to a request for update information, the CRB will advise the person making the request (which can be the applicant, or any person authorised by the applicant who is entitled to see that information) either that there is no new information that would be included on a new certificate or that a new certificate should be applied for (which would imply that a new certificate would contain new information).

Section 84: Criminal conviction certificates: conditional cautions

344. **Section 84** amends section 112(2) of the 1997 Act which details the content of a criminal conviction certificate. Such a certificate includes the details of any convictions unspent under the terms of the Rehabilitation of Offenders Act 1974. The amendment to section 112(2) provides that a criminal conviction certificate must also include details of any unspent conditional cautions. A conditional caution is an out of court disposal whereby an offender avoids being prosecuted for an offence by admitting his or her guilt and agreeing to comply with certain conditions designed to rehabilitate the offender or provide reparation to the victim; under the Rehabilitation of Offenders Act 1974 a conditional caution becomes spent after three months. Section 112 of the 1997 Act is not in force in England and Wales.

Section 85: Inclusion of cautions etc. in national police records

345. **Section 85** amends section 27 of the Police and Criminal Evidence Act 1984 (“PACE”) so that cautions, reprimands and warnings are recorded on the Police National Computer (“PNC”) in exactly the same way as convictions. The PNC needs to hold all relevant records when applications for criminal record certificates and enhanced criminal record certificates are made so that relevant matters can be disclosed. This section will give the same statutory authority for putting cautions etc on the PNC as already exists for convictions

Section 86: Out of date references to certificates of criminal records

346. **Section 86** amends section 75 of the Data Protection Act 1998, which provides that section 56 of that Act, which in turn would make it an offence for an employer or prospective employer to require a person to supply details of any convictions or cautions in respect of that person held by the police (otherwise known as ‘enforced subject access’), cannot be commenced until criminal conviction certificates, criminal record certificates and enhanced criminal record certificates are all available under the 1997 Act. The amendments to section 75 replace out of date references to sections 113 and 115 of the 1997 Act (which were repealed by the Serious Organised Crime and Police Act 2005). The replacement provisions for sections 113 and 115 are now sections 113A and 113B which provide for criminal record certificates and enhanced criminal record certificates respectively.