

# STATES OF JERSEY



## PROTECTION OF FREEDOMS ACT 2012: EXTENSION OF PROVISIONS TO JERSEY BY ORDER IN COUNCIL

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Lodged au Greffe on 31st July 2012  
by the Chief Minister

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STATES GREFFE

## **PROPOSITION**

**THE STATES are asked to decide whether they are of opinion –**

to signify, pursuant to Article 31(1)(b) of the States of Jersey Law 2005, whether they agree that a request be made to the Privy Council for the making of an Order in Council that would extend to Jersey, with appropriate modifications and adaptations, the provisions of Part 5, Chapter 2 (and part of Chapter 3), of the Protection of Freedoms Act 2012, together with associated provisions of Schedules 9 and 10 to the said Act, as summarised in the report of the Chief Minister dated 30th July 2012.

CHIEF MINISTER

## REPORT

### Executive Summary

1. This Proposition relates to improvements which have been made in the United Kingdom in relation to the vetting and barring scheme which provides information, including criminal records checks, on prospective employees and voluntary workers who may be working with children and vulnerable adults.
2. The purpose of this Proposition is to request the States to consider whether to agree to extend to Jersey certain provisions of the Protection of Freedoms Act 2012 (c.9) with modifications suitable to the application of those provisions to Jersey.
3. Article 31 of the States of Jersey Law 2005 provides that where it is proposed that an Order in Council should extend the provisions of a UK Act of Parliament to Jersey, the Chief Minister shall lodge the proposal in order that the States may signify their views on it. The States are asked to agree to the Proposition; and the draft Order in Council will be finalised in consultation with officials in the Law Officers' Department, the Home Affairs Department and legal advisers and other officials in the Home Office and the Ministry of Justice.
4. The relevant provisions of the Protection of Freedoms Act 2012 to be extended to Jersey are –
  - Section 79 (restriction on information provided to certain persons);*
  - Section 80 (minimum age for applicants for certificates or to be registered);*
  - Section 82 (enhanced criminal record certificates: additional safeguards);*
  - Section 83 (updating certificates);*
  - Section 84 (criminal conviction certificates: conditional cautions);*
  - Section 87 (formation and constitution of DBS);*
  - Section 88 (transfer of functions to DBS and dissolution of ISA);*
  - Section 89 (orders under section 88);*
  - Part 6 of Schedule 9 and Part 5 of Schedule 10 (safeguarding of vulnerable groups);*
  - Part 7 of Schedule 9 and Part 6 of Schedule 10 (criminal records).*
5. The details of these provisions and the changes that they make are set out in greater detail further on in this report.

## Historical background

6. Following the Soham murder enquiry and the subsequent Bichard Report (<http://www.bichardinquiry.org.uk/10663/report.pdf>), the UK Government decided to introduce new arrangements for vetting and barring in 'managed phases' over a 5 year period from October 2009.
7. It was noted that the introduction of new UK arrangements would impact upon Jersey's ability to access crucial barring information which is used in making checks for the purposes of safeguarding local children and vulnerable adults, because it was intended that all barred status information would be transferred to the Independent Safeguarding Authority (ISA), with the only access to that information being via Criminal Records Bureau (CRB) checks.
8. Mindful of the work being done in the UK, the Council of Ministers agreed in 2008 that a centralised vetting and barring service should be developed in Jersey to mirror the UK arrangements. This would be a 2 stage process.
9. On 10th September 2009, the States unanimously adopted P.121/2009 to extend Part V of the Police Act 1997 to Jersey by Order in Council. The Order in Council was made on 17th March 2010 and registered on 9th April 2010. The relevant piece of legislation, the Police Act 1997 (Criminal Records) (Jersey) Order 2010, formed Stage 1 of the process for developing the Jersey Vetting and Barring Service, because it enabled individuals in Jersey to apply to the CRB for 2 levels of certificate; and also provided for the Minister for Home Affairs to register with the Secretary of State as a 'registered person' for the purpose of countersigning or transmitting applications for criminal record certificates and enhanced criminal record certificates. This meant that individuals in Jersey were able to apply for these certificates through the Minister instead of through 'gateways' in England and Wales. In practice, the Jersey Vetting Bureau fulfils this role on behalf of the Minister. The Jersey Vetting Bureau falls within the responsibilities of the States of Jersey Police and went live in April 2011.
10. Stage 2 was intended to be the route for developing the Jersey vetting and barring arrangements, either by extending the UK Safeguarding Vulnerable Groups Act 2006 legislation or, alternatively, developing an equivalent Island Law in order to extend the full Vetting and Barring Scheme to the Island. However, on 22nd October 2010, and following the formation of the Coalition Government in the UK, the UK Home Secretary commissioned an independent review of the Criminal Records Regime (CRR) to be led by the Independent Advisor for Criminality Information, Mrs. Sunita Mason. Under the terms of reference for the review, Mrs. Mason was asked to examine whether the CRR struck the correct balance between respecting civil liberties and protecting the public and what actions were needed to re-balance the system. Pending clarification of the UK position, it was not possible to make further progress with Stage 2 at that time. Progress was similarly delayed in the Home Department in Guernsey, with whom the Jersey Home Affairs Department has been working closely since 2008.

11. The review by Mrs. Mason looked at how employers access criminality information to help them make informed decisions about an individual's suitability, particularly in relation to working with children and vulnerable adults. Mrs. Mason's report generated 10 recommendations for improvements to the Criminal Records Bureau's operation and processes, building on the Government's associated changes to scale back the Vetting and Barring Scheme arrangements to make the issue of CRB certificates more proportionate and efficient, and to reduce the burden on both applicants and employers. The UK Government accepted the majority of Mrs. Mason's recommendations and set out the necessary legislation in its Protection of Freedom's Bill, which was introduced to Parliament on 11th February 2011.
  
12. The amendments contained within the Protection of Freedoms Act 2012 ("the 2012 Act") give effect in the United Kingdom to the following of Mrs. Mason's recommendations –
  - children under 16 should not be eligible to request criminal record checks;
  - criminal records checks should be portable between positions within the same employment sector;
  - the CRB should introduce an online system to allow employers to check if updated information is held about an applicant;
  - a new CRB procedure should be developed so that the criminal record certificate is issued directly to the individual applicant who will be responsible for its disclosure to potential employers and/or voluntary bodies;
  - the introduction of a package of measures to improve the disclosure of police information to employers. This included the test used by chief officers to make disclosure decisions under section 113B(4) of the 1997 Act to be amended from 'might be relevant' to 'reasonably believes to be relevant'; the development of a statutory code of practice for the police to use when deciding what information should be disclosed;
  - the current 'additional information' provisions under section 113B(5) of the 1997 Act to be abolished so that the police use alternative methods to disclose this information outside of the criminal record disclosure process;
  - to make effective use of the Police National Database so that decision-making by chief officers about the relevancy of information in relation to enhanced criminal record certificates can be centralised, regardless of from which police force the information originated;
  - the CRB to develop an open and transparent representations process for individuals to challenge inaccurate or inappropriate disclosures and that the disclosure of police information is overseen by an independent expert.

## Legislative changes

13. As detailed above, Part V of the Police Act 1997 has already been extended to Jersey (see P.121/2009) and has enabled Jersey to apply to the Criminal Records Bureau (“CRB”) for disclosure information for specific individuals (referred to as a “criminal record certificate”). Because the 2012 Act amends the Police Act 1997, various provisions of the 2012 Act need to be extended to Jersey by virtue of Order in Council. A Keeling Schedule, which sets out how Part V of the Police Act 1997 is intended to read, once amended by the 2012 Act, is attached for ease of reference for members.
14. The relevant provisions of the 2012 Act to be extended to Jersey are –  
*Section 79 (restriction on information provided to certain persons)*
15. Currently, 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 sends a copy of the certificate to the registered body (in practice, in Jersey, the Jersey Vetting Bureau ‘JVB’, as the Minister is, under section 120 of the Police Act 1997, the only registered body in Jersey) which countersigned the application. The registered body (JVB) then sends the relevant certificate on to the employer/regulator. Section 79 will modify Sections 113A and 113B of the Police Act 1997 to remove the requirement for the Secretary of State, through the CRB, to send relevant information, a criminal records certificate or an enhanced criminal records certificate to the registered body (JVB) in addition to the applicant. Therefore, the certificate will only be issued to the applicant, which will allow the applicant to make appropriate representations to the CRB regarding any information which the applicant disputes, without it already having been seen by the registered body (JVB).
16. Currently, sensitive (non-conviction) information, which might be relevant to an employer/regulator, is sent to a registered body (JVB) without it being copied to the applicant. This would be the case, 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. Section 79 will remove the statutory obligation to disclose the relevant information to the registered body (JVB) by repealing section 113B(5) of the Police Act 1997. However, despite this repeal, it would remain open to the police, using their ordinary powers to prevent crime and protect the public, to pass such information to a potential employer/regulator where they considered it justified and proportionate.
17. The insertion of the new section 120AC into the Police Act 1997, by virtue of section 79(3) of the 2012 Act, will allow registered bodies (JVB) 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 the certificate has been issued. It will also enable the registered body (JVB) to be informed in cases where the certificate does not contain any relevant information (in effect, that the certificate is ‘clear’).

18. Section 79(3) of the 2012 Act also inserts a new section 120AD into the Police Act 1997. This provides that the CRB must, in certain circumstances, send a copy of the certificate to the registered body (JVB). Those circumstances are when the new updating service has advised an applicant that a new certificate should be applied for, and the applicant has applied for the certificate but has not, within the prescribed period, sent a copy of it to the relevant person (JVB).

*Section 80 (minimum age for applicants for certificates or to be registered)*

19. Section 80 amends the Police Act 1997 to set a minimum age of 16 for an applicant requesting a certificate under sections 112 (criminal conviction certificates); 113A (criminal record certificates); 113B (enhanced criminal record certificates); 114 (criminal record certificates: Crown appointment) and 116 (enhanced criminal record certificates: judicial appointments and Crown employment). Previously, there was no discretion for the Secretary of State to refuse an application by a person below a certain age, provided the person had made the application in the prescribed manner and form and paid the relevant fee.

*Section 82 (enhanced criminal record certificates: additional safeguards)*

20. Currently, under 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/regulator's decision on whether the applicant is suitable for the role concerned.
21. Section 82 of the 2012 Act makes 2 material changes to the Police Act 1997: It inserts additional safeguards into section 113B in respect of 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, it 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 as 'approved information'.
22. The second change 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' means any police force which holds information about the applicant (whether conviction or non-conviction information); there may be 2 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 changes made by section 82 of the 2012 Act, as they have effect in the United Kingdom, the Secretary of State will be able to approach any 'relevant chief officer'; in this way one chief officer can be assigned within the United Kingdom 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 within the

United Kingdom 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. In relation to applications for enhanced criminal records certificates relating to jobs or voluntary positions in Jersey, the Chief Officer of the States of Jersey Police is automatically the 'relevant chief officer', so that if any police information is available within the UK police forces, which relates to that application, it will always fall to the CRB to ask the Jersey Chief Officer of Police to decide whether in fact it meets the test for disclosure.

23. Section 82 also inserts new subsection 113B(4A) into the Police Act 1997. This subsection enables the Secretary of State to issue guidance to relevant chief officers about the discharge of their functions to provide relevant non-conviction information about an applicant for an enhanced criminal record certificate.
24. Under section 117 of the Police Act 1997, 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 that 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 it is decided that the information is indeed inaccurate, a new certificate will be issued. Section 82(4) of the 2012 Act inserts a new subsection 117(1A) to allow parties other than the applicant to make an application to the Secretary in State for a decision as to whether or not the information contained in the certificate is inaccurate.
25. Section 82 of the 2012 Act also inserts a new section 117A into the Police Act 1997. This permits an applicant to dispute non-conviction information supplied by a relevant chief officer in relation to an enhanced criminal record certificate by writing to the independent monitor. If the independent monitor receives such an application, they 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, they 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 of police and the independent monitor must have regard to the guidance published by the Secretary of State under the 1997 Act (section 113B(4A)). The independent monitor was established by an amendment to the Police Act 1997 by the Safeguarding Vulnerable Groups Act 2006, and the relevant provision extended to Jersey by virtue of the Police Act 1997 (Criminal Records) (Jersey) Order 2010.

*Section 83 (updating certificates)*

26. 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 on the date when a certificate was issued. This means that the reliance an employer/regulator can place on the information contained within a certificate diminishes with the lapse of time

following the issue of a certificate. This 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).

27. Section 83 of the 2012 Act inserts section 116A into the Police Act 1997. This introduces a procedure for updating certificates on a continuous basis. Where a person applies for a criminal conviction certificate, criminal record certificate or enhanced criminal record certificate they can subscribe, at the time of application, to updating arrangements on an annual basis on payment of an annual fee. 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). Where a person believes that the wrong up-date information has been given under section 116A, they can make an application for corrected update information under section 117(1B).

*Section 84 (criminal conviction certificates: conditional cautions)*

28. Section 84 amends section 112 of the Police Act 1997 to provide 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.

*Section 87 (formation and constitution of DBS); section 88 (transfer of functions to DBS and dissolution of ISA); section 89 (orders under section 88)*

29. These sections are extended to Jersey to the extent necessary to recognise in Jersey law the formation of the Disclosure and Barring Service; and the power of the Secretary of State to order the transfer of the criminal record certificate functions of the CRB to the Disclosure and Barring Service.

*Part 6 of Schedule 9 (safeguarding of vulnerable groups)*

30. Some of the consequential amendments made to the Police Act 1997 by Part 6 of Schedule 9 of the 2012 Act are extended to Jersey.

*Part 7 of Schedule 9 (criminal records)*

31. This Part of Schedule 9 makes some further consequential amendments to the Police Act 1997, as extended to Jersey. In particular, in relation to a person who has a certificate which is subject to update arrangements under section 116A, it gives the Minister for Home Affairs the power to require the applicant to give their fingerprints for transmission to the Secretary of State, in order to confirm their identity against the identity of a person in respect of whom the Secretary of State has provided information (but for no other purpose).

*Part 5 of Schedule 10 (safeguarding of vulnerable groups)*

32. Part 5 of Schedule 10 is extended so as to effect the repeal of sections 113BA(2)(b) to (d) and 113BB(2)(b) to (d) of the Police Act 1997.

*Part 6 of Schedule 10 (criminal records)*

33. This Part of Schedule 10 repeals certain provisions of the Police Act 1997 which have been extended to Jersey. The repeals are purely consequential.

**Financial and manpower implications**

34. Inasmuch as the Order will merely modify existing legislation in Jersey, there are unlikely to be any additional manpower, revenue, capital or further legislative requirements arising. The financial costs of establishing the Jersey Vetting Bureau were set out in the report that accompanied P.121/2009, which extended Part V of the Police Act 1997 to Jersey.