

EXPLANATORY MEMORANDUM TO
THE REHABILITATION OF OFFENDERS ACT 1974 (EXCEPTIONS) (AMENDMENT)
(ENGLAND AND WALES) ORDER 2013

2013 No. [DRAFT]

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

2. Purpose of the instrument

2.1 This instrument amends the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (the “Exceptions Order”). It introduces provisions into the Exceptions Order so that some spent convictions and cautions, which would otherwise be covered by the Exceptions Order, do not have to be disclosed and cannot be taken into account in employment decisions. In addition, non-recordable service offences are removed from the ambit of the Exceptions Order so that, once spent, they need not be disclosed and cannot be taken into account for any employment purposes regardless.

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

3.1 None.

4. Legislative Context

4.1 This instrument is being made following a Court of Appeal judgment. In *R(T) v Chief Constable of Greater Manchester and Others* [2013] EWCA Civ 25, the Court held that the Police Act 1997 and the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 are incompatible with article 8 of the European Convention on Human Rights (ECHR) in that they provide for the disclosure to employers of, and allow employers to ask about and take into account, all spent convictions and cautions on a blanket basis. The Court found that the regime is disproportionate because even historic and minor convictions and cautions (which may not be relevant to the position being applied for) must be disclosed and may be taken into account.

4.2 The Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) Order 2013, which is laid at the same time as this Order, amends the definition of “relevant matter” in the Police Act 1997. This sets out what is disclosed by the Disclosure and Barring Service in response to an application for a criminal record certificate or an enhanced criminal record certificate. The amendments to the Police Act 1997 are consistent with this instrument and provide that some cautions and convictions will not be disclosed on certificates.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

Jeremy Wright, the Parliamentary Under Secretary of State, has made the following statement regarding Human Rights:

“In my view the provisions of the Rehabilitation of Offenders Act 1974 (Exceptions) (Amendment) (England and Wales) Order 2013 are compatible with the Convention rights.”

7. Policy background

7.1 The Rehabilitation of Offenders Act 1974 (“the Act”) protects rehabilitated offenders from having to reveal certain past convictions (of 30 months imprisonment or less) and cautions once a specified period of time has passed, which varies according to the seriousness of the disposal received. The Act seeks to aid the reintegration and resettlement of ex-offenders into employment by not requiring them or any other person to answer questions regarding their spent convictions.

7.2 The Exceptions Order creates exceptions to the Act with the effect that, in some circumstances, all convictions and cautions must be disclosed and may be taken into account when assessing a person’s suitability for certain positions. This reflects that, while it is generally desirable to facilitate ex-offenders into employment, the public must remain adequately protected. Those areas of activity included in the Exceptions Order are activities requiring a high degree of trust, often involving vulnerable persons, and therefore where it is appropriate that an employer should know a person’s full criminal history before an offer of employment is made and consideration can be given to any necessary safeguards to be put in place.

7.3 The Exceptions Order currently provides for full disclosure of a person’s criminal history, regardless of how old or minor the disposal. The Court of Appeal has found that this blanket disclosure of all cautions and convictions is incompatible with Article 8 of the ECHR. The purpose of this amendment is, therefore, to remedy this incompatibility by ‘filtering’ certain cautions and convictions, which are sufficiently old and minor to have no bearing on an employment decision. This means that the individual will no longer have to reveal these cautions and convictions nor will they appear on standard and enhanced disclosure certificates.

Filtering or non-disclosure scheme

7.4 In order to maintain public protection, the amendment lists offences which must always be disclosed. These offences are serious violent and sexual offences and other offences of specific relevance for posts concerned with safeguarding children and vulnerable adults. In addition, no conviction resulting in a custodial sentence will be filtered.

7.5 The amendment provides that, in certain circumstances, other cautions and convictions will be “protected”, which has the effect that these spent disposals will not be subject to disclosure under the Exceptions Order.

7.6 For non-specified offences:

- cautions, and equivalents, administered to a young offender will not be subject to disclosure after a period of two years;
- adult cautions will not be subject to disclosure after a period of six years;
- a conviction received as a young offender resulting in a non-custodial sentence will not be subject to disclosure after a period of 5.5 years;
- an adult conviction resulting in a non-custodial sentence will not be subject to disclosure after a period of 11 years; but
- a conviction will not be subject to disclosure only if there is no other conviction on the individual's record, whether a young offender or an adult.

7.7 It is important that this amendment is made now in order light of the Court of Appeal's recent judgment. There are related changes being made to Part V of the Police Act 1997 so that standard and enhanced disclosure certificates will not include certain cautions and convictions.

Non-recordable service offences

7.8 The term “convictions” for the purposes of the Act and the Exceptions Order covers all service offences. This means that if a service person (or former service person) was applying for any of the positions covered by the Exceptions Order, he or she would have to disclose previous convictions for all service offences. Recordable service offences cover conduct which would be criminal in the civilian sphere and other matters deemed sufficiently serious to be recorded on the Police National Computer. However, non-recordable service offences do not correlate to conduct which would be criminal in the civilian sphere. For example, conduct such as being absent without leave or disobeying a superior. To this amendment removes non-recordable service offences from the ambit of the Exceptions Order altogether. This means that this category of service offence will remain subject to the Act and, once spent, will not need to be disclosed regardless of the position being applied for.

- Consolidation

7.9 An informal consolidated version of the amended Exceptions Order will be available at <http://www.legislation.gov.uk>.

8. Consultation outcome

8.1 The amendment being made is in response to a Court of Appeal judgment which requires the Government to take action. There has been consultation across Government Departments to ensure that the non-disclosure of certain cautions and convictions does not undermine any statutory eligibility criteria for occupations listed on the Exceptions Order.

9. Guidance

9.1 Guidance on the amendment to the Exceptions Order will be made available on Government websites and to stakeholders.

10. Impact

10.1 There are no financial implications for the private sector or public sector as a result of these reforms. It is anticipated that there will be a significant positive impact on many individuals with old and minor spent convictions as these may no longer need to be disclosed.

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

11. Regulating small business

11.1 The legislation does not apply to small businesses.

12. Monitoring & review

12.1 The Exceptions Order and the Act will be kept under review.

13. Contact

Alison Foulds at the Ministry of Justice, at Alison.Foulds@justice.gsi.gov.uk or on telephone number 0203 334 5029, can answer questions about this instrument.