

EXPLANATORY MEMORANDUM TO
THE REHABILITATION OF OFFENDERS ACT 1974 (EXCEPTIONS)
(AMENDMENT) (ENGLAND AND WALES) ORDER 2009

2009 No. 1818

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 expands the list of employments exempted from The Rehabilitation of Offenders Act 1974 (“The Act”) to include the following groups:

- a. persons working in regulated activity as defined by the Safeguarding Vulnerable Groups Act 2006 (“the SVGA 2006”). The relevant provisions of the Act come into force on 12th October 2009 in England and Wales;
- b. regulated immigration advisers;
- c. persons working for the Criminal Records Bureau;
- d. those named on applications for licences to handle or supply controlled drugs and precursor chemicals; and
- e. those seeking membership of the Master Locksmiths Association.

2.2 The Order also confers the right to ask questions about persons working in the Channel Islands where similar laws regarding the rehabilitation of offenders apply. This right to ask excepted questions about spent convictions and cautions etc will bring questions from the Channel Islands within the definition of exempted questions for the purposes of Part V of the Police Act 1997, so that the Criminal Records Bureau can issue disclosures for the Islands. This in turn will enable the Islands to participate in the Vetting and Barring scheme under the SVGA in due course, and will ensure that they have access to all necessary information in the meantime.

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

3.1 We draw the Committee’s attention to the Explanatory Memorandum accompanying the Rehabilitation of Offenders Act 1974 (Exceptions) (Amendment) (England And Wales) Order 2008 (S.I. 2008/3259). This is available at http://www.opsi.gov.uk/si/si2008/em/uksiem_20083259_en.pdf. It explained the drafting error in the primary legislation when the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 was amended to cover spent cautions.

3.2 Until the erroneous cross reference in the second line of paragraph 4(a) of Schedule 2 to “paragraph 3(2)” can be corrected to “paragraph 3(3)”, we construe the delegated power as intended to refer to paragraph 3(3) of that

Schedule. A reference to paragraph 3(3) appears in article 6 of the Order (see new article 6(1): Channel Islands exceptions).

4. Legislative Context

Legislative Context of Exceptions Order

4.1 The Rehabilitation of Offenders Act 1974 (“the Act”) introduced limitations on the requirement to disclose previous convictions. Section 4(4) of the Act enables the Secretary of State by order to make provision that certain positions, licences, bodies and proceedings be excepted from the Act.

4.2 The Exceptions Order removes the protection afforded by the Act so that disclosures may be requested for positions, licences, bodies and proceedings of a sensitive nature. For those purposes listed on the order, the Criminal Records Bureau (CRB) is able to provide the relevant disclosure information on application.

4.3 The Exceptions Order is amended periodically to ensure that the criminal disclosure regime keeps pace with changes in public risk and is part of an ongoing assessment and legislation process. The most recent amendments to the Order were made in December 2008. The Rehabilitation of Offenders Act 1974 (Exceptions) (Amendment) (England and Wales) Order 2008 (S.I. 2008/3259) amended the Exceptions Order to expand the scope of the order to cover spent cautions, amend provisions related to Childcare, and include the new position of “Approved Legal Services Body Managers” created by the Legal Services Act 2007.

Legislative Context of Safeguarding Vulnerable Groups Act 2006

4.4 The SVGA 2006, introduced in response to the Bichard Review, created a new Vetting and Barring Scheme. This requires all those working in sensitive positions with direct access to children or vulnerable adults to be vetted and registered with the newly created Independent Safeguarding Authority (ISA). They will also be subject to monitoring (meaning that the ISA will be informed as soon as any new convictions emerge). The scheme is being phased in starting on 12 October 2009, with applications for ISA registration opening from summer 2010 and an obligation for those conducting Regulated Activity to be ISA registered by November 2010.

4.5 Until the Channel Islands participate in the Vetting and Barring scheme, they will rely upon the right to ask exempted questions under Part V of the Police Act in order to obtain information currently available under the Protection of Children Act 1999 and the Care Standards Act 2000.

Legislative Context of other provisions

4.6

- a. The Office of the Immigration Services Commissioner regulates immigration advisers as defined in section 82 of the Immigration and Asylum Act 1999.
- b. The Home Office Drug Licensing and Compliance Unit issue licenses under regulation 5 of the Misuse of Drugs Regulations 2001, Article

3(2) of Regulation (EC) No 273/2004 and Article 6(1) of Regulation (EC) No 111/2005

- c. The Criminal Records Bureau operates under Part 5 of the Police Act 1997.
- d. The Master Locksmiths operate a system of membership under their own bylaws.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 The Parliamentary Under Secretary of State for Justice, Maria Eagle MP, 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 2009 are compatible with the Convention rights.”

7. Policy background

7.1 The Exceptions Order was introduced to balance the rights of ex-offenders under the Rehabilitation of Offenders Act 1974 with the aim of protecting the public. After specified periods of time, certain convictions become ‘spent’ under the Act and are no longer required to be disclosed to employers and various other bodies.

7.2 Although generally it is desirable to encourage employment of ex-offenders by allowing their convictions to become spent, there are certain positions of such sensitivity that disclosure of all convictions should be made available when requested. The Exceptions Order specifies the positions and professions which are excepted from the Rehabilitation of Offenders Act 1974 and where full criminal records checking (including ‘spent’ convictions) can therefore be conducted.

7.3 By updating the list of exceptions to the Order, this amendment seeks to enhance the public protection aspect of the criminal record disclosure regime. Checks cannot be made on positions etc which are not contained within the Exceptions Order and therefore legislation is required.

7.4 All those positions etc listed on this draft order are there for reasons of ensuring that those working in positions of extreme sensitivity, or with access to vulnerable individuals, can be vetted as appropriate on the basis of all relevant evidence.

7.5 There are no plans at present to consolidate the instrument, however this will be considered in due course.

8. Consultation outcome

8.1 The provisions relating to the SVGA 2006 are necessary to implement primary legislation. Full consultation was conducted at the time of the Act, and no further consultation is necessary.

8.2 The provisions relating to the Channel Islands are also necessary for SVGA implementation, and have been included at the express request of the Channel Islands governments.

8.3 The provisions related to regulated immigration advisers have been included at the request of, and after consultation with, the Office of the Immigration Services Commissioner. The measures are necessary to tighten identified shortcomings in the existing regulatory regime, and to ensure that existing regulatory functions can be conducted satisfactorily. No further consultation is therefore necessary.

8.4 The provisions relating to the Master Locksmiths Association are being included at the request of, and after consultation with, that organisation.

8.5 The provisions relating to the Home Office licences for controlled drugs and precursor chemicals are intended to address an identified weakness in the current regulatory regime.

8.6 The provisions relating to the Criminal Records Bureau have been included at the request of the CRB, following an internal review of security measures, in line with recommended government practice with regard to data security. The proposed amendment does not have any impact wider than the CRB.

9. Guidance

9.1 Comprehensive guidance regarding the SVGA 2006 is being produced by the relevant government departments and will be made available prior to the scheme's introduction in October.

9.2 Guidance for all other provisions is being made available by the relevant departments and regulatory bodies.

10. Impact

Safeguarding Vulnerable Groups Act

10.1 Comprehensive impact assessments regarding the SVGA 2006 Vetting and Barring Scheme have been conducted at the time of the primary legislation, and as part of the implementation programme.

10.2 The remaining provisions are small schemes, specific to certain regulatory bodies, and covering a limited number of individuals. As such the impact is restricted to the bodies who have requested the provisions.

10.3 The CRB have confirmed that the volume of work involved in issuing disclosures under these new exceptions is manageable, and any impact can therefore be absorbed.

10.4 As CRB disclosures are self-financed by application fees there is no cost implication.

11. Regulating small business

11.1 The SVGA 2006 Vetting and Barring Scheme has wide applicability to small businesses in the care and education sectors. This has been fully assessed and debated at the time the primary legislation was before parliament. This Order does nothing to change the impact on business; it simply enables the Independent Safeguarding Authority to conduct its business with regards to vetting and barring, and enables employers to obtain CRB disclosures for those areas of Regulated Activity not already covered by the Exceptions Order.

11.2 The remaining provisions are merely tightening existing regulatory regimes and will have minimal impact on small businesses.

12. Monitoring & review

12.1 As this Order only serves to enhance existing regulatory regimes no specific monitoring or review is necessary.

13. Contact

David Meyer at the Ministry of Justice Tel: 020 3334 5037 or email: david.meyer@justice.gsi.gov.uk can answer any queries regarding the instrument.