

**EXPLANATORY MEMORANDUM TO  
THE REHABILITATION OF OFFENDERS ACT 1974 (EXCEPTIONS)  
(AMENDMENT) (ENGLAND AND WALES) ORDER 2008**

**2008 No.**

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 1975 Order”). It updates definitions related to child care to bring these into line with recent legislation, it extends the definition of conviction to include cautions, reprimands and final warnings, and it expands the list of sensitive positions which qualify for disclosure of spent conviction information to include the newly created position of non-lawyer “approved legal services body manager.”

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

*Article 4 (amendment of article 3) of the draft Rehabilitation of Offenders Act 1974 (Exceptions) Amendment) (England and Wales) Order 2008*

3.1 The Joint Committee will wish to be aware that there is an error in the drafting of the primary legislative provision providing the vires for part of the amendment to the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 so far as it relates to cautions.

3.2 The Rehabilitation of Offenders Act 1974 provides that certain convictions become ‘spent’ after a ‘rehabilitation’ period and need not be disclosed. However, there should be exceptions (primarily relating to employment in work with children or vulnerable people, or other positions of trust) and these are listed in the Exceptions Order. Section 4(4) of the Act provides an order-making power which empowers the Secretary of State to except certain questions from the application of sections 4(2)(a) and/or (b), and section 4(3) of the Act.

3.3 Paragraph 4 of Schedule 2 to the Act (as amended by the Criminal Justice and Immigration Act 2008, section 49 and Schedule 10, to be commenced to coincide with this Order) provides an equivalent order making power to allow the Secretary of State to provide for exceptions in relation to cautions. Paragraph 4(a) provides that:

“The Secretary of State may by order—

make provision for excluding or modifying the application of either or both of paragraphs (a) or (b) of paragraph 3(2) in relation to questions put in such circumstances as may be specified in the order;”

Paragraph 3(2) and 3(3) are as follows:

“(2) Nothing in sub-paragraph (1) applies in relation to any proceedings for the offence which are not part of the ancillary circumstances relating to the caution.

(3) Where a question seeking information with respect to a person’s previous cautions, offences, conduct or circumstances is put to him or to any other person otherwise than in proceedings before a judicial authority—

(a) the question shall be treated as not relating to spent cautions or to any ancillary circumstances, and the answer may be framed accordingly; and

(b) the person questioned shall not be subjected to any liability or otherwise prejudiced in law by reason of any failure to acknowledge or disclose a spent caution or any ancillary circumstances in his answer to the question.”

3.4 The reference in the second line of paragraph 4(a) to paragraph 3(2) should be to paragraph 3(3). We believe that the erroneous cross-reference has arisen because paragraph 3(2) was inserted after the original draft clauses were drafted, and the cross-reference has not been updated to reflect that. Paragraph 3(2) does not relate to questions being asked of a person, and contains no paragraph (a) or (b). The intention should be to allow the exclusion or modification of the application of either or both of paragraphs (a) or (b) of paragraph 3(3) in relation to the questions referred to in those paragraphs.

3.5 The point is made clearer by reference to the equivalent order-making power in section 4(4)(a) of the Act, which provides for exceptions from the application of sections 4(2)(a) and/or (b). The Committee will note that section 4(2)(a) and (b) are in almost identical terms to paragraph 3(3)(a) and (b), and it was clearly Parliament’s intention that cautions ought to be capable of being excepted in a similar way, from the same questions, as convictions.

3.6 We consider that this is a clear case of simple error in the drafting of the provision. We consider that the reader (and the courts) can properly construe the provision as referring to paragraph 3(3) to give it its proper, intended effect. To do otherwise strips the provision of all sense (and effect), not least in that it provides for exceptions from paragraphs (a) or (b) of paragraph 3(2), which do not exist. As such, we consider that the proper approach is to read the reference in paragraph 4 of Schedule 2 to the Act as a reference to paragraph 3(3), so as to provide the proper vires for this Order.

3.7 The Ministry of Justice regrets the error, and will seek to correct the primary legislation at an early opportunity.

#### **4. Legislative Context**

4.1 The Rehabilitation of Offenders Act 1974 (“the Act”) introduced limitations on the requirement to disclose previous convictions. Section 4(4) of, and (in relation to cautions) paragraph 4 of Schedule 2 to, 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 1975 Order removes the protection afforded by the Act so that disclosures may be requested for positions, licences, bodies and proceedings of a sensitive nature. The Criminal Records Bureau (CRB) provides the relevant disclosure information on application.

4.3 The 1975 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 2007. The Rehabilitation of Offenders Act 1974 (Exceptions) (Amendment) (England and Wales) Order 2007 (S.I. 2007/2149) amended the 1975 Order to insert, amongst other professions, staff of the Public Guardianship Office, authorised search officers under the Immigration, Asylum and Nationality Act 2006 and ContactPoint operators and came into force on 22<sup>nd</sup> July 2007.

4.4 This Amendment updates the definitions of “child minding” and “day care” in the order to make them consistent with the new relevant primary legislation (the Childcare Act 2006).

4.5 Prior to 1 September 2008, the provision of childminding and day care in England and Wales was regulated under Part 10A of the Children Act 1989, which provided a system of registration for childminders and day care providers. Registration under Part 10A is dependent on suitability of the people caring for the children, and also others who may have contact with them, and the 1975 Order currently enables such people to be subject to CRB disclosures. From 1st September 2008, childcare provision in England is regulated under Part 3 of the Childcare Act 2006, and regulations made under this Act require enhanced CRB disclosures of those caring for children, and others who may have contact with children on childcare premises.

4.6 Amendments to the 1975 Order are therefore needed, as a consequence of the Childcare Act 2006, to ensure that CRB checks can continue to be carried out on all those involved in registered childcare in England. Childcare in Wales continues to be regulated by Part 10A of the Children Act 1989.

4.7 This Amendment also takes account of the provisions in the Criminal Justice and Immigration Act 2008 which extend the Rehabilitation of Offenders Act 1974 to cover reprimands, warnings, cautions and conditional cautions as well as convictions. Under the new provisions simple cautions, reprimands and final warnings will become immediately spent. The rehabilitation period for conditional cautions and youth conditional cautions will be three months. This Amendment ensures that relevant cautions and the other disposals – spent or otherwise – will still be disclosed under CRB enhanced and standard checks if someone seeks new employment

working with children or vulnerable people, or in other sensitive employment included in the Order.

4.8 This Amendment also extends coverage of the 1975 Order to cover the newly created position of “approved legal services body manager”. This is necessary to implement effectively reforms made through the Legal Services Act 2007 (‘the 2007 Act’)

4.9 The 2007 Act, which received Royal Assent on 30<sup>th</sup> October 2007, reforms the provision and regulation of legal services. The 2007 Act created Alternative Business Structures (‘ABS’), which enable lawyers and non-lawyers to work together in new forms of business structures, providing a range of services. This will enable the collaboration of lawyers and non-lawyers in the ownership and control of law firms. It is intended that the reforms will enable greater efficiency and competition within the profession. Prior to the full implementation of ABS, the 2007 Act enables limited forms of ABS to emerge, known as Legal Disciplinary Practices (‘LDPs’). These LDPs may only provide legal services, non-lawyer ownership is restricted to 25% and non-lawyer managers must be individuals.

4.10 Traditionally, a partner in a law firm was required to be either a solicitor or his equivalent (such as a registered foreign lawyer), therefore restricting access to such positions. Non-legal managers will be able to manage a legal services body, for instance become partners in solicitors firms, but must be assessed as suitable for such by the Law Society. Adding them to the Exceptions Order enables the appropriate checks to be carried out (similar to those which would be required of many lawyer managers). The Solicitors Regulation Authority (‘the SRA’), the regulatory branch of the Law Society, has developed procedure and policy to approve such individuals as suitable to manage. The SRA proposes to begin processing these applications in January 2009.

## **5. Territorial Extent and Application**

5.1 This instrument applies to England and Wales.

## **6. European Convention on Human Rights**

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) Order 2008 are compatible with the Convention rights.”

## **7. Policy background**

7.1 The 1975 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 where disclosure of all convictions should be made available when requested. The 1975 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 Order and adding a new position to the list of ‘exceptions’, this amendment seeks to increase the public protection aspect of the criminal record disclosure regime. Checks cannot be made on positions which are not contained within the Exceptions Order and therefore legislation is required.

7.4 There are no plans at present to consolidate the instrument.

## **8. Consultation outcome**

8.1 The DSCF amendment to the definitions of day care and child minding is necessary for the sole purpose of continuing an existing scheme of vetting the criminal records of those involved with childcare. No consultation was therefore required.

8.2 The inclusion of cautions, conditional cautions, reprimands and final warnings under the ambit of the Rehabilitation of Offenders Act (Exceptions) Order is necessary to correct an identified anomaly, and to give effect to the relevant provisions in the Criminal Justice and Immigration Act 2008. No consultation was therefore necessary.

8.3 The addition of non-lawyer managers to the Amendment has been done in full consultation with and with the approval of the SRA (the primary affected body) and other relevant stake holders in the legal sector, for example the Federation of Small Business and other regulatory bodies.

## **9. Guidance**

9.1 Ofsted has produced guidance material to support childcare providers who wish to be registered under the Childcare Act 2006, and to help parents, local authorities, schools and others in understanding the requirements including the need for CRB checks.

9.2 The SRA will be responsible for providing guidance for those applying for the role of non-lawyer managers and the organisations in which they may be working.

9.3 The Office for Criminal Justice Reform (OCJR) will be responsible for providing guidance to criminal justice practitioners (in particular the police and defence solicitors) and organisations such as the Citizens Advice Bureau in relation to reprimands, warnings and cautions.

## **10. Impact**

*Childcare*

10.1 This is the continuation of an existing scheme and therefore any impact will be negligible.

10.2 No impact assessment has been prepared in relation to the Early Years and General Childcare Registers (GCR) because there is only a small additional impact on the private, charity or voluntary sector and there are no additional costs to the public.

10.3 The impact on the private, voluntary and charity sector is very small because the majority of childcare providers will continue to receive CRB checks fully subsidised by DCSF for themselves and in respect of their employees and this subsidy will continue under the new regime.

#### *Cautions, Reprimands and Warnings*

10.4 This change ensure that reprimands, warnings and cautions will continue to be disclosed under standard and enhanced disclosure checks once the provisions in the Criminal Justice and Immigration Act are implemented. It will not impact on the number of such checks made.

#### *Non-Lawyer Managers*

10.5 The impact of the addition of non-lawyer managers is limited to the legal sector and those non-lawyers seeking to become non-lawyer managers in law firms.

10.6 The number of applications to become non-lawyer managers is difficult to predict given that the provisions that enable access to these positions have not yet been commenced. For those that do apply, the impact is not anticipated to be significant. Solicitors are already included on the Exceptions Order and are expected to submit to a standard disclosure CRB checks on admission to the Roll of Solicitors. The proposal would merely extend this to a new class of potential managers of legal practices under the 2007 Act.

10.7 In financial terms, either the applicant firm or individual would cover the cost of the CRB check. In addition to the £31 charge from the CRB, the SRA will charge £16 to cover the costs of administering the checks. This is within the normal range of charges and is not considered overly burdensome.

## **11. Regulating small business**

11.1 The legislation has minimal application to small business.

#### *Childcare*

11.2 To minimise the impact of the requirements on firms employing up to 20 people, the approach taken is for DCSF to subsidise the cost of the CRB checks

#### *Cautions, Reprimands and Warnings*

11.3 This has no impact on or relevance to the regulation of small businesses.

### *Non-Lawyer Managers*

11.4 Applicant firms or individuals would cover the costs of CRB checks of prospective non-lawyer managers. The proposed amendment is not considered to be overly onerous on firms of any size. The Federation of Small Businesses ('the FSB') was consulted on the issue and was of the view that it is crucial for the success of ABS that there is confidence in the position of "non lawyer manager." The FSB added that it was satisfied that such checks should be standardised in the legal profession and that such measures were not excessively burdensome on business.

## **12. Monitoring & review**

12.1 In respect of childcare the DCSF will monitor the impact of this order over the next 12 months. .

12.2 In respect of other provisions there is no monitoring or review necessary.

## **13. Contact**

David Meyer at the Ministry of Justice Tel: 020 7035 8379 or email: [david.meyer@justice.gsi.gov.uk](mailto:david.meyer@justice.gsi.gov.uk) can answer any queries regarding the instrument.