

EXPLANATORY MEMORANDUM TO
THE REHABILITATION OF OFFENDERS ACT 1974 (EXCEPTIONS) ORDER 1975
(AMENDMENT) (ENGLAND AND WALES) ORDER 2019

2019 No. [XXXX]

1. Introduction

- 1.1 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 The instrument amends the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (“the Exceptions Order”) to enable inquiries caused to be held under the Inquiries Act 2005 to be able to admit and consider evidence of convictions and cautions that have become spent under the Rehabilitation of Offenders Act 1974 (“the 1974 Act”) where it is necessary to fulfil the terms of reference of that inquiry.

3. Matters of special interest to Parliament

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

- 3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 This entire instrument applies to England and Wales only.
- 3.3 The instrument does not have any minor or consequential effects outside England and Wales.
- 3.4 In the view of the Department, for the purposes of Standing Order No. 83P of the Standing Orders of the House of Commons relating to Public Business, the subject-matter of this entire instrument would be within the devolved legislative competence of the Northern Ireland Assembly if equivalent provision in relation to Northern Ireland were included in an Act of the Northern Ireland Assembly as a transferred matter, and the Scottish Parliament if equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament. .
- 3.5 In the view of the Department, for the purposes of House of Commons Standing Order No. 83 P, the subject matter of this instrument would not be within the devolved legislative competence of the National Assembly for Wales if equivalent legislation were included in an Act of the National Assembly for Wales.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales.
- 4.2 The territorial application of this instrument is set out in Section 3 under “Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)”.

5. European Convention on Human Rights

5.1 The Minister, Rory Stewart, has made the following statement regarding Human Rights:

“In my view the provisions of the Rehabilitation of Offenders Act (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2019 is compatible with the Convention rights.”

5.2 It is recognised that disclosure of spent convictions and cautions engages Article 8 of the European Convention on Human Rights i.e. the right to respect for private and family life. However, Article 8 is not an absolute right and public authorities are permitted to interfere with it if it is lawful and proportionate to do so.

5.3 Section 6 of the Human Rights Act 1998 requires public authorities, including inquiries, to not act in a way which is incompatible with Convention rights. Inquiries will only be able to admit evidence of spent convictions and cautions where it is necessary to do so to fulfil the inquiry’s terms of reference, and it is the Department’s view that this is a necessary and proportionate interference with Article 8.

6. Legislative Context

6.1 The Rehabilitation of Offenders Act 1974 affords offenders protection from having to disclose their convictions and cautions once those convictions and cautions have become spent under the Act i.e. the offender has become rehabilitated.

6.2 The 1974 Act provides the Secretary of State with the power to exempt offenders from those protections for certain offices, employment, work and also proceedings. These exceptions are set out in the Exceptions Order.

6.3 Section 4(1) of the Act states that spent convictions cannot be admitted into evidence for judicial proceedings and paragraph 3(1) of Schedule 2 to the Act has the same effect for spent cautions.

6.4 Section 7(4) of the Act gives the Secretary of State the power to make an order excluding the application of section 4(1) for certain proceedings, meaning that spent convictions and cautions can be admitted into evidence for those proceedings. Article 5 of the Exceptions Order sets out that section 4(1) and paragraph 3(1) of Schedule 2 of the Act will not apply to proceedings listed in Schedule 3 (Excepted Proceedings) of the Exceptions Order.

6.5 This Order therefore amends the Exceptions Order by adding an additional excepted proceeding to Schedule 3 which will enable inquiries caused under the Inquiries Act 2005 to consider spent convictions and cautions to fulfil their terms of reference.

6.6 This legislative change was initially requested by Sir John Mitting, chair of the Undercover Policing Inquiry (UCPI). Sir John requested that inquiries are added to the Exceptions Order, to enable information on individuals’ spent convictions to be disclosed and considered for the purposes of the inquiry, as without this information the inquiry would be unable to fulfil its terms of reference. Whilst section 7(3) of the 1974 Act allows judicial authorities to consider evidence of spent convictions and cautions where justice cannot be done in the case, each admission of evidence would have to be considered on a case by case basis which would take up significant time and resources. Sir John also questioned whether an inquiry would fall within the requirement that “justice” cannot be done and this therefore may limit an inquiry’s capacity to fulfil its terms of reference. The power at section 7(4) to add certain

proceedings to the list of excepted proceedings in Schedule 3 to the Exceptions Order means that inquiries that require the consideration of spent convictions and cautions to fulfil their terms of reference will automatically be able to do so.

7. Policy background

What is being done and why?

- 7.1 The amendment at Article 2 of the Order adds paragraph 24 to Schedule 3 to the Exceptions Order to make proceedings before an inquiry caused to be held under section 1 of the Inquiries Act 2005 excepted proceedings for the purposes of fulfilling the terms of reference of the inquiry.
- 7.2 As set out in paragraph 6.5 above, the request for an amendment to the Exceptions Order was made by the chair of the UCPI, Sir John Mitting, in order to allow the UCPI to consider spent convictions and cautions when hearing evidence for the inquiry.
- 7.3 The UCPI will examine undercover police operations conducted by English and Welsh police forces from 1968 onwards (including the way they monitored various political groups). To give this adequate consideration, and assess the proportionality of police decision-making, the convictions of members of the political groups under investigation will need to be reviewed. Given the historical nature of the UCPI, many such convictions are likely to be spent and therefore would not be disclosable under the 1974 Act. The amendment in this Order is likely to be particularly relevant to this inquiry, as police forces are likely to use convictions of group members as evidence to justify undercover operations.
- 7.4 The Exceptions Order lists activities or categories of jobs, where employers (and other bodies as specified) are eligible to have sight of spent convictions and other Police National Computer data, where relevant. The key rationale behind the Exceptions Order is that there are certain jobs – positions of public trust; those involving, for example, unsupervised work with children – where more complete disclosure of an individual’s criminal record may be appropriate, to mitigate against risks to public safety.
- 7.5 The Exceptions Order is not, however, limited to employment purposes, although that is its primary use. The amendment proposed here is not employment-related but related only to the consideration of evidence of spent convictions and cautions in judicial proceedings, namely before inquiries caused to be held under the Inquiries Act 2005. The disclosure and consideration of the spent convictions and cautions will not affect any ex-offender’s protection against disclosure when applying for work, but will simply mean that the offender’s spent convictions and cautions can be considered to fulfil the terms of reference of the inquiry.
- 7.6 Although UCPI is a particularly clear case of an inquiry where spent convictions are relevant, it was decided that an amendment should be made to the Exceptions Order that allows any inquiry under the Inquiries Act 2005 to admit evidence of spent convictions and cautions, but limited only to where it is necessary to fulfil the terms of reference of the inquiry. It is likely that there are or will be other inquiries that may need to consider spent criminal records as these can be key to determining whether authorities have acted reasonably in assessing and responding to risk. For example, the Independent Inquiry into Child Sexual Abuse (“IICSA”) may need to consider criminal records to make assessments of this type.

- 7.7 Whilst this is the first request that has been received –development of data protection laws in recent years has prompted much greater awareness by public bodies of their potential responsibilities around personal data including criminal records. In any event, making this exception for UCPI will render the position questionable for other inquiries if they were not included on the Exceptions Order. As inquiries are obligated to have regard to the rights of those who hold criminal records, and to the legitimacy of using such evidence in the course of their duties – our view is that the duties of all inquiries are of sufficient seriousness to justify clarifying that they may take spent criminal record evidence into consideration where they believe it is necessary.
- 7.8 Under section 1 of the Inquiries Act 2005, inquiries are caused to be held by a Minister where particular events have caused, or are capable of causing, public concern, or there is public concern that particular events have occurred. Public interest is at the centre of the purpose of inquiries, however it is possible that evidence central to an inquiry’s terms of reference may be excluded because of the provisions of the 1974 Act. Whilst the provisions provide necessary protections to rehabilitated offenders, this amendment is necessary to ensure that inquiries that are of high public interest and concern are able to consider the evidence that is relevant and necessary to fulfil their purpose.
- 7.9 Adding these inquiries to the Exceptions Order now will ensure that more efficient use is made of the Parliamentary process as further amendments will not be required for specific individual inquiries.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 This Order does not seek to consolidate or revoke any existing Orders.

10. Consultation outcome

- 10.1 While formal consultation was not undertaken, discussions were had with internal stakeholders and the UCPI. No substantive comments or issues were raised.

11. Guidance

- 11.1 Guidance on the Act and Exceptions Order is available on the Government website at: <https://www.gov.uk/government/publications/new-guidance-on-the-rehabilitation-of-offenders-act-1974>

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 An Impact Assessment has not been prepared for this instrument because it has a low level or not impact on businesses or the public sector. Any costs incurred for applications for any standard or enhanced criminal records checks will be met by the relevant Inquiry.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 There is no intention to monitor or review this Order.

15. Contact

15.1 Julia Gerrard at the Ministry of Justice, Telephone: +447972319261 or email: Julia.Gerrard@justice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Claire Fielder, Deputy Director for Bail, Sentencing and Release Policy, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

15.3 Minister Rory Stewart at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.