

EXPLANATORY MEMORANDUM TO

THE REHABILITATION OF OFFENDERS ACT 1974 (EXCEPTIONS) (AMENDMENT) (ENGLAND AND WALES) ORDER 2023

2023 No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command.

2. Purpose of the instrument

- 2.1 This instrument amends Schedule 1 to the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (“the 1975 Order”) by adding new paragraphs to cover chartered management accountants, fire and rescue authority employees, justice system intermediaries and notaries public of England and Wales to enable questions to be asked about cautions and convictions that have become spent under the Rehabilitation of Offenders Act 1974 (“the 1974 Act”) where it is necessary to assess a person’s suitability to engage in such work.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

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 England and Wales.

5. European Convention on Human Rights

- 5.1 The Minister of State for Sentencing and Criminal Law, the Right Honourable Edward Argar 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 2023 are compatible with the Convention Rights.”

6. Legislative Context

- 6.1 The Rehabilitation of Offenders Act 1974 affords offenders protection from having to disclose certain convictions and cautions once a specified period of time has passed, which varies according to the seriousness of the disposal received. This 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 or cautions.
- 6.2 The Rehabilitation of Offenders Act (Exceptions) Order 1975 disapplies certain provisions in the 1974 Act which would otherwise prevent a person from having to disclose a spent conviction or caution. The general effect of the disapplication of these provisions is that, in specified circumstances, questions about spent convictions and

cautions are permitted to be asked. 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 1975 Order are activities requiring a high degree of trust, often involving vulnerable persons or sensitive information, and therefore it is appropriate that an employer should know a person's fuller criminal history, including certain spent convictions or cautions, before an offer of employment is made and consideration can be given to any necessary safeguards to be put in place.

- 6.3 Article 2 of this Order amends Schedule 1 to the 1975 Order by adding new paragraphs to Part 1 (professions) to cover chartered management accountants and notaries public of England and Wales, and Part 2 (offices, employment and work) to cover fire and rescue authority employees, and justice system intermediaries.
- 6.4 The amendments would mean that a person's spent convictions and cautions may be taken into account when assessing a suitability to engage in such work.

7. Policy background

What is being done and why?

- 7.1 The 1975 Order lists activities or categories of jobs, where employers (and other bodies as specified) are eligible to access spent convictions and cautions. 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 risks to public safety. This Order adds chartered management accountants, fire and rescue authority employees, justice system intermediaries and notaries public of England and Wales to the list of roles attracting greater disclosure.

Chartered management accountants

- 7.2 The aim of adding chartered management accountants to Part 1 of Schedule 1 of the Exceptions Order is to allow the Chartered Institute of Management Accountants (CIMA) to require prospective and current members to disclose spent convictions and cautions. At present, the 1974 Act prevents CIMA from requiring disclosure of spent cautions. This is an unsatisfactory position because chartered management accountants undertake sensitive accounting functions in a position of trust, and so there is a particular opportunity for individuals to cause harm to the public through abuse of trust. Some convictions and cautions are clearly relevant to a person's function as a management accountant in such position of trust, even if the conviction or caution has become spent, for example, fraud. There have been multiple examples where CIMA has been unable to take effective action against members with respect to relevant convictions and cautions. The inability of CIMA to take effective action with respect to such convictions and cautions impedes CIMA's ability to fulfil its function of protecting the public through the regulation of the chartered management accountancy profession, in particular by properly assessing the suitability of new applicants to the profession and by taking appropriate disciplinary action against existing members and students. The addition of CIMA to the Exceptions Order would remedy this situation.

Fire and rescue authority employees

- 7.3 Fire and rescue authority (FRA) employees play a vital public safety role in their communities. FRA employees are both deeply trusted and highly reliant on trust to conduct their roles which regularly bring them into contact with vulnerable people.
- 7.4 While the role of FRA employees has traditionally included firefighting, it can also include attending schools which can lead to significant contact with children and young people, targeting elderly and disabled people's homes for fire safety visits, attending incidents as medical first responders, exercising statutory powers and helping to safeguard others.
- 7.5 Engagement by the Home Office and National Fire Chiefs Council (NFCC) identified significant concerns in fire and rescue services about their ability to access Disclosure and Barring Service (DBS) checks of an individual's criminal record. Inclusion of FRA employees in the 1975 Order will provide eligibility for Standard DBS checks, which disclose spent convictions and cautions, subject to filtering rules. Subject to the approach taken in using these checks, we anticipate these measures could help identify and mitigate any risks posed by current or potential FRA employees which are evidenced on this higher-level of DBS check. Guidance is being developed to support appropriate approaches to use of this new eligibility (see paragraph 11.2).
- 7.6 We anticipate this order will help maintain public trust and help mitigate risks to public safety from FRA employees. This order will also provide FRA employees with the same status with regard to criminal record disclosures as some other emergency service employees, who collaborate closely with FRA employees. During stakeholder engagement, a majority of those organisations who responded supported the principle of the change (see paragraph 10.2).

Justice system intermediaries

- 7.7 The aim of adding justice system intermediaries to Part 2 of Schedule 1 of the Exceptions Order, is to allow providers of intermediaries which are commissioned through government approved schemes, or contracted services, such as the Ministry of Justice Witness Intermediary Scheme or His Majesty's Courts and Tribunals Service Appointed Intermediary Services, to request standard DBS certificates for these roles. Justice system intermediaries bear a high degree of responsibility for the welfare of the vulnerable people they assist and may at times have unsupervised access to such individuals, including children. The present arrangements limiting disclosure to unspent convictions are considered unsatisfactory, as they prevent intermediary service providers from accessing information which may indicate an individual is unsuitable for the justice system intermediary role. This poses a risk to the vulnerable people that justice system intermediaries assist. Allowing standard DBS certificates to be requested for the justice system intermediary role will help further safeguard vulnerable individuals and increase confidence in intermediary services.

Notaries public of England and Wales

- 7.8 The amendment to Schedule I Part I (Professions) to add "notary public of England and Wales" has been recommended by the Faculty Office of the Archbishop of Canterbury ("the Faculty Office") in its capacity as the regulator of the notarial profession in England and Wales. This amendment will allow the Faculty Office to request a standard DBS certificate from notaries public and notary public applicants in order to be authorised.

- 7.9 Notaries public have access to sensitive information and client money, and they deal with vulnerable individuals. Therefore, it is appropriate to give the Faculty Office the power to have access to a notary public or notary public applicant's complete criminal record. Furthermore, having this power will also better equip the Faculty Office to promote the prevention and detection of economic crime in its regulated community.
- 7.10 This amendment will bring parity between notaries public and other parts of the legal profession such as solicitors, barristers and CILEX authorised persons who are already included in the 1975 Order.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union or 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 CIMA's addition to Part 1 of Schedule 1 of the Exceptions Order has been put to CIMA's Professional Standards Committee and the CIMA Council, who consider the interests of CIMA members, and has been approved by both bodies. CIMA will also publish a notification to all members in the regulatory updates section of the next edition of its magazine in April 2023. CIMA has not conducted a formal consultation with its members given the public interest in its addition to the Schedule and the fact that CIMA intends to require disclosure of spent convictions and cautions on a forward-looking basis.
- 10.2 The business case seeking inclusion of FRA employees in the order was presented to Government by the National Fire Chiefs Council, the representative body of chief fire officers. Drafts of the business case proposing the amendment relating to FRA employees were provided to organisations representing both FRAs and their employees. Letters expressing general support of the principle were received from organisations representing FRAs. Responses received from bodies representing employees provided conditional support, identifying considerations around implementation of the change which are addressed in the context of guidance to support the change (see para 11.2 below).
- 10.3 The Ministry of Justice Vulnerable Users Policy Team overseeing intermediary services policy has not held a formal consultation on adding justice system intermediaries to Part 2, Schedule 1 of the Exceptions Order, as this change is in the public interest. Justice system intermediaries within the Witness Intermediary Scheme have indicated broad support for increasing the level of DBS check eligibility for the role.
- 10.4 A formal consultation, which ran for almost three weeks, was undertaken by the Faculty Office in October 2022. The Faculty Office notified all notaries public to draw their attention to the consultation and it was also separately sent to the Legal Services Board (LSB), the Office for Professional Body Anti-Money Laundering Supervision (OPBAS), the Legal Services Consumer Panel (LSCP), the Notaries Society, the Society of Scrivener Notaries, and Unlock (a charity providing support to people with criminal records). The consultation received two responses. The Notaries

Society, one of the representative bodies for notaries public, expressed their support for adding notaries public to the Exceptions Order. The second response came from advocacy charity 'Unlock' who did not support the proposal. This was on the grounds that it would increase the level of criminal records disclosure allowed, without clarifying when it is appropriate for a standard check to be completed. The Faculty Office has offered to run its policy guidance past Unlock and discuss how they intend to implement it.

11. Guidance

11.1 Guidance on the Act and the Exceptions Order is available on the Government website at:

[Guidance on the Rehabilitation of Offenders Act 1974 and the Exceptions Order 1975 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/guidance-on-the-rehabilitation-of-offenders-act-1974-and-the-exceptions-order-1975)

11.2 The organisations concerned are producing guidance to support a proportionate approach to disclosure of criminal records with regard to public safety, equality, avoiding undue cost, preventing delays to recruitment and individual privacy. The guidance will also emphasise that those making recruitment decisions should only consider offences that are relevant to the role in question and that any information obtained is used in a way that does not undermine the rehabilitation of offenders.

12. Impact

12.1 There are no expected impacts on business, charities or voluntary bodies.

12.2 While this order only provides eligibility for the disclosure of criminal records, rather than requiring it, we anticipate that additional costs may be incurred by FRAs through their use of such disclosures. These costs may be financial from directly requesting disclosures, or economic from additional time spent by FRAs on these requests and processing disclosures. These costs are expected to be met from existing budgets.

12.3 An Impact Assessment has not been prepared for this instrument as the impact on the public sector is expected to be low. Any costs incurred for applications for criminal records checks will be met by the relevant organisations or the individuals applying for roles within them.

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 plan to monitor or review this SI.

15. Contact

15.1 Yasmin N'Jai at the Ministry of Justice, email: Yasmin.NJai@justice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Adam Bailey, Deputy Director for Prisoner Outcomes, Resettlement and Reoffending at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

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