EXPLANATORY MEMORANDUM TO

THE REHABILITATION OF OFFENDERS ACT 1974 (EXCEPTIONS) (AMENDMENT) (ENGLAND AND WALES) (NO. 2) ORDER 2011

2011 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") to add a new exception that will allow questions to be asked about the spent convictions and cautions of individuals for the purpose of assessing, in accordance with Part 5 of the Legal Services Act 2007 ("the Legal Services Act"), whether the person is suitable to hold certain interests (defined in the Act and known as a "restricted interest") in a firm providing legal services to the public which is partly or wholly owned or controlled by non-lawyers.

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

3.1 None.

4. Legislative Context

4.1 The Rehabilitation of Offenders Act 1974 ("the 1974 Act") protects rehabilitated offenders from having to reveal certain past convictions and cautions once a specified period of time has passed. Section 4(4) of the 1974 Act enables the Secretary of State, by order, to make provision that in certain circumstances and proceedings the protection against having to reveal spent convictions does not apply. Where the Exceptions Order applies in a particular case, a person asked about his criminal record must include details of spent convictions and cautions in his response.

4.2 The Exceptions Order, by providing for the right to put an exempted question, taken in conjunction with the provisions of the Police Act 1997 and regulations made under it, has the result that a full criminal records history may be provided for an individual involved in sensitive areas of activity and work. The Criminal Records Bureau is able to provide the relevant disclosure information on an application made for any purpose listed in the Exceptions Order.

4.3 The Exceptions Order is amended periodically to ensure that the criminal disclosure regime meets the changing requirements of public protection.

4.4 The Legal Services Act contains a framework for the regulation of lawyers. Part 5 (alternative business structures) provides that approved regulators which have been designated as licensing authorities under Schedule 10 to that Act may issue licences to bodies that are wholly or partly owned or controlled by non-lawyers ("licensed bodies"), permitting those bodies to offer legal services, or a mixture of legal services and other services, to the public. Schedule 13 to that Act requires that, before granting such a licence, the licensing authority must approve the holding by non-lawyers of a restricted interest in the body. The criteria for granting such approval are set out in that Schedule.

5. Territorial Extent and Application

5.1 This Instrument applies to England and Wales.

6. European Convention on Human Rights

Crispin Blunt, the Parliamentary Under Secretary of State, Ministry of Justice, 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) (No.2) Order 2011 are compatible with the Convention rights."

7. Policy background

What is being done and why

7.1 The Rehabilitation of Offenders Act 1974 designates convictions of 30 months imprisonment or less as 'spent' after a certain period of time has elapsed. That period varies according to the seriousness of the sentence received. The 1974 Act seeks to aid the reintegration and resettlement of ex-offenders through the removal of barriers to employment by not requiring them to answer questions regarding their spent convictions for any purpose not included in the Exceptions Order.

7.2 While it is generally desirable to facilitate ex-offenders into employment, the Exceptions Order exists to ensure that the public remains adequately protected. Those areas of activity included in the Exceptions Order are considered to provide individuals with particular opportunities to harm the public. In those circumstances it is appropriate that it should be possible to know a person's full criminal history before decisions regarding the person's suitability to carry out these activities are made.

7.3 Those who hold a restricted interest in a licensed body have particular influence over its management. In order to safeguard against the risk of improper management of firms providing legal services, including the risk of the exploitation of access to client money, Schedule 13 to the Legal Services Act requires all those who hold a restricted interest in a licensed body to be subject to a fitness to own test. The quality of this assessment, and therefore

the protection of the public, will be improved if information about spent convictions and cautions can be taken into account. This Order therefore amends the Exceptions Order so as to permit a licensing authority to take spent convictions and cautions into account when deciding whether to approve the holding by a non-lawyer of a restricted interest in a licensed body.

Consolidation

7.4 Versions of the statutory instrument will be available on the legislation.gov.uk website. Consolidated versions are not available at this time.

8. Consultation Outcome

8.1 Consultation relating to the regulatory arrangements introduced by Part 5 of the Legal Services Act has been conducted by the oversight regulator, the Legal Services Board ("the LSB"). All respondents agreed to a greater or lesser extent, that spent conviction information should be disclosed and was relevant to the determination of the suitability of a person to own a licensed body.

8.2 This Order has been drafted following engagement with the LSB, the Council for Licensed Conveyancers ("the CLC") and the Law Society and its regulatory arm, the Solicitors Regulation Authority ("the SRA"). The CLC and SRA (on behalf of the Law Society) are, or are expected, to become licensing authorities under Part 5 of the Legal Services Act. These bodies and other legal stakeholders have also been consulted on the content of the Order. The SRA, the CLC, the Law Society, the LSB and the Bar Standards Board have expressed the view that the Order as drafted effectively extends the Exceptions Order to those with a restricted interest in an ABS. All those bodies have also indicated that they would have liked the Order to extend to exempt managers of licensed bodies who do not hold a restricted interest in it from the 1974 Act. The Ministry of Justice does not presently consider that there is evidence to support that approach.

9. Guidance

9.1 The LSB has provided guidance on the fitness to own test that licensing authorities must apply when assessing a potential owner of a licensed body. This includes a requirement on licensing authorities to produce their own guidance on the type of issues that may mean someone does not meet the criteria for approval to hold a restricted interest in a licensed body. Both the SRA and the CLC have produced guidance about how they expect to treat information about spent convictions when assessing the suitability of a person to hold a restricted interest in a licensed body.

10. Impact

10.1 The Exceptions Order enables licensing authorities to carry out checks in accordance with the regulatory arrangements required for the operation of

Part 5 of the Legal Services Act, for which an impact assessment has already been carried out. This Order has no additional direct financial implication on the public or private sectors. The cost of obtaining a criminal record check will be borne either by the regulators or by persons who apply for a licence under Part 5.

11. Regulating Small Business

11.1 The changes will not create new burdens on small businesses.

12. Monitoring and Review

12.1 The policy behind the Exceptions Order is kept under regular review by the Ministry of Justice.

13. Contact

Mary Strong at the Ministry of Justice, Tel: 020 3334 2863 or e-mail: mary.strong@justice.gsi.gov.uk can answer any queries regarding the instrument.