EXPLANATORY MEMORANDUM TO

THE REHABILITATION OF OFFENDERS ACT 1974 (EXCEPTIONS) ORDER 1975 (AMENDMENT) (ENGLAND AND WALES) ORDER 2014

2014 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 order amends the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (the "Exceptions Order"). It makes amendments in relation to (i) childminder agencies, (ii) special guardians, (iii) administrative and auxiliary staff in children's homes, adoptions agencies etc (iv) those authorised to conduct reserved legal activity and conduct certain management activities by the Chartered Institute of Legal Executives ("CILEx") and (v) updates the description of probation officers.

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

3.1 None.

4. Legislative Context

4.1 This instrument is being made to support legislative changes and to ensure that those who carry out certain existing occupations work and activities can be asked about their unprotected spent convictions and cautions.

(i) *Childminder agencies* – Amendments support the amendments made to Part 3 of the Childcare Act 2006 ("the 2006 Act") by sections 84 of, and Schedule 4 to, the Children and Families Act 2014. The amendments to the 2006 Act will permit a person who wishes to provide childcare on domestic premises to register with a childminder agency rather than with Her Majesty's Chief Inspector of Education, Children's Services and Skills ("the Chief Inspector"). This instrument will permit the Chief Inspector to ask about the unprotected spent convictions and cautions of any person who carries on the agency or any directors and other officers of the agency. The childminder agency will also be permitted to ask about the unprotected spent convictions and cautions of any person who works for the agency and who will be entering a childminder's premises.

(ii) *Special guardians* – The amendments will permit a local authority, when preparing a report for the court about the suitability of a person to be a special guardian to ask about the unprotected spent convictions and cautions of that person (or a person over the age of 18 living in the same household as the proposed guardian).

(iii) *administrative and auxiliary staff* – The amendments will permit administrative and auxiliary staff to be asked about their unprotected spent convictions and cautions where they are working in children's homes, residential family centres, and where they are working in adoption services adoption support agencies, voluntary adoption agencies, fostering services or fostering agencies adoption agencies or residential family centres and, in the course of their normal duties, will have contact with children or will have access to sensitive personal information about children.

(iv) *Those authorised by CILEx* - The amendments will permit CILEx to ask a person who intends to conduct a reserved legal activity or a person who will be concerned with the management of a CILEx authorised person about their unprotected spent convictions and cautions.

(v) *Probation officers* - The amendments also reflect legislative changes introduced by the Offender Management Act 2007 under which individuals authorised to deliver probation services are described as officers of providers of probation services.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

Jeremy Wright, the Parliamentary Under Secretary of State, has made the following statement regarding Human Rights:

> "In my view the provisions of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2014 are compatible with the Convention rights."

7. Policy background

7.1 The Rehabilitation of Offenders Act 1974 ("the Act") protects rehabilitated offenders from having to reveal certain past convictions (of four years' imprisonment or less) and cautions once a specified period of time has passed, which varies according to the seriousness of the disposal received. The 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.

7.2 The Exceptions Order creates exceptions to the Act with the effect that, in some circumstances, all unprotected convictions and cautions must be disclosed and may be taken into account when assessing a person's suitability for certain positions. 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 Exceptions Order are activities requiring a high degree of trust, often involving vulnerable persons or sensitive information therefore it is appropriate that an employer should know a person's

fuller criminal history, including certain spent convictions and cautions, before an offer of employment is made and consideration can be given to any necessary safeguards to be put in place.

Childminder agencies

7.3 Childminder agencies (CMAs) are a new type of organisation that will be able to register, quality assure and enhance the professional development of childminders from September 2014. CMAs will effectively take over some of the duties that the Office for Standards in Education Children's Services and Skills (Ofsted) has now in terms of registering and inspecting childminders, although the agencies themselves will be registered and inspected by Ofsted. CMA proprietors (e.g. directors or those nominated to run the agency on their behalf) and their monitoring staff will be making visits to the childminders' home while they are taking care of children.

7.4 The purpose of the amendment to the Exceptions Order is to permit Ofsted to seek disclosure of any unprotected cautions and convictions from those individuals applying to register as CMAs, and for CMA proprietors to do the same for employees who are responsible for monitoring visits to child minders. Ofsted inspectors themselves are subject to this level of disclosure and the amendment is being made to ensure that public protection is maintained when CMAs take over some of their functions.

Special guardians

7.5 Special guardianship is a type of legal guardianship of a child, made under court order, which shares parental responsibility between the special guardian and the birth parent, but gives priority to the special guardian. The role of special guardians is akin to that of adoptive parents as, in the majority of cases, children subject to a special guardianship order will live with the special guardian following the making of the order. The local authority is under a duty to investigate and prepare a report for the court in relation to the suitability of the applicant to be a special guardian. As part of that assessment, this amendment will allow the authority to seek disclosure of unprotected spent caution and conviction information about the special guardian (or an adult living in the same household as the proposed special guardian), which will be an important safeguard.

Administrative and auxiliary staff in children's homes, etc

7.6 Looked after children are particularly vulnerable and it is important that all staff who come into contact with such children in the normal course of their duties or have access to sensitive information about the children are assessed for their suitability to work in children's homes, fostering and adoption agencies, etc. Many of the posts in these areas are already covered by the Exceptions Order because the roles fall under the definition of regulated activity, as provided for in Schedule 4 to the Safeguarding Vulnerable Groups Act 2006 (immediately before it was amended by the Protections of Freedoms Act 2012). However, even where individuals are not employed to carry out regulated activity they

may still, for example, have access to certain sensitive personal data about children or have some contact with children. These risks can be mitigated by seeking disclosure of unprotected spent caution and conviction information about such individuals.

Probation officers

7.7 This amendment updates the current reference to probation officers in the Exceptions Order so that it refers to officers of providers of probation services. This reflects legislative changes introduced by the Offender Management Act 2007.

Chartered Institute of Legal Executives (CILEx)

7.8 The Exceptions Order already provides for fellows of CILEx to be subject to the disclosure of unprotected cautions and convictions. The range of reserved legal activity for which CILEx will be an approved regulator will be extended to include those carrying out probate and conveyancing. However those carrying out such activities will not be required to be a fellow of CILEx and so the Exceptions Order is amended to provide for those carrying these regulated activities to be asked about their unprotected spent convictions and cautions too. The amendments will also permit CILEx to ask about the unprotected convictions and cautions of those who intend to be CILEx approved managers.

Consolidation

7.9 The statutory instrument will be available at http://www.legislation.gov.uk. Consolidated versions are not available at this time.

8. Consultation outcome

8.1 The Department for Education issued a consultation paper, *More great childcare,* in January 2013 setting out proposals, including those relating to childminders, which were subsequently legislated for in the Children and Families Act 2014. The other amendments being made to the Exceptions Order reflect other changes to legislation which allow additional individuals to do occupations or activities already covered by the Exceptions Order, or update existing references in the Exceptions Order, or reflect the Regulations made by Parliament governing the suitability of individuals to work in sensitive areas (which were the subject to consultation with stakeholders).

9. Guidance

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

10. Impact

10.1 There are no financial implications for the private sector or public sector as a result of these reforms. This Order has no additional direct financial implication on the public or private sectors.

10.2 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The amendments do not apply to small businesses.

12. Monitoring & review

12.1 The Exceptions Order and the Act are kept under regular review.

13. Contact

Alison Foulds at the Ministry of Justice, at Alison.Foulds@justice.gsi.gov.uk or on telephone number 0203 334 5029, can answer questions about this instrument.