EXPLANATORY MEMORANDUM TO

THE REHABILITATION OF OFFENDERS ACT 1974 (EXCEPTIONS) ORDER 1975 (AMENDMENT) (ENGLAND AND WALES) ORDER 2015

2015 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 those concerned with counter fraud work, the investigation of offences or security management within the National Health Service in England or Wales, and to current regulated activities under the Safeguarding Vulnerable Groups Act 2006.

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

3.1 None.

4. Legislative context

4.1 The amendment is designed to reflect legislative changes to ensure that all individuals who engage in regulated activities relating to children and vulnerable adults, and individuals concerned with security and counter fraud in the NHS can be asked about their unprotected spent convictions and cautions.

Counter Fraud, Investigation and Security Management in the National Health Service

4.2 Amendments will permit those concerned with counter fraud work, the investigation of offences or security management within the National Health Service (NHS) in England or Wales to be asked about their unprotected spent convictions and cautions. Such individuals have responsibility for the preparation of prosecutions, access to confidential information, medicines and equipment and can be called upon to give evidence in proceedings where character and antecedents can be called into question. The previous convictions of persons concerned with such work are therefore relevant considerations.

Regulated Activity relating children and vulnerable adults

4.3 Amendments will enable *all* those engaging in regulated activity to be asked about unprotected spent cautions and convictions. The Exceptions Order covers all individuals engaged in regulated activity as defined prior to the amendments in the Protection of Freedoms Act 2012 (POFA 2012). The POFA 2012 amended the definition of regulated activity in the Safeguarding Vulnerable Groups Act 2006 (SGVA 2006) and, in most respects, narrowed the definition. However, it is necessary

to amend the Exceptions Order to ensure that there are no circumstances where an individual engaged in regulated activity is not covered.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 Andrew Selous MP, Parliamentary Under-Secretary of State at the Ministry of Justice, 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 2015 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, and 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.

Counter Fraud, Investigation and Security Management in the National Health Service

7.3 The protection of NHS staff, patients and resources concerns a variety of activities including the investigation of fraud, bribery and corruption, safeguarding staff and patients and NHS assets. Those undertaking such activities frequently have access to confidential information, medicines and may also have contact with vulnerable individuals. When concerned with the preparation of prosecutions those engaged in counter fraud investigations can be called upon to give evidence in criminal or civil proceedings. In such circumstances character and antecedents are relevant to this issue of a witnesses' credibility.

7.4 The purpose of the amendment to the Exceptions Order is to enable disclosure of any unprotected cautions and convictions from those individuals applying for posts

as counter fraud, investigatory and security management in the National Health Service. To date this area of activity has been dealt with under the wider provision in the Exceptions Order which covers working in health services. However, there have been changes in NHS Protect so that now certain administrative staff may assist in investigations and therefore have access to some sensitive material. It is therefore considered that there should be a specific provision in the Exceptions Order to cover this area of activity, which will ensure that it is comprehensive and clear.

Regulated Activity relating children and vulnerable adults

7.5 The amendments proposed in respect of regulated activity relating to children and vulnerable adults are required due to changes in the legislation governing these activities, made by the POFA 2012. The Exceptions Order currently covers all individuals working in regulated activity as defined prior to the amendments in the POFA 2012. This reflected the government's commitment to ensure that employers would still be able to obtain information in respect of previous convictions for those who no longer fell within the definition of regulated activity relating to children and vulnerable adults following the amendments made in 2012.

7.6 Whilst the general position is that the amendments made by the POFA 2012 sought to restrict the scope of regulated activity in respect of both children and vulnerable adults, the definition of regulated activity relating to children was also expanded to a limited extent. For example, an individual who provides healthcare or personal care (as defined by paragraphs 1A and 1B of Part I of Schedule 4 to the SVGA 2006) on an occasional basis will now come within the definition of regulated activity relating to children where before these individuals would not have been covered due to not meeting the relevant frequency conditions.

7.7 In addition, section 5(3) of the SVGA 2006 provides the Secretary of State with the power to amend the definitions at Parts I and II of Schedule 4 to the SVGA 2006 by order, such that in future it is possible that roles that are not covered by the definition of regulated activity prior to the amendments made by the POFA 2012 could fall within the revised definition of regulated activity. The purpose of the amendment is therefore to ensure that employers are able to obtain information in respect of all individuals engaging in such activities in order to consider their suitability for such roles.

8. Consultation outcome

8.1 The amendment proposed in respect of NHS Protect was considered largely a clarification of an existing internal work process and as such it was not deemed to require a consultation. The amendment proposed for regulated activity relating to children and vulnerable adults reflects changes to other legislation and continuing monitoring of requirements to safeguard these specific vulnerable groups.

9. Guidance

Counter Fraud, Investigation and Security Management in the National Health Service

9.1 Guidance has been produced and is made available to all new potential nominees that may have to be propriety checked.

Regulated Activity (relating children and vulnerable adults)

9.2 Guidance is available in respect of the scope of regulated activity relating to children to assist employers in deciding whether an employee falls within that definition:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/316179/Regulated_Activity_in_relation_to_Children__DfE_.pdf

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/253564/Supervision_guidance.pdf

9.3 Similarly, guidance is available in respect of the scope of regulated activity relating to vulnerable adults:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/216900/Regulated-Activity-Adults-Dec-2012.pdf

10. Impact

10.1 There are no additional direct financial implications for the public sector, business, charities or voluntary bodies as a result of these reforms.

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

10.3 There are no equality implications as a result of these reforms.

11. Regulating small business

11.1 The amendments do not apply to small business.

12. Monitoring and review

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

13. Contact

13.1 Chris Morris-Perry at the Ministry of Justice, at chris.morris-perry@justice.gsi.gov.uk or on telephone number 0203 545 8549 can answer questions about this instrument.