EXPLANATORY MEMORANDUM TO

THE REHABILITATION OF OFFENDERS ACT 1974 (EXCEPTIONS) ORDER 1975 (AMENDMENT) (ENGLAND AND WALES) ORDER 2016

2016 No. 824

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 This order amends the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (the "Exceptions Order"). It makes amendments in relation to current regulated activities under the Safeguarding Regulated Activity Act 2006, certain members of staff and commissioners of the Independent Police Complaints Commission and candidates seeking appointment to judicial office.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 This entire instrument applies only to England and Wales.

3.3 In the view of the Department, for the purposes of House of Commons Standing Order 83P 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.

3.4 In the view of the Department, for the purposes of House of Commons Standing Order 83P, 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. Legislative Context

Regulated Activity with Children

4.1 The Police Act 1997 (Criminal Records) Regulations 2002 prescribe the purposes for which an enhanced criminal records check can be sought under section 113B of the Police Act 1997. These Regulations define work with children as including (at regulation 5C (i)): "(i) work done infrequently which, if done frequently, would be regulated activity relating to children within the meaning of Part 1 of Schedule 4 to the Safeguarding Vulnerable Groups Act 2006 or as it had effect immediately before the coming into force of section 64 of the Protection of Freedoms Act 2012". This instrument is being made to replicate these Regulations in the Exceptions Order, to

align the disclosure requirements relating to the individual and the content of criminal records certificates for these activities.

The Independent Police Complaints Commission

4.2 The Independent Police Complaints Commission (IPCC) was established by the Police Reform Act 2002 to investigate complaints and incidents involving the police that are classed as serious or sensitive matters, as well as handling certain appeals from people who are unhappy with the way the police have dealt with their complaint. Many of these cases require contact with children or vulnerable adults or necessitate access to personal sensitive data about children or vulnerable adults. This instrument is being made to allow those members of staff and commissioners who are responsible for investigations relating to the sexual exploitation and abuse of children or vulnerable adults to be asked about their unprotected spent convictions and cautions in order to assess their suitability for the role.

Judicial Appointments Commission

4.3 The Constitutional Reform Act 2005 ("the 2005 Act") established the Judicial Appointments Commission (JAC) to select candidates for judicial office in courts and tribunals in England and Wales and for some tribunals whose jurisdiction extends to Scotland or Northern Ireland. The 2005 Act places a duty on the JAC to select only people of good character[1]. This instrument is being made to allow those who apply for judicial office to be asked about their spent convictions and cautions which are currently protected from disclosure under the Exceptions Order, in support of the good character duty placed on the JAC by the 2005 Act. The effect of the instrument is to dis-apply the provisions of the Exceptions Order which protect certain old and minor spent cautions and convictions and cautions from disclosure in respect of these appointments.

5. Extent and Territorial Application

5.1 The extent of this instrument is England and Wales.

5.2 The territorial application of this instrument is set out in Section 3 under "Other matters of interest to the House of Commons".

6. European Convention on Human Rights

6.1 Andrew Selous, the 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 2016 are compatible with the Convention rights."

7. Policy background

What is being done and why?

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

[1] Section 63(3) of the CRA

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, or to take them into account.

7.2 The Exceptions Order creates exceptions to the Act with the effect that where it applies unprotected spent convictions and cautions must be disclosed and may be taken into account when assessing a person's suitability for certain positions, and in a few cases all spent cautions and convictions must be disclosed. 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 where 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.

Regulated Activity with Children

7.3 There is an anomaly between the Exceptions Order and the connected Police Act 1997 (Criminal Records) Regulations 2002 regarding regulated activity in so far as it relates to children. The Police Act Regulations cover both regulated activity relating to children, and activity which would be regulated activity relating to children if done frequently. However currently only roles falling under regulated activity are covered the Exceptions Order. The purpose of this instrument is to align the Exceptions Order with the Regulations so that positions involving unsupervised work with children on an infrequent basis are eligible for either standard or enhanced criminal record checks. These positions would involve, for example, providing relevant personal and care to children such as helping a child for reasons of age, illness or disability, with eating or drinking or bathing and dressing, and health care relating to physical or mental health including palliative care and medical and surgical operations.

The Independent Police Complaints Commission

7.4 The IPCC's primary statutory purpose is to secure and maintain public confidence in the police complaints system in England and Wales and it is overseen by a Commission comprising a Chair, two Deputy Chairs, six operational commissioners, three non-executive commissioners and two associate commissioners. The Commission is supported by a Chief Executive who leads a staff of around 800 people recruited from a range of backgrounds, including a minority who have previously worked for the police.

7.5 There are around 30,000 complaints made against the police each year and the IPCC investigates the most serious complaints and incidents involving the police, as well as handling certain appeals from people who are unhappy with the way the police have dealt with their complaint

7.6 The IPCC is currently undertaking a three-year programme of change, due to complete in 2017. This follows the Home Secretary's decision in 2013 to transfer resources to the IPCC to enable all serious and sensitive cases to be investigated independently. Since the start of this programme, 202 new investigative staff and 33 trainee investigators have been recruited.

7.7 Alongside physical expansion, the IPCC has also expanded in terms of the breadth of matters that are now being investigated for example the investigation of police force handling of matters relating to safeguarding of children.

7.8 Certain IPCC staff and commissioners routinely carry out a number of tasks requiring them to have contact with children and vulnerable adults. For example, an investigation may require IPCC investigators to conduct interviews with children or vulnerable adults who have been the victim or witness to an incident involving the police, and keep them updated throughout the investigation.

7.9 All IPCC operational staff also have access to sensitive and personal information about people involved in investigations and appeals work. This can be information provided by a victim or family in support of their complaint, or other evidence obtained during the course of an investigation. Support staff working on investigations, for example lawyers and press officers also require access to sensitive case information to perform their roles.

7.10 The purpose of the amendment to the Exceptions Order is to permit the IPCC to seek disclosure of any unprotected spent cautions and convictions from staff and commissioners working in specific roles who have contact with vulnerable adults, children and young people or have access to sensitive personal data relating to them in order to mitigate any risks.

Judicial Appointments Commission

7.11 The 2005 Act transferred the role of selection for judicial appointments from the Lord Chancellor to the JAC to strengthen the independence of the judiciary, in turn enhancing accountability, integrity, public confidence and effectiveness. Under section 63(3) of the 2005 Act, no-one must be selected for judicial appointment unless the JAC is satisfied that person is of 'good character'. This is a central aspect of judicial appointment; judicial appointees are expected to demonstrate a higher standard of conduct than most other employees or public servants. Given judges' crucial role in upholding the rule of law, and the potential damage to the integrity of that constitutional function were judges not to possess the requisite 'good character', the JAC regards this aspect of its statutory remit as fundamental to its function, to be treated with the utmost care and attention.

7.12 Judicial appointments are already covered by the Exceptions Order which means that the JAC is entitled to ask candidates to provide details of both unspent and spent (but not protected) cautions and convictions, and can take the information into account. Under the Police Act 1997 (Criminal Records) Regulations 2002, judicial appointments are subject to enhanced disclosure which means that in addition to details of unspent and spent (but not protected) cautions and convictions, the JAC will receive relevant police intelligence. Since March 2013 when the disclosure policy under the Exceptions Order changed, the JAC is entitled to ask for and take into account any unprotected spent cautions and convictions. The purpose of the amendment is to allow the JAC to take account of <u>all</u> spent cautions and convictions by dis-applying the provisions in the Order which would otherwise protect certain of these from disclosure.

7.13 The Lord Chief Justice has asked for the JAC to be added to the limited number of roles for which it is considered necessary and proportionate to be able to request, and take into account, all cautions and convictions. The justification for doing so centres on the unique position of judges and the fact that in the light of that position, the

significance of a caution or conviction is much greater. Establishing good character is a key factor in the JAC's decision making process. The JAC requires a broad picture of a person's previous behaviour to enable it to make an informed decision on whether or not to recommend someone for appointment to judicial office. The disclosure of cautions and convictions which are otherwise protected, is considered necessary to mitigate the risk to the public confidence in the integrity of the entire judiciary should details of an appointee's previous caution or conviction emerge.

7.14 Disclosures will be treated not just transparently in accordance with the JAC's 'Good Character Guidance' but also consistently, rationally and confidentially.

Consolidation

7.15 The Department is in discussion with the Law Commission about the possibility of a consolidation project of the legislation governing disclosure including Exceptions Order. .

8. Consultation outcome

8.1 Consultation has not taken place in relation to the regulated activity or IPCC amendments. There was also no public consultation on the JAC amendment, however, senior members of the judiciary, including the Lord Chief Justice, and other key stakeholders were consulted and support the amendment.

9. Guidance

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

9.2 Guidance on regulated activity with children can be found at: https://www.gov.uk/government/publications/keeping-children-safe-in-education--2

9.3 A revised version of the JAC 'Good Character Guidance' taking account of the changes to disclosure rules will be available at https://jac.judiciary.gov.uk/good-character

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 There is no impact on the public sector.

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

11. Regulating small business

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

12. Monitoring & review

12.1 The Exceptions Order and 1974 Act are kept under regular review.

13. Contact

13.1 Chris Morris-Perry of the Ministry of Justice at Chris.Morris-Perry@justice.gsi.gov.uk or on telephone 07580 701017, can answer questions about this instrument.