EXPLANATORY MEMORANDUM TO

THE REHABILITATION OF OFFENDERS ACT 1974 (EXCEPTIONS) ORDER 1975 (AMENDMENT) (ENGLAND AND WALES) ORDER 2020

2020 No. 1373

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 instrument amends the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 ("the Exceptions Order") in two respects. The first amendment removes the requirement, in circumstances where the Exceptions Order applies, to disclose all convictions if a person has more than one conviction, unless disclosure of a conviction is still required by another provision of the Exceptions Order. The second amendment removes the requirement, in circumstances where the Exceptions Order applies, to disclose any spent youth cautions.

3. Matters of special interest to Parliament

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

3.1 None

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 This entire instrument applies to England and Wales only.

3.3 The instrument does not have any minor or consequential effects outside England and Wales.

3.4 In the view of the Department, for the purposes of House of Commons Standing Order No. 83 P, 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.

3.5 In the view of the Department, for the purposes of Standing Order No. 83P of the Standing Orders of the House of Commons relating to Public Business, 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.

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 set out in Section 3 under "Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)".

5. European Convention on Human Rights

5.1 Chris Philp, Minister for 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 2020 are compatible with the Convention rights.

6. Legislative Context

6.1 The Rehabilitation of Offenders Act 1974 ('the Act') affords offenders protection from having to disclose their convictions and cautions once those convictions and cautions have become spent under the Act i.e. once the offender has become rehabilitated.

6.2 The Act provides the Secretary of State with the power to exempt offenders from those protections for certain offices, employment, work and also proceedings. The exceptions are set out in the Exceptions Order.

6.3 Where the Exceptions Order is engaged and a person has more than one conviction, all convictions which would otherwise be spent under the Act are not subject to the protection of the Act and are therefore required to be disclosed by a person if they are asked about it. This is regardless of the seriousness of the offence, the disposal received or the time that has passed. This is known as the "multiple conviction rule". Additionally, where the Exceptions Order is engaged, any youth caution which would otherwise be spent under the Act is not protected (and would be required to be disclosed if asked about it) if it was given for certain serious offences or received within two years of the disclosure request.

6.4 This instrument is being made following a Supreme Court judgment. In R(P) v Secretary of State for the Home Department and Others [2019] UKSC 3 the Court held, in judgment given on 31 January 2019, that the multiple conviction rule and the disclosure of youth warnings and reprimands in the Police Act 1997 (the "1997 Act") and the Exceptions Order are incompatible with Article 8 of the European Convention on Human Rights (the right to a private life). In respect of the multiple conviction rule, the Court accepted the legitimate aim that a multiplicity of convictions may indicate a criminal propensity likely to be relevant to the suitability of an otherwise rehabilitated person for a sensitive occupation. However, as that rule applied irrespective of the nature of the offence, of their similarity, of the number of occasions involved or the intervals of time separating them, it could not be regarded as a necessary and proportionate way of achieving that aim. In respect of youth warnings and reprimands administered to young offenders under sections 65 and 66 of the Crime and Disorder Act 1998 (replaced since 2013 by youth cautions under section 66ZA of that Act), the Court held that such disposals are an alternative to prosecution given to a young offender whose moral bearing are still in the course of formation. The Court stated further that as such disposals are designed to avoid any deleterious effect on subsequent life, its disclosure to a potential employer would be inconsistent with that purpose.

6.5 This Order responds to that judgment by amending the provisions of the Exceptions Order concerning protected convictions and cautions such that multiple convictions and youth cautions will no longer have to be disclosed when a person is asked about them, unless required to be disclosed by any other provisions of the Exceptions Order.

6.6 The Police Act 1997 (Criminal Records Certificates: Relevant Matters) (Amendment) (England and Wales) Order 2020, which is laid at the same time as this Order, amends the definition of "relevant matter" in the 1997 Act. This sets out what is disclosed by the Disclosure and Barring Service in response to an application for a standard or enhanced criminal record certificate, required for those sensitive roles equivalent to the circumstances set out in the Exceptions Order. The amendments to the 1997 Act are consistent with this instrument and provide that some cautions and convictions will not be disclosed on certificates.

7. Policy background

What is being done and why?

7.1 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 and type of disposal received. The Act seeks to aid the reintegration and resettlement of people who have offended in the past into employment by not requiring them to disclose their spent conviction or cautions. It also states employers cannot not use spent convictions or cautions as grounds for dismissal or to prejudice an employee.

7.2 The Exceptions Order creates exceptions to the Act with the effect that, in some circumstances, certain spent convictions and cautions must be disclosed and may be taken into account when assessing a person's suitability for certain positions. There must be compelling evidence that there exists a particular opportunity for employees or people involved within that activity to cause harm to the public. This reflects that, while it is generally desirable to enable people who have offended in the past to access employment, the public must remain adequately protected. Areas of activity included in the Exceptions Order are those requiring a high degree of trust, often involving vulnerable persons. It is therefore appropriate that an employer should know relevant aspects of a person's criminal history before an offer of employment is made so consideration can be given to any necessary safeguards that need to be put in place.

7.3 The Exceptions Order currently provides for full disclosure of a person's criminal convictions where there are multiple convictions, regardless of how old or minor the offence and disclosure of serious or recent youth cautions, reprimands and warnings. The Supreme Court ruled that the multiple conviction rule cannot be regarded as a necessary or proportionate way of disclosing to potential employers' criminal records indicating a propensity to offend. The Supreme Court also found that the purpose of warnings and reprimands is wholly instructive, and its use as an alternative to prosecution is designed to avoid any deleterious effect on an individual's subsequent life. Their disclosure to a potential employer would be directly inconsistent with that purpose.

7.4 The purpose of this amendment is to remedy the incompatibility with the right to privacy found by the Supreme Court by removing both the multiple conviction rule and the disclosure of youth cautions. This will include youth reprimands and warnings (which the Supreme Court case was concerned with but which were replaced by youth cautions in 2013) and youth conditional cautions (which the Supreme Court case did not relate to but which we consider to be sufficiently similar to warrant protection from disclosure once they are spent). This means that the individual will no longer

have to reveal these cautions and convictions, unless one of the other disclosure rules is engaged (for instance, the rules regarding the most sensitive roles or, for adult cautions or youth and adult convictions, the offence is recent, on a list of specified offences set out in the Exceptions Order or the conviction received a custodial sentence). They will also not appear on standard and enhanced disclosure certificates, except for the most sensitive roles.

7.5 This Order is therefore necessary to ensure the disclosure of criminal records fully complies with Article 8 of the ECHR. There are related changes being made to the 1997 Act so that standard and enhanced disclosure certificates will not include certain cautions and convictions.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union / 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 The amendment being made is in response to a Supreme Court judgment which requires the Government to take action. Consultation was not formally undertaken although we have taken into account the views put forward in reports, representations and letters received.

11. Guidance

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

12. Impact

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

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because it has a low level or no impact on businesses or the public sector.

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 intention to monitor or review this Order.

15. Contact

15.1 Joanne Simpson at the Ministry of Justice Telephone: 07889405712 or email: joanne.simpson@justice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Dilys Alam, Deputy Director for Youth Justice and Adam Bailey, Deputy Director for Bail, Sentencing and Release Policy, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

15.3 Chris Philp MP at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.