EXPLANATORY MEMORANDUM TO

The Rehabilitation of Offenders (Exceptions) (Amendment) Order (Northern Ireland) 2019

SR 2019 No. 214

1. Introduction

1.1. This Explanatory Memorandum has been prepared by the Department of Justice to accompany the Statutory Rule (details above) which is laid before the Northern Ireland Assembly.

1.2. The Statutory Rule is made under Articles 5(4) and 8(4) of the Rehabilitation of Offenders (Northern Ireland) Order 1978 ("the 1978 Order") and is subject to negative resolution procedure.

2. Purpose

2.1. This instrument amends the Rehabilitation of Offenders (Exceptions) Order (Northern Ireland) 1979 ("the 1979 Order") to give effect to changes to a criminal record 'filtering scheme' that allows some old and minor spent convictions to be 'filtered, so that they are no longer disclosed and cannot be taken into account in employment decisions in certain circumstances.

3. Background

3.1. The 1978 Order makes it possible for certain convictions to become "spent", which means that after a specified period a person can be treated for certain purposes as if the conviction had never happened and they need not, for example, tell an employer about the conviction when applying for a job.

3.2. To ensure that the public is adequately protected, however, certain exceptions to the 1978 Order are set out in the 1979 Order so that, for specified professions and occupations that typically involve a high degree of trust and often involve vulnerable persons, applicants must declare all past convictions when asked.

3.3. The 1979 Order is amended periodically to ensure that the access to the criminal record disclosure regime keeps pace with changes in public risk; to ensure that disclosure regimes remain consistent across jurisdictions where appropriate; and to maintain the public trust and protection process.

3.4. This Order, the Rehabilitation of Offenders (Exceptions) (Amendment) Order (Northern Ireland) 2019 ("the 2019 Order"), stems from a Supreme Court judgment, which ruled that elements of the criminal record 'filtering scheme' operated by the Department of Justice were disproportionate.

3.5. The 'filtering scheme' was established in 2014 following a review of the criminal records regime in Northern Ireland that was carried out by Sunita Mason during 2011, which recommended that the Department of Justice should filter old and minor convictions from standard and enhanced

criminal record certificates; and to take account of the findings of two court cases concerning the disclosure of criminal record material at that time.

3.6. The terms of the scheme are that a conviction can be filtered after a period of 11 years (or 5.5 years for those under 18 at the time of the conviction), so long as the conviction was not for a specified offence as listed in the 1979 Order (e.g. serious violent and sexual offences; or offences of specific relevance for posts concerned with safeguarding children and vulnerable adults; etc.); did not attract a custodial sentence; and if there is no other conviction on the individual's record.

3.7. The Supreme Court found that limiting the filtering scheme to a single offence, with the result that more than one old and minor conviction would be disclosed automatically, was disproportionate. The Department has, therefore, adjusted the terms of the scheme to allow more than one offence to be filtered in order to comply with the judgment.

3.8. The 2019 Order gives effect to this change by amending the 1979 Order to remove Article 1A(2)(c), which restricted the terms of the filtering scheme to a single conviction. The Department is satisfied that public protection is maintained, however, as the remaining elements of the filtering scheme will continue to ensure that there is no increased risk to the public as a result of this change.

4. Consultation

4.1. The Department of Justice conducted a public consultation exercise on Sunita Mason's recommendation to filter old and minor convictions during 2012 and there was broad support for the proposal to introduce a filtering scheme.

4.2. The changes that the 2019 Order will give effect to are required to bring the domestic law within the terms of the law as now understood on foot of the judgment and order of the Supreme Court, rather than as the result of a normal, policy development cycle that would typically involve a formal consultation component.

5. Equality Impact

5.1. An equality screening exercise was carried out and the filtering scheme was screened out as not requiring an equality impact assessment.

6. Regulatory Impact

6.1. There are no issues to be considered.

7. Financial Implications

7.1. The change to the filtering scheme will require a one-off, minor IT solution to be put in place by AccessNI to allow multiple conviction filtering to take place, which is expected to cost less than £5k.

8. Section 24 of the Northern Ireland Act 1998

8.1. There are no s.24 considerations.

9. EU Implications

9.1. The aim of the 2019 Order is to avoid a similar legal challenge against the Department's criminal record disclosure and rehabilitation of offender regimes in future and thus avoid any possible breach of Article 8 of the European Convention on Human Rights (right to privacy).

9.2. There are no other EU implications.

10. Parity or Replicatory Measure

10.1. The terms of the Northern Ireland 'filtering scheme' are consistent with those of a scheme introduced in England and Wales during 2013 as that jurisdiction's response to the court rulings on the disclosure of criminal record material.

10.2. Similar changes to the Northern Ireland 'filtering scheme' to allow more than one old and minor conviction to be filtered are expected to be introduced to the England and Wales scheme.

11. Additional Information

11.1. Not applicable