

EXPLANATORY MEMORANDUM TO

The Rehabilitation of Offenders (Exceptions) (Amendment) Order (Northern Ireland) 2014

2014 No. 27

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 a ‘filtering’ scheme by introducing provisions so that some old and minor spent convictions will no longer have to be 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. 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.
- 3.2. 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.
- 3.3. This Order, the Rehabilitation of Offenders (Exceptions) (Amendment) Order (Northern Ireland) 2014 (“the 2014 Order”) primarily stems from 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.
- 3.4. The establishment of a filtering scheme also addresses comments made in two court cases concerning the disclosure of criminal record material. In one, a European Court of Human Rights ruling in November 2012, the Court recognised that while there may be a need for a comprehensive record to be maintained of all cautions, convictions, warnings, reprimands, acquittals and even other police information, it was not satisfied that there

were sufficient safeguards in the system for the retention and disclosure of criminal record data to ensure that data relating to an individual's private life would not be disclosed in violation of their Article 8 (right to privacy) rights.

- 3.5. In the other, a judgment by the England and Wales Court of Appeal in 2013, the Court noted that, in relation to disclosure, relevance must depend on a number of factors, including the seriousness of the offence; the age of the offender at the time of the offence; the sentence imposed or other manner of disposal; the time that has elapsed since the offence was committed; whether the individual has subsequently re-offended; and the nature of the work that the individual wishes to do.

Filtering or non-disclosure scheme

- 3.6. The 2014 Order introduces provisions that will allow certain convictions that are sufficiently old and minor to have no bearing on an employment decision to be 'filtered', which means that the individual will no longer have to reveal these convictions nor will they be disclosed as part of standard and enhanced disclosure certificates.
- 3.7. The 2014 Order amends the 1979 Order so that a conviction for a non-specified offence for an adult will be filtered after a period of 11 years and 5.5 years for those under 18 at the time of the conviction; and that a conviction will only be filtered if there is no other conviction on the individual's record.
- 3.8. Public protection is maintained, however, as the 2014 Order also amends the 1979 Order to include a list of specified offences that will not be filtered and must always continue to be disclosed; and to specify that no conviction resulting in a custodial sentence will be filtered.
- 3.9. The list of specified offences includes serious violent and sexual offences; offences of specific relevance for posts concerned with safeguarding children and vulnerable adults; and offences which pose a risk of harm or the likelihood of harm to the public, children and vulnerable adults.
- 3.10. These arrangements are consistent with the terms of a 'filtering' scheme introduced in England and Wales during 2013 as that jurisdiction's response to the court rulings.

Non-recordable service offences

- 3.11. The 2014 Order also amends the 1979 Order to bring exceptions arrangements in Northern Ireland for non-recordable service offences into line with those already in operation in England and Wales, thereby ensuring a consistency of approach for service persons (and former service persons) across all jurisdictions of the United Kingdom.
- 3.12. The term "conviction" for the purposes of the 1978 and 1979 Orders covers all service offences, including non-recordable service offences such as being absent without leave or disobeying a superior. This means that if a service person (or former service person) was to apply for a position covered by the 1979 Order, he or she would have to disclose these previous minor convictions for conduct that has no criminal law equivalent in the civilian field, with the result that they risk being treated less favourably than

their civilian counterparts when applying for the same employment opportunities.

3.13. As an extension of the filtering scheme and to ensure consistency with other jurisdictions, the 2014 Order amends the 1979 Order to remove non-recordable service offences from the ambit of exceptions legislation in Northern Ireland so that this category of service offence can be considered spent once the relevant rehabilitation period has been served; need not be declared thereafter; and will not be disclosed as part of any future criminal record checks.

3.14. Public protection remains undiminished, however, as there are no changes to the more serious category of recordable service offences, which do have criminal offence equivalents and will continue to need to be declared and disclosed.

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. The results of the consultation were published in December 2013, which can be viewed at www.dojni.gov.uk/index/public-consultation/archive-consultation/review-of-criminal-records-regime-further-consultation.htm

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. It is estimated that manual filtering will have a recurring cost of around £2.5k per month, which will continue until an IT solution can be put in place in AccessNI. The set up costs for a technical, computer based solution are estimated to be around £190k with annual running costs of about £21k. It is anticipated that the overall costs of the IT contract and annual running costs will be funded through an increase in fees.

8. Section 24 of the Northern Ireland Act 1998

8.1. There are no s.24 considerations.

9. EU Implications

9.1. Part of the aim of this Order is to avoid a possible breach of Article 8 of the European Convention on Human Rights (right to privacy). There are no other EU implications.

10. Parity or Replicatory Measure

10.1. This Order will ensure a uniform position with the law in England and Wales in that the terms of the two filtering schemes are consistent and the removal of non-recordable service offences from the ambit of exceptions

legislation in Northern Ireland replicates arrangements introduced in that jurisdiction during 2013.

11. Additional Information

11.1. Not applicable