

Instruments under the Police Act 1997 and Rehabilitation of Offenders Act 1974 - Homes for Ukraine Sponsorship Scheme - Business and Regulatory Impact Assessment

May 2022



Scottish Government
Riaghaltas na h-Alba
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Final Business and Regulatory Impact Assessment

1. Title of Proposal

The Police Act 1997 (Criminal Records) (Scotland) Amendment Regulations 2022

The Police Act 1997 (Criminal Records) (Homes for Ukraine Sponsorship Scheme) (Scotland) Amendment Regulations 2022

The Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2022

The Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Homes for Ukraine Sponsorship Scheme) (Scotland) Amendment Order 2022

2. Purpose and intended effect

2.1 Background

The Police Act 1997 (Criminal Records) (Scotland) Amendment Regulations 2022 were made on 17 March 2022 and came into force on 24 March 2022. These regulations made amendments to the Police Act 1997 (Criminal Records) (Scotland) Regulations 2010 (“the 2010 Regulations”) to ensure the statutory framework for state disclosure allowed for higher level disclosure checks to be carried out on sponsors (volunteers providing accommodation in their homes) and those in the sponsoring household, to ensure those fleeing the war in Ukraine are placed in safe homes.

The Police Act 1997 (Criminal Records) (Homes for Ukraine Sponsorship Scheme) (Scotland) Amendment Regulations 2022 were made on 6 May 2022 and came into force on 12 May 2022. These regulations substitute the amendments made by the Police Act 1997 (Criminal Records) (Scotland) Amendment Regulations 2022, and now provide for enhanced disclosure checks to be carried out when any individual, whose suitability to provide accommodation to a person who has permission to enter into or to stay in the UK under the Homes for Ukraine scheme (regardless of whether that accommodation is restricted to premises in which the individual also resides or not), is being assessed.

Connected and similar amendments to the statutory framework in relation to self-disclosure were initially made by the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2022 and subsequently by the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Homes for Ukraine Sponsorship Scheme) (Scotland) Amendment Order 2022. These Orders ensure that the rules on self-disclosure and state disclosure of convictions are aligned.

Currently, the Police Act 1997 (Criminal Records) (Homes for Ukraine Sponsorship Scheme) (Scotland) Amendment Regulations 2022 and the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Homes for Ukraine Sponsorship

Scheme) (Scotland) Amendment Order 2022 extend the circumstances in which questions about previous criminal history may be asked of an individual, when assessing their suitability in particular circumstances, to include those persons volunteering to provide accommodation (whether that be within personal homes or via second properties) to a person who has permission to enter or stay in the UK under immigration rules granted in relation to the Homes for Ukraine scheme. Where the individual offering the accommodation is offering a room in their own home, any other individual over the age of 16 years also residing in the household with that individual, can also be subject to the same level of check.

There is a single policy behind all of these instruments so a combined BRIA has been completed.

2.2 The disclosure regime in Scotland

The disclosure regime in Scotland is comprised of two broadly aligned parts: self and state disclosure. The Rehabilitation of Offenders Act 1974 (“the 1974 Act”) and the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013 (“the 2013 Order”) regulate the self-disclosure obligation placed on an individual to admit to previous convictions if asked in certain proceedings. Self-disclosure by the individual is then verifiable by disclosures provided by the state. Disclosure Scotland, an executive agency of the Scottish Ministers, carries out functions on behalf of the Scottish Ministers under the Police Act 1997 (“the 1997 Act”) and the Protection of Vulnerable Groups (Scotland) Act 2007 (“the 2007 Act”) in relation to the disclosure of conviction information and other criminal history. The 1997 Act and the 2007 Act set out the system for state disclosure of an individual’s previous criminal history.

A conviction may become spent if a certain length of time has elapsed since the date of conviction, with different periods of time applying to different disposals, as set out in section 5 of the 1974 Act. Once a conviction is spent, an individual becomes a “protected person”. The 1974 Act provides that such a person is not normally required to disclose their spent conviction and that they generally cannot be prejudiced by its existence. The purpose of this approach is to appropriately allow an individual to move away from their past criminal activity so that they can contribute effectively to society while also ensuring that people with a legitimate interest, such as employers, are able to understand an individual’s background.

There are some categories of employment and proceedings to which the rules in the 1974 Act do not apply as it is considered appropriate that disclosure of spent conviction information continues to be available. This is because the employment positions and proceedings involve a high degree of sensitivity or there is an expectation of integrity or for the purposes of public protection. This is referred to in the legislation as asking ‘exempted questions’. These positions and proceedings are subject to what is known as enhanced disclosures which contain details of unspent convictions and other relevant information.

Enhanced disclosure checks can only be made by organisations registered to do so under section 120 of the 1997 Act. Under section 120(5) any body that applies to register must satisfy Scottish Ministers that it (a) is likely to ask ‘exempted

questions’, or (b) is likely to countersign applications under section 113A or 113B of the 1997 Act, at the request of bodies or individuals asking ‘exempted questions’.

Registered persons who countersign applications on behalf of others asking the exempted question are called ‘umbrella bodies’. There are various umbrella bodies registered under section 120 of the 1997 Act and those bodies are listed on Disclosure Scotland’s website.

2.3 Objective

All of these instruments were made in response to the Homes for Ukraine scheme announced by the UK Government and the Scottish Government’s intention to act as a “super sponsor” for those fleeing the war in Ukraine.

In broad terms, the Orders made under the 1974 Act and the Regulations made under the 1997 Act work together to ensure that the rules on self-disclosure and state disclosure of convictions are aligned, so that the appropriate level of vetting checks can be made in relation to individuals (and where the individual offering the accommodation is offering a room in their own home, any other individual over the age of 16 years also residing in the household with that individual) who are seeking to provide accommodation to a person who has permission to enter or stay in the UK under immigration rules granted in relation to the Homes for Ukraine scheme.

This has the effect that, when an individual is offering to provide accommodation, to a person who has been granted permission to enter or stay in the UK under the Homes for Ukraine scheme, they can be subject to an appropriate level of checks and an enhanced criminal record certificate with suitability information relating to children and adults can be issued under sections 113B, 113CA and 113CB of the 1997 Act. Where the individual offering the accommodation is offering a room in their own home, any other individual over the age of 16 years also residing in the household with that individual, can also be subject to the same level of check.

2.4 Rationale for Government intervention

The Scottish Ministers consider that, as the Homes for Ukraine scheme is likely to predominantly involve women and children fleeing the war, the safeguarding needs of these individuals and families when they arrive in Scotland are paramount and an adequate level of protection must be ensured. Whilst recognising that the vast majority of people volunteering to accommodate displaced Ukrainians will present no risk of harm to them, the Scottish Ministers are aware from previous similar schemes that people may seek to exploit vulnerabilities in the system and seek opportunities to cause harm.

In the private sector, different types of housing can be considered as suitable housing options as part of the scheme including individuals offering spare rooms within their own homes and individuals offering whole properties, such as second home/holiday lets/empty homes. Second homes etc. are particularly useful as they provide self-contained accommodation. This is likely to be more attractive for accommodating families or vulnerable people in particular and, as there is no requirement to share with others, placements are more likely to be sustained as the

risk of tenant/host relationship breakdowns through living in close proximity is reduced. In addition, such properties do not exacerbate an already pressured private rented sector (unlike landlords offering empty properties to the scheme which will reduce private rented sector housing stock and potentially put further pressure on market rents).

The Scottish Ministers consider that the level of disclosure checks that an individual offering to provide accommodation asked to undertake as part of the suitability assessment for the scheme should be the same no matter the type of accommodation offered.

Occupancy arrangements in relation to second homes etc. under the Homes for Ukraine Scheme will not be the same as standard tenancy agreements, and individuals offering whole properties under the scheme will not have entry to their property restricted by the terms of any lease. The Scottish Government considers that there is a significant risk that the scheme could attract individuals who are seeking to exploit this opportunity to gain access to vulnerable people. Further examination of the risks and emerging evidence of those risks materialising in other parts of the UK, as well as information of concern being disclosed on those checks already happening on those offering rooms, has led the Scottish Ministers to conclude an enhanced disclosure with suitability information relating to children and adults on everyone offering accommodation through the scheme (whether that be within personal homes or via second properties) offers the appropriate level of safeguarding in these circumstances.

Without these amendments to the existing statutory disclosure framework the only disclosure legally available to sponsors providing accommodation to displaced Ukrainian persons is a 'basic disclosure' under section 112 of the 1997 Act. The basic disclosure is available to any individual for any purpose and contains details of unspent convictions. It tends to be used for general employment purposes and not for roles where there is an expectation of integrity or for the purposes of public protection. The Scottish Ministers consider that the basic disclosure check offers an inadequate level of protection and reassurance that, those inviting displaced Ukrainian persons into their homes, do not have a history of known harmful behaviours.

The Scottish Ministers consider that this policy contributes to the Scottish Government's National Outcomes:

- We respect, protect and fulfil human rights and live free from discrimination
- We live in communities that are inclusive, empowered, resilient and safe
- We are open, connected and make a positive contribution internationally
- We grow up loved, safe and respected so that we realise our full potential

3. Consultation

3.1 Within Government

The response to the humanitarian crisis in Ukraine has been SG wide and has also involved local government and police. There have been regular discussions involving

Disclosure Scotland, the Children and Families Directorate and Communities Division about how the Homes for Ukraine scheme will be delivered in Scotland. Scottish Government officials have also liaised with COSLA, and have had discussions with the Disclosure and Barring Service in England and Wales, and Access Northern Ireland.

3.2 Public Consultation

In ordinary circumstances, the Scottish Ministers would consult with relevant individuals and organisations to inform the decisions that they make in this context. However, they have had to respond at speed in this situation, recognising the vulnerable status of the displaced Ukrainian nationals, and/or their immediate family members, in these circumstances.

The Homes for Ukraine scheme (including the 'Warm Scots Welcome' programme which enables displaced Ukrainian persons, when applying for a visa under the scheme, to select the Scottish Government as their super sponsor) is a voluntary scheme whereby members of the public throughout a UK Government portal can note their interest to become sponsor and provide accommodation. The guidance that is currently available on the UK Government website clearly states that disclosure checks will be undertaken in relation to those volunteering to be sponsors; where those volunteering are offering to provide accommodation within the same premises that they also reside in, other adult members of their household will also be subject to disclosure checks.

Due to the pace at which a legislative response has been needed in order to respond to the developing circumstances of the Homes for Ukraine scheme, the uncertainty around the number of people who will seek refuge in Scotland and the extent to which the Homes for Ukraine scheme will be used, it is intended that consultation and review will be revisited as the Homes for Ukraine scheme develops to ensure its effectiveness, and to ensure there are no unintended consequences.

3.3 Business

Disclosure Scotland has not consulted with any businesses directly due to the speed at which they have had to respond in this situation and the narrow circumstances in which enhanced disclosure checks are anticipated in response to this situation.

Enhanced disclosure checks, even in these circumstances, may still only be made by persons or organisations registered with Disclosure Scotland under section 120 of the 1997 Act. To be registered, the person or organisation must satisfy the Scottish Ministers that it is likely to ask 'exempted questions', or is likely to countersign applications under section 113A or 113B of the 1997 Act, or at the request of bodies or individuals asking 'exempted questions'.

The fee to be charged for enhanced disclosure certificates issued in these particular circumstances will be met by the Scottish Government. This will ensure that the registered persons or organisations countersigning the applications, are not burdened by the costs of disclosure checks and the administrative process associated with the fee being paid.

4. Options

4.1 Option 1 – Do Nothing

These instruments have been made in response to the Homes for Ukraine scheme announced by the UK Government and the Scottish Government's intention to act as a "super sponsor" due to the conflict in Ukraine.

The instruments made in March 2022 were made with urgency as there was no provision at that point in disclosure legislation for persons offering accommodation under the Homes for Ukraine scheme and individuals were already being approved under the Homes for Ukraine scheme and offers of accommodation had already been made.

The instruments laid in May 2022 increase the options for housing Ukrainian people fleeing conflict and ensure those housing options are safe. The urgency associated with these instruments arose from the number of people due to arrive in Scotland in a very short timescale given that applications to the Homes for Ukraine scheme are turning into visas and people are starting to travel. The Scottish Government have worked expeditiously to ensure that safe accommodation options are in place. The Scottish Ministers believe the safeguarding system (of which disclosure checks form only one part) should be sufficiently robust to protect it from those who may seek to exploit vulnerabilities in the system. As the Homes for Ukraine scheme is likely to predominantly involve women, children and older people; many who will be vulnerable due to trauma experienced, being displaced and having insufficient support network, the Scottish Ministers consider that the safeguarding needs of these individuals and families when they arrive in Scotland are paramount and an adequate level of protection must be ensured. The Scottish Ministers consider that making no amendments to the legislation would contribute to an inadequate level of protection for displaced Ukrainian persons in these circumstances.

Benefits

None. If the Scottish Ministers made no amendments to the disclosure legislation then only the basic disclosure would be available in these circumstances. This only contains details of unspent convictions. The Scottish Ministers consider that the basic disclosure check offers an inadequate level of protection and reassurance that those offering to provide accommodation to displaced Ukrainian persons within their own personal homes or in second homes, do not have a history of known harmful behaviours.

Costs

None, the current position would remain the same.

4.2 Option 2 – Introduce legislation that widens the scope of the circumstances in which registered persons may ask questions about a person's previous criminal history

Organisations registered with Disclosure Scotland to apply for higher level disclosures, will be able to apply for enhanced disclosure checks in connection with assessing the suitability of individuals to provide accommodation under the Homes for Ukraine scheme. Where the individual offering the accommodation is offering a room in their own home, registered organisations will be able to apply for an enhanced disclosure check in relation to any other individual over the age of 16 years also residing in the household with that individual. This means the organisation responsible for matching the individual volunteers and displaced Ukrainian persons under the Homes for Ukraine scheme, for example local authorities, charities and faith and community groups who are registered with Disclosure Scotland under section 120 of the 1997 Act, will be responsible for carrying out identity checks, applying for and handling disclosure information.

Benefits

Local authorities and many third sector organisations are already registered with Disclosure Scotland to access higher level disclosures and so will have processes to do so already in place. Registered persons are experienced in checking identity for various purposes, and experienced in applying for and handling higher level disclosure information. These organisations will already be in contact with the volunteer host as part of the wider Homes for Ukraine scheme and this minimises the number of agencies involved in the end to end process.

Costs

The fees associated with applications made in these circumstances will be met by the Scottish Government. This will ensure that the registered persons or organisations countersigning the applications, are not burdened by the costs of disclosure checks and the administrative process associated with the fee being paid.

The scale of the Homes for Ukraine scheme may have a bearing, because the potential numbers of applications in these circumstances may increase the administrative resource required of the organisations responsible for matching the individuals volunteering and displaced Ukrainians. However, this is considered to be an impact of the Homes for Ukraine scheme rather than the amendments made by these instruments.

5. Scottish Firms Impact Test

Due to the narrow scope of the legislation, we were unable to identify any specific businesses which would be detrimentally impacted by pursuing option 2.

5.1 Competition Assessment

Using the four Competition and Markets Authority competition assessment questions we have concluded that the legislation will neither directly nor indirectly limit the number or range of suppliers to compete or reduce supplier's incentives to compete vigorously.

5.2 Test run of business forms

These proposals do not introduce any new business reforms.

6. Legal Aid Impact Test

These proposals do not create any new procedure or right of appeal to a court or tribunal, nor do they change any existing procedures or rights of appeal. Due to the narrow scope of the legislation, it will not result in additional people seeking legal assistance or being taken through the courts.

7. Enforcement, sanctions and monitoring

There will be no enforcement, sanctions or monitoring requirements on those seeking higher level disclosures.

8. Implementation and delivery plan

The first set of instruments came into force on 24 March 2022 and the second set (substituting the amendments made in March) came into force on 12 May 2022.

8.1 Post-implementation review

In support of the Homes for Ukraine scheme, Disclosure Scotland established a dedicated team to support local authorities in handling disclosure checks for individuals offering accommodation under the Homes for Ukraine scheme. Disclosure Scotland has been working closely with the local authorities involved in the Homes for Ukraine scheme and who have been responsible for submitting all applications under it to date. At present, local authorities appear to have been able to absorb the demand for applications through their existing cohort of registered persons and have been using a priority service created by Disclosure Scotland. The average processing timescales for applications relating to the Homes for Ukraine scheme is 1.9 working days.

9. Summary and recommendation

The Scottish Government has taken forward option 2.

Option 1 was not considered to be feasible as it would mean that the only disclosure check legally available to people offering accommodation to displaced Ukrainians is a basic disclosure. The Scottish Ministers considered this level of check to offer an inadequate level of protection and reassurance that those inviting displaced Ukrainian nationals, and their immediate family members into their home, do not have a history of known harmful behaviours.

10. Declaration and publication

The Cabinet Secretary or Minister responsible for the policy (or the Chief Executive of non departmental public bodies and other agencies if appropriate) is required to sign off all BRIAs prior to publication. Use appropriate text from choices below:

- Sign-off for Final BRIAs:

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed:

Neil Gray

Date: 13th May 2022

Minister's name: Neil Gray

Minister's title: Minister for Culture, Europe and International Development and Minister with special responsibility for Refugees from Ukraine

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The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

ISBN: 978-1-80435-508-4 (web only)

Published by The Scottish Government, May 2022

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA
PPDAS1093582 (05/22)

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