

POLICY NOTE

THE REHABILITATION OF OFFENDERS ACT 1974 (EXCLUSIONS AND EXCEPTIONS) (SCOTLAND) AMENDMENT ORDER 2022

SSI 2022/XXX

1. The above instrument was made in exercise of the powers conferred by sections 4(4) 10(1), 10A(1) and paragraph 6 of schedule 3 of the Rehabilitation of Offenders Act 1974 (“the 1974 Act”). The instrument is subject to affirmative procedure. For the purposes of this note, the instrument will be called “the ROA Amendment Order”.

Summary Box

This instrument amends the Rehabilitation of Offenders Act (Exclusions and Exceptions) (Scotland) Order 2013 (SSI 2013/50) (“the 2013 Order”) to bring individuals – who are seeking to provide accommodation within premises that they also reside in (and those over the age of 16 years residing within the same premises) to Ukrainian nationals, and their immediate family members, who have left Ukraine in connection with the Russian invasion within the scope of the exceptions set out in the 2013 Order, requiring them to self-disclose spent convictions.

Policy Objectives

2. The ROA amendment Order has been made by the Scottish Government in response to the “Homes for Ukraine” scheme (“the 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.

3. The ROA amendment Order amends the 2013 Order so that the appropriate level of vetting checks can be made in relation to individuals who are seeking to provide accommodation within premises that they also reside in (and those over the age of 16 years residing within the same premises) to Ukrainian nationals and their immediate family members under the scheme. Connected amendments to the statutory framework in relation to self and state disclosure are being made in the Police Act 1997 (Criminal Records) (Scotland) Amendment Regulations 2022.

4. The Scottish Ministers consider that, as the scheme is likely to predominantly involve women and children fleeing the war, the safeguarding needs are paramount in order to ensure an adequate level of protection. Whilst recognising that the vast majority of people volunteering to accommodate Ukrainian refugees 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.

General background to state and self-disclosure

5. 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 self-disclosure the obligation placed on an individual to admit to previous convictions if asked by a prospective employer. Self-disclosure by the individual is verified 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 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 Police Act 1997 ("the 1997 Act") and the Protection of Vulnerable Groups (Scotland) Act 2007 ("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.

6. 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.

7. The lowest level of disclosure certificate that can be issued under the Police Act 1997 is referred to as a basic disclosure. It is available to any individual for any purpose under section 112(1) of the Police Act and contains details of unspent convictions.

8. Section 4 of the 1974 Act sets out the effect of becoming a protected person. Broadly speaking, section 4 permits such persons not to disclose spent convictions when asked to do so (e.g. by a prospective employer), prevents others from asking about those spent convictions and prohibits reliance on spent convictions in certain legal proceedings or to prejudice an individuals in an employment context. However, there are certain exceptions and exclusions to this general approach when the interests of public safety are paramount.

9. 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. These positions and proceedings are subject to what is known as enhanced disclosures which contain details of unspent convictions and other relevant information.

The 2013 Order

10. Article 4 of the 2013 Order excludes the application of section 4(2)(a) and (b) of the 1974 Act in relation to questions put in the circumstances set out in its schedule 3.

11. Section 4(2) relates to questions about spent convictions asked outwith judicial proceedings and provides that a person is entitled to treat such a question as if it does not relate to a spent conviction and must not be prejudiced by a failure to disclose a spent conviction in response to such a question. The circumstances in schedule 3 include the assessment of a

person's suitability for a profession, office, employment or occupation set out in schedule 4, or to hold a licence, certificate or permit set out in paragraph 3(3) of schedule 3. Provision is made in schedule 3 for other special circumstances that arise – for example, in the context of child minding, adoption and fostering. Article 2(2) of the ROA Amendment Order modifies schedule 3 of the 2013 Order so as to add any question asked to assess the suitability of a person who is seeking to provide accommodation to a Ukrainian national, or the immediate family member of a Ukrainian national, and who has left Ukraine in connection with the Russian invasion that took place on 24 February 2022, in specified circumstances. Those circumstances being that

- (a) the question relates to the person being assessed and that person also resides in the accommodation being provided, and
- (b) the question relates to a person over the age of 16 who resides also in the accommodation being provided.

12. This has the effect that, when an applicant to the scheme is offering to provide accommodation in the premises where they also reside, they (and any other person also residing there aged over 16) 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 Police Act 1997. The Scottish Ministers consider that this level of vetting is necessary to minimise any risk of placing refugees with an unsuitable individual while allowing for the scheme to achieve its aims.

Consultation

13. In ordinary circumstances, the Scottish Ministers would consult with stakeholders to inform the determinations that they make in this context. However, they have had to respond at speed in this situation, recognising the vulnerable status of the Ukrainian refugees in these circumstances. The Scottish Ministers are of the view that this enhanced level of vetting of individuals is a proportionate and necessary response to the circumstances.

14. No consultation has been carried out due to the pace at which a legislative response was needed in order to respond to the circumstances. It is intended that consultation and review will form part of the scheme as it rolls out.

Impact Assessments

15. There are no impact assessments for this Order. The Scottish Government is working with key partners, such as COSLA, the Scottish Refugee Council and Police Scotland, to ensure effective coordination of plans to address the practical challenges of resettling those coming to Scotland.

Financial Effects

16. The fee that is charged for enhanced disclosures certificates issued in these circumstances will be met by the Scottish Government. This will ensure that organisations, such as local authorities and NGOs, are not burdened by the costs of disclosure checks and the administrative process associated with the fee being paid.

Scottish Government
Disclosure Scotland

17 March 2022