COMBINED POLICY NOTE – VICTIM SURCHARGE SSIs

DRAFT: THE VICTIM SURCHARGE (SCOTLAND) REGULATIONS 2019

THE VICTIM SURCHARGE FUND (PRESCRIBED RELATIVES) (SCOTLAND) REGULATIONS 2019
SSI 2019/282

THE VICTIMS AND WITNESSES (SCOTLAND) ACT 2014 (COMMENCEMENT NO. 5) ORDER 2019
SSI 2019/283 (C. 11)

THE ENFORCEMENT OF FINES (RELEVANT PENALTY) (SCOTLAND) ORDER 2019
SSI 2019/280

THE SERIOUS CRIME ACT 2015 (COMMENCEMENT NO. 2) (SCOTLAND) REGULATIONS 2019
SSI 2019/281 (C. 10)

DRAFT: THE VICTIMS AND WITNESSES (SCOTLAND) ACT 2014 (SUPPLEMENTARY PROVISIONS) ORDER 2019

The Victim Surcharge (Scotland) Regulations 2019 are made in exercise of the powers conferred by sections 253F and 253G of the Criminal Procedure (Scotland) Act 1995 ('the 1995 Act') and are subject to affirmative procedure.

The Victim Surcharge Fund (Prescribed Relatives) (Scotland) Regulations 2019 are made in exercise of the powers conferred by section 253G(3) and (8) of the 1995 Act and are subject to negative procedure.

The Victims And Witnesses (Scotland) Act 2014 (Commencement No.5) Order 2019 is made in exercise of the powers conferred by section 34(2) of the Victims and Witnesses (Scotland) Act 2014 ('the 2014 Act').

The Enforcement of Fines (Relevant Penalty) (Scotland) Order 2019 is made in exercise of the powers conferred by section 226I(1) of the 1995 Act and is subject to negative procedure.

The Serious Crime Act 2015 (Commencement No. 2) (Scotland) Regulations 2019 are made in exercise of the powers conferred by section 88(2) of the Serious Crime Act 2015 ('the 2015 Act').

The Victims and Witnesses (Scotland) Act 2014 (Supplementary Provisions) Order 2019 is made in exercise of the powers conferred by section 33 of the 2014 Act and is subject to affirmative procedure.

Purpose of Each Instrument

The Victim Surcharge (Scotland) Regulations 2019 - To make provisions for the operation of the victim surcharge and the administration of the victim surcharge fund (VSF).

The Victim Surcharge Fund (Prescribed Relatives) (Scotland) Regulations 2019 - To define those relatives of victims to which certain provisions of the 1995 Act apply. The practical effect of this definition is to enable Victim Support Organisations (VSOs) to use the VSF to support relatives of victims of crime (for example the parent of a child victim).

The Victims And Witnesses (Scotland) Act 2014 (Commencement No.5) Order 2019 – To partly commence section 26 of the 2014 Act, which inserts section 253F to 253J into the 1995 Act. These sections provide for the introduction of victim surcharge and the VSF. The only part of section 26 not being commenced is the new section 253G(4)(a) and (b) of the 1995 Act which would enable payments to be made out of the Fund directly to victims of crime and the prescribed relatives of victims respectively.

The Enforcement of Fines (Relevant Penalty) (Scotland) Order 2019 – To specify the victim surcharge as a relevant penalty for the purposes of section 226I of the 1995 Act to ensure it can be enforced in the event of non-payment by the offender. This order also specifies the relevant court to enable enforcement of the surcharge.

The Serious Crime Act 2015 (Commencement No. 2) (Scotland) Regulations 2019 – To commence the parts of the 2015 Act which ensure that the court can give payment of the victim surcharge priority over a confiscation order.

The Victims and Witnesses (Scotland) Act 2014 (Supplementary Provisions) Order 2019 To substitute a new definition of fine into section 307 of the 1995 Act to clarify that the victim surcharge is not a fine.

Policy Objectives - General

The Victims and Witnesses (Scotland) Act 2014 ('the 2014 Act') introduced various measures to improve the support and information available to victims and witnesses of crime. This included provisions to introduce a victim surcharge to be imposed on a person who is convicted of an offence and receives a certain prescribed sentence.

The surcharge will be collected by the Scottish Courts and Tribunals Service (SCTS), in the same way they already collect fines and compensation orders, and transferred to the victim surcharge fund (VSF), which will be administered by the Scottish Government. The purpose of the VSF (as set out in section 253G(3) of the 1995 Act) is to 'secure the provision of support services for persons who are or appear to be the victims of crime and prescribed relatives of such persons'.

Once the surcharge has been operational for a prescribed period of time, victim support organisations (VSOs), such as Victim Support Scotland, will be invited to apply to the Scottish Government for a share of the VSF.

In turn, VSOs will be able to use this funding to provide practical support to victims and their relatives in the aftermath of crime. (A flow chart explaining this is provided in Annex A at the end of this Policy Note.)

Support provided by the VSF will help mitigate the negative experience of becoming a victim of crime, and be beneficial for the victim and/or their family. Funding should be used to meet:

- costs that would not have been incurred but for the fact that they are a victim or crime;
- costs which require to be met in the short term and cannot be met reasonably by any other source.

It is envisaged that such support will include paying for items such as: cost of travelling to court; childcare costs; funeral costs; new furniture; new doors and locks; and alarms.

Policy Objectives - The Victim Surcharge (Scotland) Regulations 2019

This instrument prescribes that the surcharge will be imposed on all persons who are convicted of an offence and receive a court fine. The instrument also sets out the surcharge amount the person must pay, which is proportionate to the amount of fine imposed by the court. This is shown in table 1 of schedule 1 of the instrument.

This instrument also prescribes that no payment will be made from the VSF until at least 6 months after this instrument comes into force. This is to allow time for the surcharge to be collected by SCTS and for monies in the VSF to accumulate. The instrument also sets out how the VSF will be administered by the Scottish Government, including the preparation of guidance on the operation of the VSF which must be published by 25 May 2020.

Furthermore, the instrument sets out how payments will be made out of the VSF, details record-keeping arrangements and sets out when reports on the administration of the VSF will be prepared and published.

Policy Objectives - The Victim Surcharge Fund (Prescribed Relatives) (Scotland) Regulations 2019

This instrument defines those relatives of victims to which provisions in section 253G of the 1995 Act apply. In particular, this definition is required to inform the purpose of the Fund under sections 253G(3) and (8) of the 1995 Act respectively. The practical effect of this definition is to enable VSOs to use the VSF to support relatives of victims of crime (for example the parent of a child victim or the bereaved family where the victim has died).

Policy Objectives - The Victims And Witnesses (Scotland) Act 2014 (Commencement No.5) Order 2019

This Order commences section 26 of the 2014 Act for the limited purposes of inserting sections 253F to 253J into the 1995 Act with the exception of section 253G(4)(a) and (b).

Section 253G(4) provides that any payment out of the Fund may only be made to a victim, a prescribed relative of a victim or a person who provides or secures the provision of support services for victims. Payments may also be made to the operator of the VSF in respect of administrative expenses.

Subsections 253G (4)(a) and (b) are not being commenced at this time. These subsections set out that the VSF can be used to make payments directly to a person who is, or appears to be, a victim of crime and prescribed relatives of such a person. The VSF will be administered by the Scottish Government, who will invite applications for funding from VSOs. In turn, VSOs will use this funding to provide practical support to victims of crime. The Scottish Government considers that, given their existing work with victims of crime, VSOs are in the best position to determine the immediate and practical needs of victims or their relatives and then utilise the VSF to meet these needs.

The alternative approach of commencing subsection 253G(4)(a) and (b) and enabling victims or their relatives to apply directly to the Scottish Government for support would likely be more onerous for the victims, take more time, remove the direct link to the expertise of the VSOs and generally be less effective in providing immediate and practical support.

Section 253H details the order in which payments must be made when an offender incurs more than one financial penalty in relation to the same proceedings. Payments must be made firstly towards any compensation order to the victim, then to the victim surcharge, then the fine.

Section 253J sets out that the provisions in the 1995 Act listed there shall apply to the victim surcharge in the same way as they do to fines, with some modifications.

Policy Objective - The Enforcement of Fines (Relevant Penalty) (Scotland) Order 2019

This instrument ensures that the victim surcharge can be enforced in the event of non-payment by the offender. It achieves this by adding the victim surcharge to the existing list of financial penalties in the 1995 Act that can be enforced by Fines Enforcement Officers (FEOs) employed by SCTS and by the courts in the event of non-payment.

The existing list includes penalties such as fines and compensation orders and it is considered appropriate for the victim surcharge to be treated in a similar fashion for the purposes of enforcement.

In addition, this order defines the relevant court for the purposes of applications made by FEOs to enforce the victim surcharge in the event of non-payment, such as an application for sale of a seized vehicle. The relevant court is defined as the court which imposed the victim surcharge or, if the penalty was transferred to another court, that court.

Separately, at the request of the Scottish Government, the UK Government brought into force The Victims and Witnesses (Scotland) Act 2014 (Consequential Modification) Order 2019, on 8th July 2019. This Order ensures that the victim surcharge can be recovered via deduction from an offender's benefits by amending section 24 of the Criminal Justice Act 1991.

Section 24 of the 1991 Act gives the Secretary of State the power to introduce a process, via subordinate legislation, whereby courts can apply a deduction from an offender's benefits to pay for a fine or compensation order, to ensure payment.

The Order prescribes that certain references to a fine in section 24 are treated as including a reference to the new victim surcharge (as is already the case for the victim surcharge in England and Wales).

By amending section 24 in this way, this Order extends the existing processes and facilitates recovery of the surcharge via deduction from benefits. This aligns the recovery powers in respect of the Scottish surcharge with the powers that already exist in respect of the corresponding surcharge in England and Wales.

Policy Objectives - The Serious Crime Act 2015 (Commencement No. 2) (Scotland) Regulations 2019

Section 15 of the 2015 Act inserts section 97A to the Proceeds of Crime Act 2002 ('the 2002 Act'), making provision for the situation where a court imposes a victim surcharge or restitution order (under section 253F or 253A of the 1995 Act respectively) alongside a confiscation order (under section 92 of the 2002 Act). The new section 97A of the 2002 Act operates so as to ensure that the court can give payment of the victim surcharge or restitution order priority over the confiscation order where monies are collected from the offender.

Paragraphs 36 to 41 and 44 of Schedule 4 of the 2015 Act make minor and consequential amendments to the 2002 Act so as to ensure that a victim surcharge or a restitution order would be treated in a similar manner to a compensation order when a court imposes a confiscation order on an offender under section 92 of the 2002 Act. Compensation orders are imposed under section 249 of the 1995 Act.

All of these provisions are brought into force in respect of the victim surcharge but not restitution orders as the relevant provisions of the Victims and Witnesses (Scotland) Act 2014 in relation to restitution orders have not yet been brought into force.

Policy Objective - The Victims and Witnesses (Scotland) Act 2014 (Supplementary Provisions) Order 2019

Section 253J of the 1995 Act (as inserted by section 26 of the 2014 Act) applies certain provisions to the victim surcharge as they apply to fines (including matters to do with enforcement and recovery) with certain modifications. In this way, section 253J implies that the victim surcharge is not in itself a fine but there is no express statement of that position in the 1995 Act (as amended). The current definition of "fine" includes any pecuniary penalty which could be interpreted widely. This Order removes any doubt as to whether the definition of "fine" in section 307 of the 1995 Act is wide enough to include the victim surcharge by substituting a new definition of fine into section 307 of the 1995 Act which expressly excludes the victim surcharge.

Consultation - General

A public consultation paper, 'Making Justice Work for Victims and Witnesses'[1] was published in July 2012 prior to the introduction of the Victims and Witnesses Bill, which led to the 2014 Act. This included consultation on the introduction of a victim surcharge, responses to which helped to shape its design. For example, the majority of respondents to the consultation agreed to: the principle of introducing a victim surcharge; the surcharge being applied to a court fine in the first instance; and the amount payable being proportionate to the value of the fine imposed, rather than a flat rate. Non-confidential responses to the consultation[2] and an analysis[3] are available on the Scottish Government website.

Consultation with VSOs, including Victim Support Scotland, Scottish Women's Aid and Rape Crisis Scotland and the justice organisations affected by the legislation was undertaken throughout the development of the Bill.

This engagement with VSOs has continued in preparing these instruments to help design the way the surcharge will be imposed, collected, enforced, applied for, allocated, monitored and reported. This engagement has included meetings with the Victims Organisations Collaboration Forum Scotland (VOCFS) at which the plans for introducing the VSF were discussed. In addition, input on the draft Guidance and application process has been sought from victims' organisations. The aim is to ensure the administrative arrangements for the fund are efficient and robust, and that victims of crime are able to access appropriate help from the fund when needed.

Consultation - The Victim Surcharge Fund (Prescribed Relatives) (Scotland) Regulations 2019

In identifying the key familial relationships, consideration was given to existing legislation and related materials on the categories of individual who should be, or are, treated as relatives of a victim. In particular:

- article 2(1)(a)(ii) of the EU Directive establishing minimum standards on the rights, support and protection of victims of crime (2012/29/EU) requires that families of those persons who die as a result of a criminal offence, and who have suffered harm as a result, be treated as victims;

- section 14(6)(a) of the Criminal Justice (Scotland) Act 2003 ("the 2003 Act") allows any or all of the four qualifying persons listed highest in section 14(10) of the 2003 Act to make a victim impact statement where the victim has died as a result of the offence;

- section 14(1) of the Damages (Scotland) Act 2011 defines, for the purposes of entitlement to raise a claim for damages, "relative" in relation to a person who has died;

[1] http://www.gov.scot/Publications/2012/05/8645/0
[2] http://www.gov.scot/Publications/2012/09/3650/0
[3] http://www.gov.scot/Publications/2013/01/8185/0

- the Code of Practice for Victims of Crime in England and Wales, issued by the Secretary of State for Justice under section 32 of the Domestic Violence, Crime and Victims Act 2004, specifies who is entitled to receive services under the Code and the term 'close relatives' is defined in the Glossary.

As well as taking into consideration precedent and current Scottish Government policy in areas such as family law and equalities, the list was developed in consultation with the justice organisations and VSOs.

In considering how to define those persons who are or have been living together with the victim as if they were married, reference was made to how this relationship is defined and measured elsewhere in legislation and related materials to ensure a consistent approach. Section 14(11) of the 2003 Act uses a minimum period of 6 months cohabitation in determining those who can receive information about the release of an offender (operated through the Victim Notification Scheme), where the victim has died, as applied by section 16 of the 2003 Act.

This approach was also used in the Victims And Witnesses (Scotland) Act 2014 (Prescribed Relatives) Order 2014. It was therefore considered appropriate that the minimum period for cohabitation be defined in the same terms. Furthermore, it was necessary to set out in the instrument a period that would allow the verification of the relationship and 6 months was considered a proportionate length of time.

While this list is considered appropriate at present, the Scottish Ministers are able to modify the list of prescribed relatives if necessary. With the future development of legislation and the definitions of familial relationships being subject to change, this will allow flexibility in updating the list of prescribed relatives in future to take account of any such changes.

Consultation - The Serious Crime Act 2015 (Commencement No. 2) (Scotland) Regulations 2019

We have engaged with the Crown Office and Procurator Fiscal Service and SCTS to discuss the impact of these Regulations and they are content with the proposed approach. The Secretary of State has been consulted as required by Section 88(2) of the 2015 Act prior to the Scottish Ministers bringing certain provisions in to force.

Impact Assessments

An Equality Impact Assessment has been completed to accompany these instruments. This concluded that the provisions in these instruments do not discriminate in any significant way on the basis of age, disability, sex including pregnancy and maternity, gender reassignment, sexual orientation, race or religion and belief.

A potential differential impact was identified in relation to the victim surcharge on the basis of both age and sex. Those over 30 - and in particular males over 30 - are more likely to receive a fine, and therefore will be adversely effected by having to pay the victim surcharge. However, this is a result of the offender population rather than the proposal itself, and any such minor effects are considered proportionate to the aims of the policy.

A DPIA has also been completed which identifies that:

- the collection of the surcharge by SCTS will not require them to collect any additional information on the offender over and above what they already collect.
- No personal data on offenders or sentence data will be transferred to the Scottish Government.
- VSOs already engage with victims and their families, including children, and will require to collect personal information to enable them to do so.
- When VSOs are invited to apply for a share of the VSF, the application process will include VSO having to demonstrate they have robust processes in place for the handling of personal data of victims.
- If SG are required to review an individual invoice for audit purposes we would require to have a process in place with VSOs to make sure any information which could identify the victim is redacted.

Following a screening exercise, it is considered that a Children's Rights and Wellbeing Impact Assessment and a Fairer Scotland Impact Assessment are not required for this policy.

Financial Effects

A Business and Regulatory Impact Assessment (BRIA) has been completed and is attached.

The implementation of the surcharge and VSF do not directly create regulatory requirements or additional financial or administrative burdens on business or the third sector.

There will be a potential financial or administrative impact on VSOs where they choose to apply for money from the VSF. Our intention is that VSOs will be able to use a small percentage of the funds they are awarded to administer their application for and use of the Fund. This can be covered by payment from the Fund under section 253G(4)(c). We will continue to engage with VSOs on the Fund and will finalise the maximum percentage that can be used for administration in guidance, to be published by 25th May 2020.

As set out in the BRIA, there will be a cost on the Scottish Government through fulfilling its role as operator of the VSF. Specifically, this would require staff time to account for funds received from SCTS, processing of applications from VSOs for payment from the VSF, record keeping, oversight and reporting. We estimate this cost will be a maximum of £26,000 per annum, once the VSF is fully operational, and will be recouped from the VSF as an outlay occurred in administration in terms of section 253G(4)(d)of the 1995 Act.

The estimated cost to SCTS was set out in the financial memorandum to the Victims and Witnesses Bill[4] and updated in August 2019. Regarding one-off costs, SCTS estimated the IT costs involved in setting up the victim surcharge (and restitution orders, which are being brought into force to a different timetable) at approximately £22,000.

Regarding recurring costs, the court costs for handling the victim surcharge are calculated on the basis that it will take an extra minute per case in court and administrative time to process. The total estimated cost is £135,000 per annum (estimated in 2019).

There is an estimated total recurring cost of £161,000 per annum (£135,000 on SCTS and £26,000 on SG) and an estimated one-off cost of £22,000 on SCTS.

Scottish Government
Directorate for Justice

September 2019

[4] http://www.parliament.scot/S4_Bills/Victims%20and%20Witnesses%20(Scotland)%20Bill/b23s4-introd-en.pdf

Annex A – Flowchart of Proposed Model for the Victim Surcharge

