

VICTIMS AND WITNESSES (SCOTLAND) ACT 2014

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Sentencing

Section 24 – Duty to consider making compensation order

59. This section inserts new subsections (4A) to (4D) into section 249 of the 1995 Act, placing new duties on the court in relation to compensation orders. Subsection (4A) provides that, in cases where the court could make a compensation order, it must consider whether to do so. Previously, where the court could impose a compensation order (for example where there has been a personal injury to the victim caused directly or indirectly) there was no obligation for the court to consider doing so.
60. Subsection (4B) provides that the court must take steps to ascertain the views and wishes of the victim before making a compensation order. In accordance with subsection (4C), if the victim notifies the court that they do not want compensation from the offender, the court may not impose a compensation order on the offender in favour of that victim.

Section 25 – Restitution order

61. This section inserts new sections 253A to 253E into the 1995 Act, to deal with the establishment and operation of restitution orders.
62. Subsection (1) of new section 253A establishes that that section shall apply to persons who are convicted of an offence under section 90(1) (police assault etc.) of the Police and Fire Reform (Scotland) Act 2012 (“the 2012 Act”).
63. Subsection (2) establishes the restitution order alongside other penalties (such as imprisonment, fines, Community Payback Orders etc.) as a penalty which may be imposed on persons convicted under section 90(1) of the 2012 Act. It also sets the upper limit of these orders in line with the prescribed sum (as defined in section 225(8) of the 1995 Act). Subsection (3) establishes that the Scottish Ministers have the power by regulations (subject to the negative procedure) to vary this upper limit.
64. Subsection (4) requires that the proceeds of restitution orders are to be paid to the clerk of court or any other person authorised by the Scottish Ministers. This is the same as for fines.
65. Subsection (1) of new section 253B establishes that the person to whom, under new section 253A(3), the proceeds of a restitution order are paid, must pass those proceeds on to the Scottish Ministers. Subsection (2) provides that, in turn, the Scottish Ministers must pass on the proceeds to a new fund, to be known as the Restitution Fund.
66. Subsection (3) provides for the establishment, maintenance and administration of the Restitution Fund for the purpose of securing the provision of support services to persons

who have been assaulted as mentioned in section 90(1) of the 2012 Act. Subsection (4) ensures that payments may be made only to persons providing or securing the provision of support services (as defined in subsection (8)) for victims of the section 90(1) offence or to the operator of the Restitution Fund in respect of the costs of administering the Fund.

67. Subsection (5) allows the Scottish Ministers to delegate, by order, the establishment, maintenance and administration of the Restitution Fund to another individual or body. Subsection (6) allows the Scottish Ministers to make further provision, by order, for the administration of the Restitution Fund, including who may benefit from it, how payments can be made from it, and the keeping of records and the making of reports by the operator. Any orders made in exercise of these powers are subject to the affirmative procedure.
68. Subsection (1) of new section 253C deals with the possibility that a person found guilty of an offence under section 90(1) of the 2012 Act may have a sentence imposed which could include three different financial penalties: a restitution order, a fine and a compensation order. The convicted person may have insufficient means to pay all three. In this case, in accordance with subsection (2), the court is to prefer imposing a compensation order, then a restitution order, and finally a fine.
69. Subsection (3) deals with the situation where a court considers it would be appropriate to impose two financial penalties; a restitution order and either a compensation order or a fine. In this case, under subsection (4), where the convicted person may have insufficient means to pay both, again the court should consider imposing a compensation order before a restitution order, and a restitution order before a fine.
70. Subsection (1) of new section 253D applies where a court has actually imposed a restitution order and either or both of a compensation order and a fine. Subsection (2) adopts the same logic as in new section 253C, and ensures that any payment made by the convicted individual is applied first to any compensation order, until such time as it is fully paid, then to any restitution order, until such time as that has been full paid, and then to any fine.
71. Subsection (1) of new section 253E states that a number of provisions in the 1995 Act shall apply to restitution orders in the same way as they do to fines. The provisions in question are listed in subsection (2). These include matters to do with the enforcement (sections 211 and 212 of the 1995 Act), remission (section 213), part-payment (section 220), recovery (section 221), transfer (sections 222 and 223) and mutual recognition of fines (sections 223A-T), as well as what to do in the case of default (section 216), supervision pending payment (section 217) and provisions about time for their payment (sections 214 and 215), disqualification from driving (section 248B) and imprisonment as means of enforcement or punishment for default (section 219), and discharge from imprisonment (section 224). All these provisions are to apply to restitution orders in the same way as they do to fines. Subsection (3), moreover, provides that a court may impose imprisonment as a means of punishing default on payment of a fine, but decline to do so for a restitution order but not *vice versa*. In addition, by virtue of that subsection, where imprisonment is used to punish default on payment of both a fine and a restitution order their amounts shall be aggregated to establish the appropriate duration of that imprisonment.

Section 26 – Victim surcharge

72. This section inserts new sections 253F to 253J into the 1995 Act, establishing a victim surcharge and providing for its operation.
73. Section 253F provides that the court must impose a victim surcharge on offenders who are subject to any sentence prescribed by the Scottish Ministers by regulations. However, a victim surcharge is not to be imposed where a restitution order has been imposed, or in relation to an offence or offence of a class prescribed by the Scottish

Ministers. The Scottish Ministers may, by regulations, set out the amount of the victim surcharge, which can be different for different types of offender or for different circumstances (for example, this would allow a scale of surcharge amounts to be established, to reflect different sentences imposed). The Scottish Ministers may also, by regulations, set out circumstances in which the court is not to impose a victim surcharge. Subsection (3) sets out that if a person is convicted of multiple offences in the same proceedings, there will only be one surcharge imposed and, where different amounts have been prescribed for different offenders or circumstances, the Scottish Ministers may provide by regulations which victim surcharge is payable in those circumstances. Subsection (4) sets out that the surcharge is to be paid to the clerk of court or any other person authorised by the Scottish Ministers.

74. Section 253G establishes the Victim Surcharge Fund (VSF). Subsections (1) and (2) provide that the person who collects the victim surcharge (Scottish Court Service, unless the Scottish Ministers authorise anyone else for this purpose under section 253F(4)) must pass the sum collected to the Scottish Ministers; and that the Scottish Ministers must then pay this amount into the VSF. Subsection (3) requires the Scottish Ministers to establish, maintain and administer the VSF for the purpose of securing support services for persons who are or appear to be victims of crime and their prescribed relatives. Subsection (4) sets out that the VSF can only be used to make payments to a person who is or appears to be a victim of crime and prescribed relatives of such a person, or to those who provide or secure the provision of victim support services, or to the operator of the VSF in respect of the costs of administering the VSF. Where the Scottish Ministers have delegated the establishment, maintenance and administration of the VSF, by virtue of subsection (5), the costs of administering the VSF may only be recovered with the consent of the Scottish Ministers.
75. Subsection (5) allows the Scottish Ministers to delegate responsibility for establishing, maintaining and administering the VSF to a third party. The Scottish Ministers are given a regulation making power in section 253G(6) to make further provision about the administration of the VSF. An order under subsection (5) and regulations under subsection (6) are subject to the affirmative procedure by virtue of subsection (7). Subsection (8) provides a definition of “support services”. Subsection (9) provides that any regulations under subsections (3), (4) and (8) (prescribing the relatives of victims who may receive support services funded by the VSF or direct payment from the VSF) are to be subject to the negative procedure.
76. 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.
77. Section 253J provides that the provisions in the 1995 Act listed in subsection (2) shall apply to the victim surcharge in the same way as they do to fines. As with restitution orders (see paragraph 72), these include matters to do with the enforcement, remission, part-payment, recovery, transfer and mutual recognition of fines, as well as what to do in the case of default and provisions about time for their payment, disqualification from driving and imprisonment as means of enforcement or punishment for default, and discharge from imprisonment. Subsection (3) provides that a court may impose imprisonment as a means of punishing default on payment of a fine, but decline to do so for the victim surcharge but not *vice versa*. In addition, by virtue of that subsection, where imprisonment is used to punish default on payment of both a fine and the victim surcharge their amounts shall be aggregated to establish the appropriate duration of that imprisonment.