

EXPLANATORY MEMORANDUM TO
THE CRIMINAL JUSTICE ACT 2003 (SURCHARGE)(No 2) ORDER 2007

2007 No. 1079

1. 1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.

1.2 It contains information for the Joint Committee on Statutory Instruments.

2. Description

2.1 Section 161A(1) of the Criminal Justice Act 2003 (“the 2003 Act”) (and other provisions relevant to the surcharge) will come into force on the same day as this order. Section 161A(1) requires a court, when dealing with a person for one or more offences, to order the person to pay a surcharge unless it makes an absolute discharge or an order under the Mental Health Act 1983, or unless the case is of a type prescribed by the Secretary of State in an order. The Criminal Justice Act 2003 (Surcharge)(No 2) Order 2007 does two things. First, it prescribes cases in which the court’s duty to order the payment of a surcharge does not apply, with the effect that it will apply only to offenders ordered to pay a fine (see paragraph 7.5 below). Second, it sets the amount of the surcharge at £15.

2.2 Money raised by the surcharge will fund a range of services helping victims of crime and witnesses.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This order breaches the 21 day rule, for which the Department apologises. The order revokes and replaces the Criminal Justice Act 2003 (Surcharge) Order 2007 (S.I. 2007/707). It is being distributed free of charge to recipients of that order. Discussions between the Home Office, the Department for Constitutional Affairs, HM Courts Service, the Magistrates’ Association and Justices’ Clerks Society about guidance on the original order revealed that it had been drafted on the basis of a misapprehension that the surcharge should be payable only in cases where a fine had been imposed on its own or with a compensation and/ or costs order, but not where other penalties were imposed or ancillary orders made. The revenue generated for victims had been calculated and court preparations for implementation had been made on the basis that the surcharge would be payable wherever a court dealt with an offender by imposing a fine whether or not in conjunction with another order.

3.2 As a matter of policy, the Department accept that there is no reason why defendants who are fined should be exempt from the surcharge because the court also make another order (for example an order disqualifying the offender from driving). As the original order was due to come into force on 1st April 2007, it was

thought necessary in order to avoid confusion on the part of the courts and offenders as to when the surcharge was payable, to revoke that order and replace it with this one on that date. The surcharge is only payable in relation to offences committed on or after that date.

4. Legislative Background

4.1 Section 14 of the Domestic Violence, Crime and Victims Act 2004 (“the 2004 Act”) provides for a surcharge to be payable on conviction by, amongst other things, inserting two new sections, section 161A and section 161B, into the 2003 Act. Section 14 of the 2004 Act (and other provisions relevant to the surcharge) will be commenced on the same day as this Order by the Domestic Violence, Crime and Victims Act 2004 (Commencement No. 8) Order 2007 (S.I.2007 / 602 (C.26)).

4.2 Section 161A of the 2003 Act imposes a duty on a court to order payment of a surcharge when it deals with a person for one or more offences, except when the court makes an absolute discharge or an order under the Mental Health Act 1983, or where the cases are of a type prescribed by the Secretary of State in an order, as is the case with this order. During parliamentary debates on the Bill, ministers explained that that power to prescribe cases to which the duty to impose the surcharge did not apply would be used if experience of operating the surcharge showed that certain categories of defendants were being unfairly penalised by it. (*Hansard: Commons Standing Committee E; 1 July 2004; Column 294 {Paul Goggins} - and - Lords Consideration of Commons Amendments; 2 November 2004; Columns 206 and 208 {Baroness Scotland of Asthal}*)

4.3 Section 161B(1) of the 2003 Act provides for the Secretary of State to set the amount of the surcharge by order. During parliamentary debates on the Bill, ministers indicated that the surcharge was likely to range from £5/10 (on penalty notices for disorder and fixed penalty notices), through £15 on fines of up to £1,000, to £30 (for fines above £1,000 and community penalties and custodial sentences). (*Hansard: Commons Standing Committee E; 1 July 2004; Column 294 {Paul Goggins} - and - Lords Consideration of Commons Amendments; 2 November 2004; Columns 217 and 218 {Baroness Scotland of Asthal}*)

4.4 This is the first time that the power to prescribe cases in which the court’s duty to order the payment of a surcharge on conviction does not apply and the power to specify the amount of the surcharge have been used.

5. Extent

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 It is government policy that, where possible, offenders should contribute to victims' services as part of their reparation. Proposals for a 'victims surcharge' to be levied on offenders to provide a secure income stream for victims' services were set out in the Home Office consultation document 'Compensation and Support for Victims of Crime', published in January 2004.

7.2 There was widespread support for the proposal to raise money for more and better services for victims and witnesses by adding a surcharge to criminal convictions and penalty notices for disorder. But there was opposition to levying the surcharge on fixed penalty notices for road traffic offences as well: this was seen as penalising motorists. The Government accordingly made provision in the 2004 Act to require courts to impose a surcharge on convictions (section 14) and power to impose a surcharge on penalty notices for disorderly behaviour (section 15). The power to impose a surcharge in relation to fixed penalty notices for road traffic offences would only apply where the offences were 'persistent and serious' (section 16 of the 2004 Act).

7.3 The provisions in relation to the surcharge on penalty notices for disorderly behaviour and fixed penalty notices for repeated road traffic offences (sections 15 and 16 of the 2004 Act) are not being brought into force for the time being. This is because it will not be possible to collect and account for the surcharge on these notices until a new computer system, PentiP (Penalty Ticket Processing), comes on stream: this is unlikely to be before 2009.

7.4 Revenue obtained from the surcharge payable on conviction will fund a range of services helping victims of crime and witnesses. This contribution is separate from, and additional to, any compensation which an offender is ordered to pay, under a compensation order, to an individual victim whom he has injured or harmed. The revenues from the surcharge will be taken into the Consolidated Fund, but will be ring-fenced administratively to ensure the money is used to support services for victims of crime and witnesses.

7.5 New section 161A(2) of the 2003 Act (inserted by section 14(1) of the 2004 Act) enables ministers to prescribe by order cases in which the court's duty to order payment of a surcharge on conviction does not apply. That power is being exercised in this order. The effect of the order is that the surcharge will only be payable where a court deals with an offender by imposing a fine (whether or not in addition to other penalties or orders). The reasons for limiting the application of the surcharge to these types of cases are as follows.

7.6 It will not be possible to collect the surcharge on all convictions in the courts until a substantial upgrade has been made to the computer system ('Libra')

used by the Department for Constitutional Affairs (DCA) to collect and account for financial penalties imposed by the courts. The future upgrade of Libra will be considered in the context of HM Courts-Service Business Strategy and Change Programme and agreed Criminal Justice Service objectives.

7.7 Until Libra is upgraded, all financial penalties collected by the courts are paid into DCA's Fines Revenue Accounts and treated as fines revenues. However, if the surcharge is added to fines only, at a flat rate, and is collected in the same way, DCA can estimate the proportion of the total fines revenue that is represented by real fines and by the surcharge respectively.

7.8 However, that calculation is not possible if the surcharge is added to other convictions and taken into the Fines Revenue Account (which, until the Libra upgrade, is the only account that it can be taken into). That means that it is not presently possible to collect and account for the surcharge on non fine sentences with sufficient accuracy to satisfy government audit and to meet government pledges that all surcharge income would be used to help victims of crime and witnesses. The surcharge could be collected on non fine convictions and accounted for manually, but the administrative costs of doing so would effectively wipe out the surcharge income generated.

7.9 The National Audit Office, which audit the DCA accounts, are satisfied with the method to be used for calculating the surcharge element in the Fines Revenue Account under this arrangement.

7.10 Further, a fine is the most commonly used sentence in the criminal courts, accounting for some 69% of the 1.48 million sentences in 2005. Thus, even when the surcharge is levied on all criminal sentences, by far the greatest part of the total income generated will come from the surcharge on fines. That is an additional reason why the Government has decided to start levying the surcharge on fines at this time, rather than delaying the introduction of the surcharge for another 2/3 years until it becomes possible to levy it on other criminal sentences too.

7.11 The surcharge has been set at £15, which was the indicative level given by ministers for fines of up to £1,000 during passage of the Domestic Violence, Crime and Victims Act 2004 (see para 4.3 above). It will not be feasible to set a different rate for fines above £1,000 before the DCA computer system is upgraded (see paragraphs 7.6 and 7.7. above). But, in fact, only 0.3% of fines in 2005 were over £1,000 and, for the time being, it is considered appropriate to set the surcharge on fines at a single, flat rate.

7.12 If the court considers that the offender should pay compensation to a victim under a compensation order but the offender does not have the means to pay compensation and the surcharge, the court must reduce the amount of the surcharge (if necessary to nil) – section 161A(3) of the 2003 Act. If the offender does not have the means to pay both a fine and the surcharge, then it is the fine and not the surcharge which would be reduced (section 164(4A) of the 2003 Act inserted by section 14(2) of the 2004 Act). So when considering the ability of the offender to pay: where the offender has insufficient funds to pay compensation, the surcharge and the fine, compensation to the victim, under a compensation order, ranks before

the surcharge, which in turn ranks before a fine. However, if the offender does have means to pay, then compensation orders and fines are not to be reduced on account of the offender also being ordered to pay a surcharge.

7.13 Once fully operational, it is estimated that levying the surcharge on fines in this way will generate some £16m a year (net of the costs of collection). If the number of fines increases or decreases, the surcharge raised will be correspondingly more or less. Similarly, if the success of enforcement increases or decreases, the surcharge raised will be more or less. The surcharge income will be allocated to the Home Office, the Department for Constitutional Affairs and the Office of the Attorney General to fund more and better services for victims of crime and witnesses.

7.14 The Department for Constitutional Affairs will be issuing guidance to courts about applying and accounting for the new surcharge. Several criminal justice ministers will be making public reference to the new surcharge and to their departmental plans for spending the revenue in the coming days and weeks; while other publicity will be used to inform the wider public, and offenders in particular, that the new surcharge is being introduced on fines as from 1st April.

7.15 The 2004 Act expressly provides that the surcharge payable on conviction under section 161A of the 2003 Act will only apply where the offence is committed on or after 1st April 2007 (see paragraph 7 of Schedule 12 to the 2004 Act). So the surcharge payable on conviction will only apply to offenders convicted of offences committed on or after 1st April 2007.

8. Impact

8.1 No Regulatory Impact Assessment has been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

9. Contact

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