

## POLICY NOTE

### THE VICTIMS' RIGHTS (SCOTLAND) REGULATIONS 2015

#### SSI 2015/444

1. The Victims' Rights (Scotland) Regulations 2015 ("the Regulations") are made in exercise of the power conferred by section 2(2) of the European Communities Act 1972. The Regulations are subject to the affirmative procedure.
2. Directive [2012/29/EU](#) of 25 October 2012 on *establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA* entered into force on 15 November 2012 and has become generally known as the Victims' Rights Directive ("the Directive").

#### Background

3. National laws and policies on victims' rights and the role of victims in criminal proceedings currently differ considerably from one Member State to another. The EU adopted the Directive to establish common rules aimed at protecting and assisting victims of crime to ensure minimum standards for victims' rights in all Member States.
4. The Directive replaces the [2001 Framework Decision](#) on the standing of victims in criminal proceedings. It considerably strengthens the rights of victims and their family members to information, support and protection, and strengthens victims' procedural rights in criminal proceedings. In particular, it will help ensure all victims of crime, regardless of where they live in the EU:
  - receive appropriate protection and support;
  - can participate in criminal proceedings, in accordance with national law; and
  - are recognised and treated in a respectful, sensitive and professional manner.
5. As the EU Commissioner for Justice, Consumers and Gender Equality Věra Jourová said on 13 May 2015 in a speech to Victim Support Europe<sup>1</sup>:

*"Every victim in Europe should benefit from a range of rights in line with their individual needs. We want every victim to be treated with the respect and dignity they deserve."*

#### Policy Objectives

6. The policy objective for the Regulations is to give effect to the Directive by creating clear, enforceable rights for victims, codifying many of the administrative practices which victims currently rely upon.
7. The Victims and Witnesses (Scotland) Act 2014 ("the 2014 Act") goes some way to transposing the requirements of the Directive. For example, it gives victims the right to

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<sup>1</sup> [Rights of victims of crime in Europe – celebrating 25th anniversary of Victim Support Europe and Apoio a Vitima](#) 13 May 2015

receive information about their case, places a duty on the Lord Advocate to set out rules about the process for reviewing a decision not to prosecute, and gives alleged victims of certain offences the right to request that they be interviewed by a particular gender of police officer. Additionally, much of what is required to comply with the Directive is currently delivered operationally. For example, under the Directive victims have a right to interpretation (Article 7) and competent authorities<sup>2</sup> already ensure appropriate translation services are available.

8. Shortly before the 2014 Act received Royal Assent the European Commission published a [guidance document](#) on transposition and implementation of the Directive. In particular it called on Member States to put in place a specific legal framework to enable:

- individuals to recognise clearly their rights; and
- competent authorities to recognise their obligations under the Directive.

9. In light of this, and to complete our transposition of the Directive, the Regulations amend the 2014 Act to ensure that victims' rights and the obligations of competent authorities are fully enshrined in Scots law. To ensure an outcome that is focussed on meeting victims' needs, the Regulations also oblige the Scottish Ministers to create a new Victims' Code for Scotland ("the Code") setting out victims' rights clearly, simply and in one place.

## **The Regulations**

10. The Regulations amend the 2014 Act to extend the rights of victims of crime by creating enforceable rights and placing obligations on competent authorities. Placing these rights and obligations on the face of the 2014 Act will create a specific legal framework to enable victims to recognise clearly their rights and the obligations of competent authorities under the Directive.

11. Our powers under section 2(2) of the European Communities Act 1972 only allow us to extend the rights in the Regulations to victims. Therefore, while the 2014 Act covers both victims and witnesses, the Directive focusses specifically on the rights of victims of crime. In practice, procedures put in place for the benefit of victims often apply to witnesses as well, and it is expected that this will continue.

12. In terms of structure, Regulations 2 to 9 and 13 to 16 insert a number of new sections into the 2014 Act. Regulations 10 to 12 and 17 make minor amendments to some of the existing provisions of the 2014 Act.

### *General Principles*

13. Regulation 2, which inserts section 1A, adds a number of victim-specific general principles to the 2014 Act in addition to those principles listed in section 1. This ensures that the persons who must have regard to the general principles in section 1 of the 2014 Act must now also have regard to the section 1A general principles in carrying out functions in relation to a victim. By applying the obligation in section 1A to the persons listed in section 1(2), we ensure that the general principles in sections 1 and 1A all apply to the same persons.

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<sup>2</sup> The competent authorities are the chief constable of the Police Service of Scotland, the Lord Advocate, the Scottish Courts and Tribunals Service, the Scottish Ministers (covering the Scottish Prison Service) and the Parole Board for Scotland.

## *Complaints*

14. Regulation 3 inserts new section 3A into the 2014 Act which places an obligation on competent authorities to provide a complaints process to allow a victim to challenge an alleged breach of their rights under the 2014 Act or an alleged breach of the obligations placed on competent authorities under the Act. Each of the competent authorities already has a complaints procedure which is compliant with the provisions so section 3A serves to codify existing practice.

15. If a victim feels their rights under the 2014 Act have been breached then the complaints process of the appropriate competent authority will be their first remedy. If that complaint is not upheld, the victim may, in line with the competent authority's complaints procedure, have recourse to the Scottish Public Services Ombudsman (or the Police Investigations & Review Commissioner) and ultimately judicial review.

## *Provision of information to victims: The Victims' Code for Scotland*

16. Not all legislation protecting and supporting victims of crime in Scotland is set out in the 2014 Act. For example, rules around special measures for the taking of evidence from vulnerable witnesses sit within the provisions of the Criminal Procedure (Scotland) Act 1995.

17. To help meet the needs of victims, particularly when they first come into contact with competent authorities in Scotland, section 3B of the 2014 Act, as inserted by Regulation 4, obliges the Scottish Ministers to produce a Victims' Code for Scotland. The Code will set out in simple language what rights and entitlements a person has in the event that they are a victim of crime. The Code will also act as a signpost to further information, advice and support for victims of crime.

18. Section 3C of the 2014 Act, also as inserted by Regulation 4, places an obligation on the Police Service of Scotland to inform victims that they may request a copy of the Code (and general information on victims' rights) from any competent authority. Competent authorities must then provide a copy of the Code or general information on victims' rights to a victim on request. Alternatively, the competent authority may provide advice on where a copy of the Code or the general information may be obtained.

19. The information contained in the Code will be consistent with the Standards of Service prepared under section 2 of the 2014 Act and with other information made available to victims of crime in Scotland by the competent authorities. This package will be regularly reviewed, evaluated and updated, and the Code will be available for translation into other languages as required.

## *Provision of support to victims*

20. The Police Service of Scotland already has a statutory power to refer a victim of crime to victim support services with that victim's consent<sup>3</sup>. Section 3D of the 2014 Act, as inserted by Regulation 4, places an obligation on all competent authorities to refer a person to victim support services at the request of the victim, and this applies whether or not the victim has made a formal complaint about an offence.

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<sup>3</sup> Section 18 Criminal Justice (Scotland) Act 2003

### *Assistance to communicate*

21. Section 3E of the 2014 Act, as inserted by Regulation 5, obliges a competent authority to take appropriate measures to ensure that a victim understands and is understood in certain interactions with the competent authority. It also allows the victim to be assisted by someone of their choice on first contact with a competent authority where it is considered that the victim requires assistance to communicate; the onus being on the victim to identify and arrange for this support. This right to be assisted does not apply to a hearing in criminal proceedings where other general assistance for victims is available.

22. Victims of crime are currently provided with translation and interpretation services where appropriate during the investigation and prosecution. Section 3F of the 2014 Act, as inserted by Regulation 5, places the right to interpretation and translation on a statutory footing.

### *Acknowledgment of complaints*

23. Section 3G of the 2014 Act, as inserted by Regulation 6, places an obligation on the Police Service of Scotland to provide a victim with a written acknowledgement of the making of a complaint about a crime, and allows this acknowledgement to be done by electronic means if appropriate.

### *Reimbursement of expenses and return of property*

24. In Scotland, victims of crime who are cited by the Crown to give evidence in court in the trial of an accused person are currently able to claim reasonable expenses for their attendance. Section 3H of the 2014 Act, as inserted by Regulation 7, places this on a statutory footing and obliges the Lord Advocate to publish guidance about the process. Similarly section 3I of the 2014 Act, as inserted by Regulation 8, obliges the Lord Advocate and the chief constable of the Police Service of Scotland to jointly publish guidance about the process for the return of a victim's property, which has been taken to be used as evidence, where the property is no longer required. Much of the detail around these processes are of a technical, operational nature. By placing a general power in the Act this will allow a degree of flexibility in order to change, update and review the guidance as required.

### *Rights of victims resident in another Member State*

25. Section 3J of the 2014 Act, as inserted by Regulation 9, covers crimes committed in another Member State which are reported by the victim in Scotland. Section 3J allows victims of a crime committed in another EU Member State, but who are resident (or otherwise present) in Scotland, to report the crime to the Police Service of Scotland who will then transmit it to the appropriate authority in that Member State.

### *Alleged offences*

26. Throughout the Regulations, reference is made to a person who is or appears to be a victim in relation to an offence or alleged offence. The reference to "alleged offence" is intended to make it clear that the reference to "offence" in the context of criminal investigations or criminal proceedings that have yet to conclude, does not imply that an offence has been committed. Regulations 10, 11 and 12 amend sections 4, 5 and 8 of the

2014 Act to include references to “alleged offence”. These amendments are designed to make it clear that the obligations in sections 4, 5 and 8 do not conflict with the presumption of innocence and to provide uniform terminology throughout the 2014 Act following the amendments made by the Regulations.

*Individual assessment of victims in criminal investigations.*

27. Regulation 13 adds new sections 9A, 9B and 9C to the 2014 Act which create protections for victims during criminal investigations. Section 9A places duties on the Police Service of Scotland as to how interviews with a victim should be conducted. Under section 9A(1)(d), victims may be accompanied by a person of their choice during interview, and may also be accompanied by their legal representative if they so choose. This does not place any obligation on competent authorities to pay or arrange for the legal representative (or the person of choice) to be present – the victim is simply to be permitted to be accompanied if they so choose. Article 20 of the Directive restricts this right to criminal investigations and therefore the rights in section 9A do not extend beyond the criminal investigation and into criminal proceedings.

28. Section 9B places a duty on the Police Service of Scotland to carry out an individual assessment of a victim to identify whether they are vulnerable to victimisation, intimidation or retaliation and whether they would benefit from the use of the measures listed in section 9C(3). Section 9C sets out how these measures can be utilised and what factors must be considered in determining which, if any, of the measures should be used. The measures listed in section 9C(3)(a) and (b) include, respectively, the use of specially designed interview rooms and specialist interviewers.

*Protection of victims*

29. Section 9D of the 2014 Act, as inserted by Regulation 14, obliges competent authorities to take reasonable steps to enable victims (and their families) to avoid contact with the person suspected, accused or convicted of the offence. This may include such measures as separate waiting rooms for victims in court buildings. This obligation extends only to interactions between victims (or their family members) and a competent authority in areas within the control of a competent authority, namely a police station, prosecutor’s office or court building, and does not extend to public places.

30. Under the Directive victims have a right to protection of their privacy, for example, through the use of reporting restrictions to prevent child victims from being identified through media reporting on criminal cases. Section 9E of the 2014 Act, as inserted by Regulation 14, places an obligation on competent authorities to protect the privacy of a victim and, to a more limited extent, the privacy of the victim’s family.

*Right to receive information concerning the release of an offender*

31. Victims are currently entitled to receive information about a person sentenced to over 18 months in prison via the Victim Notification Scheme (“VNS”) established under sections 16 and 17 of the Criminal Justice (Scotland) Act 2003. This scheme provides information to victims about the release of an offender as well as giving victims the right to make written (and, under certain conditions, oral) representations when the offender is being considered for

parole or release on Home Detention Curfew. The scheme mainly covers offenders who have been convicted of serious offences on indictment.

32. The Directive obliges Member States to give victims the basic right to be informed when an offender escapes or is released from custody. This right is not qualified by reference to the length of sentence an offender receives and so it is considered that the current VNS does not extend far enough.

33. In order to address this, consideration was given to extending the existing VNS. During the passage of the 2014 Act, for example, it was suggested that the sentence threshold could be lowered from 18 months to 12 months. After further consultation with stakeholders, we took the view that it should be extended to ensure that *all* victims or offenders who have been sentenced to imprisonment are entitled to be informed of the offender's release or escape. However, as the existing VNS covers more serious offences and provides for more detailed disclosure of information, it was considered that a lighter touch, more proportionate scheme should be established, rather than simply extending the current provisions.

34. Accordingly, section 27A of the 2014 Act, as inserted by Regulation 15, allows victims of offenders sentenced to less than 18 months to request notification of when that offender is released or escapes from prison, but does not include some of the additional detail which can be provided under sections 16 and 17 of the Criminal Justice (Scotland) Act 2003.

#### *Exercise of functions where victim is a child or deceased*

35. Regulation 16 adds sections 29A and 29B to the 2014 Act to provide for the situations where, respectively, a victim is under the age of 18 or where a victim's death has been caused by the offence in question. Section 29A allows a child under the age of 18 to exercise their rights under the 2014 Act if the competent authority decides it is in their best interests. Section 29A also provides for competent authorities to exercise certain of their functions in relation to, or at the request of the child's parents if it considers that it is in the best interests of the child. Section 29B covers the transfer of rights to a victim's relatives where the death of a victim has been caused by the offence in question.

#### **Victim Interactions with Competent Authorities**

36. Sections 3C, 3D, 3E, 3F, 9D and 9E of the 2014 Act, as inserted by the Regulations, contain interpretative provisions whereby requests made to, and interactions with, a fiscal are to be deemed to be requests made to, and interactions with, the Lord Advocate. Similarly, under these provisions, requests made to, and interactions with, a constable or a member of police staff, are to be deemed to be requests made to, and interactions with, the chief constable of the Police Service of Scotland.

37. The obligations in the six sections identified above are triggered by a request made by a victim to a competent authority or an interaction between a victim and a competent authority. The interpretative provisions discussed above have been added to those sections to deal with the potential argument that a request made to, or an interaction with, a constable is not a request made to, or an interaction with, a competent authority. Those requests and interactions are deemed to be requests made to, and interactions with, the chief constable. Similarly, the interpretative provisions deal with the argument that a request made to, or an interaction with, a procurator fiscal is not a request made to, or an interaction with, a

competent authority. Those requests and interactions are deemed to be requests made to, and interactions with, the Lord Advocate.

### **Consultation**

38. The Regulations have been developed in consultation with the competent authorities who will be charged with giving effect to the Directive's requirements.

39. Continuing the practice established during development of the Victims and Witness (Scotland) Act 2014, workshops have also been held under the auspices of the Victims Organisations Collaborative Forum Scotland to share information and seek input to the Victims Code for Scotland.

### **Impact Assessment**

40. An Equality and Child Rights and Wellbeing Impact Assessment and Privacy Impact Assessment have been completed and are attached. The assessments identify no adverse impacts on Equality, Child Rights and Wellbeing or Privacy.

### **Financial Effects**

41. A Business and Regulatory Impact Assessment has also been completed and is attached. It highlights no negative or significant regulatory or financial impacts. Any costs to competent authorities will be met from existing budgets.

### **Strategic Environmental Assessment ("SEA")**

42. In terms of SEA and the Scottish Government's statutory obligations under the Environmental Assessment (Scotland) Act 2005, it is considered that the Order is likely to have no or minimal effects on the environment and can be exempted under Section 7 of the 2005 Act. A pre-screening notification has therefore been submitted to the Consultation Authorities, which once processed will be added to the SEA Database.

Scottish Government  
Justice Directorate  
3 November 2015