
EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations implement, in part, Directive 2012/29/EU of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime. The Regulations amend the Victims and Witnesses (Scotland) Act 2014 (“the 2014 Act”) using the powers in section 2(2) of the European Communities Act 1972 and they extend to Scotland only.

In order to confer rights on a victim both prior to and following the conviction of the person accused of the offence and to avoid any conflict with the presumption of that person’s innocence, the Regulations refer to a victim as a person who is or appears to be a victim in relation to an offence or alleged offence. Regulation 17 of the Regulations adds a definition of “competent authority” to section 32 of the 2014 Act and this term is used throughout the amendments made by the Regulations.

Regulation 2 inserts new section 1A into the 2014 Act which creates a list of general principles in addition to those currently in section 1 of the Act. 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.

Regulation 3 inserts new section 3A into the 2014 Act. Section 3A obliges a competent authority to provide a complaints process by which a victim may challenge an alleged breach of the victim’s rights under the 2014 Act or an alleged breach of the authority’s obligations under the Act. This obligation does not apply where the competent authority is subject to an existing statutory complaints process which enables the types of complaint described in subsection (1).

Regulation 4 inserts new sections 3B to 3D into the 2014 Act. Section 3B obliges the Scottish Ministers to prepare, publish and keep under review the Victims’ Code for Scotland (“the Code”). The Code must include the various heads of information about victims’ rights listed in subsection (1) (a) to (k) and any other information the Scottish Ministers consider relevant. The Code may either include this information directly or guide the reader as to where this information can be accessed. The Scottish Ministers are obliged to translate the Code into other languages on request from a competent authority or a victim (subsection (4)) and must keep the Code under review (subsection (5)).

Section 3C creates a right for victims to receive a copy of the Code and other information about victims’ rights. Subsection (1) obliges the chief constable of the Police Service of Scotland (“the chief constable”) to ensure that victims are informed of their right to request, from any competent authority, a copy of the Code and other information relating to victims’ rights. Where a victim requests a copy of the Code, the competent authority is obliged to provide a copy of the Code or advise the victim where a copy of the Code may be obtained (subsection (3)). Where a victim requests information relating to victims’ rights, the competent authority must provide the victim with information the authority considers relevant to the request and direct the victim to any other competent authority which may hold or be able to access information relevant to the request (subsection (5)).

Section 3D makes provision for a competent authority to facilitate the referral of victims to providers of victim support services. Subsection (1) obliges the chief constable to ensure that a victim is informed of the right to request, from any competent authority, a referral to providers of victim support services and the right to contact providers of victim support services directly without referral. Subsection (2) obliges a competent authority to refer a victim to providers of victim support services on the request of the victim. Subsection (5) provides a definition of victim support services.

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Regulation 5 inserts new sections 3E and 3F into the 2014 Act. Section 3E provides a right for victims to understand and be understood in the context of certain forms of contact and communication with competent authorities. Section 3E(2) obliges a competent authority to take measures to assist a victim to understand information given to the victim by the competent authority and to be understood in the victim's interaction with the competent authority. Subsection (4) obliges a competent authority to ensure that communications with a victim are as clear and easy to understand as possible and take into account the personal characteristics of the victim. Subsection (6) obliges a competent authority, on first contact with a victim, to allow the victim to be assisted by a person of the victim's choice where the victim requires assistance to communicate. The obligation in subsection (6) does not apply where the competent authority considers that it would be contrary to the interests of justice or assistance is required for the purposes of the person giving evidence in court, where other general assistance for victims is available.

The obligations in section 3E are limited so that they only apply to the relevant functions of competent authorities. The Lord Advocate is bound by the obligations in section 3E with regard to the Lord Advocate's functions in relation to the investigation and prosecution of crime – the intention being to identify the Crown Office and Procurator Fiscal Service (COPFS) as the body to which the section 3E obligations should apply. The Scottish Ministers are bound by the obligations in section 3E in relation to any functions under the 2014 Act or sections 16, 17 and 17A of the 2003 Act. These functions of the Scottish Ministers are performed, mainly but not exclusively, by the Scottish Prison Service (SPS). The obligations in section 3E cannot be placed specifically on SPS as it is an executive agency of the Scottish Ministers, and the same is true of COPFS, which is a Ministerial Department, headed up by the Lord Advocate. The duties in section 3E will apply to the remaining competent authorities in relation to any of their functions.

Section 3F creates rights for victims to interpretation for the purposes of questioning, interviewing, making a complaint about an offence or alleged offence and giving evidence. Section 3F also creates a right for victims to obtain translation of essential information. Subsection (2) obliges a competent authority to ensure that a victim is provided with an interpreter on request for the purposes of the authority interviewing or questioning the victim other than in a court hearing and for the purposes of the victim making a complaint about an offence. Subsection (4) obliges a prosecutor to ensure that a victim is provided with an interpreter on request for the purposes of giving evidence at or for the purposes of a court hearing, where the victim has been cited as a prosecution witness.

Section 3F(6) provides that, where a competent authority is to provide certain essential information to a victim, and the victim requests that it is translated into a language that the victim understands, the competent authority must ensure that the information is translated. Similar to the position in section 3E, the obligation in section 3F(6) is restricted so that it only applies to certain functions of the Lord Advocate and Scottish Ministers. Interpretation or translation provided under section 3F must be provided free of charge (subsection (8)).

Sections 3C(7), 3D(4) and 3F(9) provide that a request made by a victim to a constable or a member of police staff is to be deemed to be a request made by the victim to the chief constable of the Police Service of Scotland. This is to ensure that the chief constable has a duty to respond to all requests under sections 3C, 3D and 3F(1) and (5) whether they are made directly to the chief constable or to constables or members of police staff. The chief constable has power to delegate functions under section 18 of the Police and Fire Reform (Scotland) Act 2012.

Sections 3C(7), 3D(4) and 3F(9) also provide that a request made by a victim to a procurator fiscal is to be deemed to be a request made by the victim to the Lord Advocate. This is to ensure that the Lord Advocate has a duty to respond to all requests under sections 3C, 3D and 3F(1) and (5) whether they are made directly to the Lord Advocate or to a procurator fiscal.

Regulation 6 inserts new section 3G into the 2014 Act. Section 3G obliges the chief constable to ensure that, where a victim makes a complaint about an offence or alleged offence, the victim is provided with written acknowledgement of that complaint.

Regulation 7 inserts new section 3H into the 2014 Act. Section 3H obliges the Lord Advocate to establish a process for the reimbursement of the reasonable expenses incurred by a victim as a result of the victim's participation in a court hearing. The Lord Advocate is also obliged to make and publish guidance about this process.

Regulation 8 inserts new section 3I into the 2014 Act. Section 3I obliges a competent authority which, for the purposes of a criminal investigation or criminal proceedings, holds property belonging to a victim, to return that property to the victim when it is no longer necessary to retain it. The Lord Advocate and the chief constable must jointly make and publish guidance about the process by which such property is to be returned to the victim.

Regulation 9 inserts new section 3J into the 2014 Act. Section 3J obliges the chief constable to ensure that, where a victim makes a complaint about an offence or alleged offence committed in another Member State and proceedings cannot be raised in Scotland, the complaint is transmitted to the relevant Member State.

Regulations 10, 11 and 12 amend sections 4, 5 and 8 of the 2014 Act to ensure that references to "offence" in those sections are expanded so that reference is also made to "alleged offence". This is 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. These amendments are designed to make it clear that the obligations under 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.

Regulation 13 inserts new sections 9A to 9C into the 2014 Act. Section 9A provides a number of safeguards for victims which the chief constable must ensure are in place during criminal investigations. These safeguards include conducting interviews without delay after the complaint is made, keeping interviews and medical examinations to a minimum and only interviewing the victim where necessary. In addition, during an interview, the victim must be permitted to be accompanied by a person of the victim's choice and the victim's chosen legal representative. This right to be accompanied can be overridden where a constable makes a reasoned decision to the contrary.

Section 9B makes provision for an assessment of the needs of victims in the context of criminal investigations. Subsection (1) obliges the chief constable to ensure a victim is assessed by a constable to determine whether the victim has protection needs and whether the victim would benefit from certain measures during the investigation. Protection needs are defined in subsection (5) as a vulnerability to secondary and repeat victimisation, intimidation and retaliation. Where a victim is under the age of 18 or would be a deemed vulnerable witness as defined in section 271(5) of the Criminal Procedure (Scotland) Act 1995 were the victim to give evidence in criminal proceedings, that victim is to be considered as having protection needs (subsection (3)). In those circumstances, the assessment of that victim is limited to whether the victim would benefit from certain measures during the investigation. Subsection (4) provides a list of matters which must be considered for the purposes of the assessment of the victim.

Section 9C provides for the use of certain measures where a victim has been assessed, under section 9B, as having protection needs and the assessment also finds that the victim would benefit from the use of these measures. Subsection (2) provides that, in these circumstances, the measures listed in subsection (3) may be used for the purposes of an interview of the victim by a constable. The measures listed in subsection (3) are: conducting the interview in specially designed or adapted premises; conducting the interview by or through trained professionals; and ensuring that all interviews are conducted by the same person or persons. The constable conducting the interview must have regard to the needs and views of the victim, the interests of justice and any practical constraints when determining which measures to use.

Regulation 14 inserts new sections 9D and 9E into the 2014 Act. Section 9D obliges a competent authority to take reasonable steps to enable a victim and the victim's family to avoid contact with the person suspected, accused or convicted of the offence in question. This obligation only applies

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to interactions between the victim (or the victim's family members) and the competent authority which are for the purposes of a criminal investigation or criminal proceedings and take place in a police station, prosecutor's office or court building. The obligation does not apply in the three circumstances narrated in subsection (2).

Section 9E obliges a competent authority to take reasonable steps to protect the privacy of victims; to prevent disclosure of information which could lead to the identification of a child victim or a child who is a family member of the victim; and to prevent disclosure of images of the victim or the victim's family. This obligation is without prejudice to other statutory obligations to protect the privacy, or prevent the identification of a victim or the victim's family or to disclose information about a victim or the victim's family. Similar to the position in sections 3E and 3F, the obligation in section 9E(2) is restricted so that it only applies to certain functions of the Lord Advocate and Scottish Ministers.

Sections 9D(3) and 9E(5) provide that an interaction between a victim (or any of the victim's family members) and a constable or a member of police staff is to be deemed to be an interaction between the victim (or family member) and the chief constable. This is to ensure that the chief constable has a duty to take reasonable steps to enable the avoidance of contact with the offender, or alleged offender, where a victim or the victim's family interact with a constable or member of police staff. Similarly, this ensures that the chief constable has a duty to take reasonable steps to protect the privacy of a victim and the victim's family where the victim or the victim's family interact with a constable or a member of police staff. The chief constable has power to delegate functions under section 18 of the Police and Fire Reform (Scotland) Act 2012.

Sections 9D(3) and 9E(6) make similar provision in relation to the Lord Advocate and procurators fiscal. This is to ensure that the Lord Advocate has a duty to take reasonable steps to enable the avoidance of contact with the offender, or alleged offender, where a victim or the victim's family interact with a procurator fiscal. Similarly, this is to ensure that the Lord Advocate has a duty to take reasonable steps to protect the privacy of a victim and the victim's family where the victim or the victim's family interact with a procurator fiscal.

Regulation 15 inserts new section 27A into the 2014 Act. Section 27A provides for information about the release or escape of a prisoner sentenced to imprisonment or detention for less than 18 months to be given to a victim following a request by the victim. This obligation applies to the release of a prisoner under the Prisons (Scotland) Act 1989 or the Prisoners and Criminal Proceedings (Scotland) Act 1993 and to the escape of the prisoner from prison. Information must also be provided to the victim about any licence conditions imposed on the prisoner under the 1989 Act or 1993 Act for the protection of the victim.

Regulation 16 inserts new sections 29A and 29B into the 2014 Act. Section 29A provides for certain of the functions conferred on competent authorities in the 2014 Act as amended (sections 3C, 3D, 3E, 3F, 3G, 6 and 27A) to be exercised in relation to, or at the request of, the parents of a victim where the victim is under the age of 18. Functions may be exercised in relation to, or at the request of, the victim's parents either in addition to or instead of the victim depending on the best interests of the victim. If the competent authority considers that it is not in the best interests of the child for a function to be exercised in relation to, or at the request of, the child's parents the function may instead be exercised in relation to, or at the request of, a person whom the authority considers appropriate.

Section 29B provides that where the victim has died as a result of the offence or alleged offence, references to the victim include qualifying relatives of the victim. Certain functions of competent authorities in the 2014 Act (the functions in sections 3C, 3D, 3G and 27A) are only exercisable in relation to the four highest listed relatives in the definition of "qualifying relatives" in subsection (5). A competent authority may decline to exercise any of those functions in relation to, or at the request of, any one of those four qualifying relatives if it is inappropriate to so exercise the function (subsection (3)(b)(i)). A competent authority is not required to exercise any of those functions in relation to any one of those four qualifying relatives where that relative's whereabouts are unknown (subsection (3)(b)(ii)).

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Regulation 17 amends section 32 of the 2014 Act to insert definitions of “competent authority”, “a member of police staff” and “procurator fiscal”.

A Business Regulatory Impact Assessment has been prepared and placed in the Scottish Parliament Information Centre. Copies can be obtained from Criminal Justice Division, St. Andrews House, Regent Road, Edinburgh EH1 3DG.