

**EXPLANATORY MEMORANDUM TO**  
**THE CRIMINAL JUSTICE ACT 2003 (SURCHARGE) ORDER 2012**

**2012 No. 1696**

1.1 This explanatory memorandum has been prepared by the Ministry of Justice ('the Department') and is laid before Parliament by Command of Her Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

**2. Purpose of the Instrument**

2.1 The Criminal Justice Act 2003 (Surcharge) Order 2012 ("the 2012 Order") replaces the Criminal Justice Act 2003 (Surcharge) (No. 2) Order 2007 ("the 2007 Order"). Like the 2007 Order, the 2012 Order specifies when a court's duty to order a surcharge under section 161A of the Criminal Justice Act 2003 ("the 2003 Act") does not apply, and specifies the amount payable by way of a surcharge when the duty does apply.

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

3.1 The Joint Committee on Statutory Instruments will note that when a court deals with an adult or legal person by way of a fine, the surcharge amount is determined by way of a percentage of the value of the fine, subject to a minimum and a maximum (see Article 4 and Table 2 in the Schedule). The Department has considered whether this approach is within the Secretary of State's power under section 161B of the 2003 Act to specify a surcharge amount.

3.2 The Department has concluded that this approach would be within the section 161B power to specify a surcharge amount. Other options considered included setting the surcharge amount by reference to bands of fine values, but this would inevitably result in an imprecise determination of the surcharge payable, unless the bands were very narrowly drawn. Determining the amount by way of a percentage is in the Department's view the most precise way of specifying the surcharge amount when a court deals with an adult or legal person by way of a fine, whilst also avoiding the need for significant numbers of bands and the unnecessary complexity that would arise, to the same effect.

**4. Legislative context**

4.1 The duty on a court to order a surcharge when dealing with an offender for one or more offences was introduced by the Domestic Violence, Crime and Victims Act 2004 which inserted sections 161A and 161B into Part 12 of the Criminal Justice Act 2003 (c.44). These provisions were brought into force on 1 April 2007 by the Domestic Violence, Crime and Victims Act 2004 (Commencement No 8) Order 2007 (SI 2007/602).

4.2 Section 161A of the 2003 Act enables the Secretary of State to specify cases in which the duty to order a surcharge does not apply, whilst section 161B of the 2003 Act enables the Secretary of State to specify the amount payable as a surcharge. The 2007 Order was made under those powers. It disapplied the duty to order a surcharge except where a person is dealt with by way of a fine, and provided for the surcharge payable in the latter case to be a fixed sum of £15 in all cases.

4.3 The 2012 Order will revoke the 2007 Order, but makes transitional provision to ensure that the 2007 Order will continue to apply in any case in which a court deals with an offender for one or more offences committed before 1 October 2012.

4.4 A screening Equality Impact Assessment (EIA) relating to the policy given effect by the Order was published in January 2012 with the consultation '*Getting it right for Victims and Witnesses*' and the 2012 Order is accompanied by a full EIA, evidencing the Secretary of State's compliance with the equality duties under section 149 of the Equality Act 2010.

## **5. Territorial extent and application**

5.1 The instrument extends to England and Wales, and applies throughout the whole of that area.

## **6. European Convention on Human Rights**

6.1 As the 2012 Order is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

## **7. Policy background**

7.1 The victim surcharge was implemented in April 2007 with the intention of meeting the then government's policy that offenders should make a contribution to the cost of services for victims. It was always the intention that the surcharge would be payable by a wide range of offenders – this is evidenced by the presumption in section 161A of the Criminal Justice Act 2003 that the surcharge would be ordered in all cases that a court deals with a person, subject to exceptions specified in secondary legislation.

7.2 The 2007 Order implemented the policy that the surcharge should be payable where an offender is fined, at a flat rate of £15. The decision to implement the surcharge in this way was influenced by operational reasons. At that time it was not possible to account for revenue generated from the surcharge other than where it was ordered with a fine without a substantial upgrade to the computer system used at the time by the then HM Courts Service.

7.3 The consultation, '*Getting it right for Victims and Witnesses*' set out proposals to see offenders play a significantly greater role in making financial reparation to their victims and assist in repairing the damage their activity has caused. There is an imbalance in the funding of victim services - central government spends approximately £66 million each year on victim support services, while offenders

contribute only around £10 million through the surcharge. To redress this imbalance, the Government has already implemented the Prisoners' Earnings Act 1996, through which it aims to generate up to £1 million a year from the earnings of certain prisoners working outside prison released on temporary licence. Furthermore, the Government has recently made provision in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 which will see offenders making greater financial reparation for their actions.

7.4 The Government intends to ensure that revenue for victim support services is increased through a phased implementation of reforms, including those relating to the surcharge. The Government believes that offenders should pay a surcharge which reflects the comparative seriousness of the sentence imposed by a court. The reforms will ensure that in most instances those subject to the most serious sentences will pay the highest surcharge. Under the 2012 Order, the surcharge will be payable where a court deals with a person who committed an offence as an adult by way of:

- a) a conditional discharge at a flat rate of £15;
- b) a fine at 10% of the fine value, with a minimum amount of £20 and a maximum amount of £120;
- c) a community sentence at a flat rate of £60;
- d) a suspended sentence of imprisonment or detention in a young offenders' institution at-
  - i) £80 for a sentence of 6 months and below;
  - ii) £100 for a sentence of over six months but not more than 12 months;
- e) an immediate sentence of imprisonment or detention in a young offenders' institution (initially imposed only by a Crown Court) at-
  - i) £80 for a sentence of 6 months and below
  - ii) £100 for a sentence of over 6 months and up to 2 years; and
  - iii) £120 for a sentence over 2 years.

7.5 The surcharge will be payable in the following amounts when the court deals with a person under the age of 18 by way of any of the following disposals:

- a) a conditional discharge at £10;
- b) a fine, a Youth Rehabilitation Order or Referral Order at £15; and
- c) a custodial sentence of any length at £20.

7.6 The surcharge payable by a person under the age of 18 is lower than that payable by an adult to reflect the difference in sentencing principles between adults and juveniles.

7.7 The surcharge will be payable in the following amounts where a person who is not an individual (for example, a company) is dealt with by way of the following disposals:

- a) a conditional discharge at a flat rate of £15; and
- b) a fine at 10% of the fine value, with a minimum amount of £20 and a maximum amount of £120.

7.8 The 2012 Order makes transitional provision for situations where:

- a) an offender is dealt with by a court for more than one offence, and at least one of these was committed either side of the 1 October 2012 implementation date. In such cases, the surcharge will be payable if the person is fined, at a rate of £15 as specified by the 2007 Order.
- b) a court deals with an adult offender for more than one offence, and at least one of those offences was committed when under 18, the surcharge will be payable at the rate for under 18s.

7.9 Once fully implemented the reforms set out in the consultation '*Getting it right for Victims and Witnesses*' will raise up to an extra £50 million from offenders for victims' support services by increasing the victim surcharge offenders are ordered to pay on fines and extending it to offenders given a conditional discharge, community or custodial sentence; and by using revenue from increased financial penalties such as Penalty Notices for Disorder. The package of reforms to the surcharge alone once fully implemented will bring in up to an additional £20 million.

7.10 The changes will lead to as many offenders as possible making financial reparation through the surcharge. The surcharge amount payable when a person is dealt with by way of a particular disposal has been set to reflect the position of that disposal within the sentencing hierarchy and to ensure that those subject to the most serious sentences are ordered to pay the largest amounts. A phased implementation on immediate custodial sentences is required pending legislation to address an anomaly which would permit the surcharge on custodial sentences imposed by a magistrates' court to be served as additional time in custody. This is not possible in the Crown Court.

7.11 To ensure that an offender makes the most appropriate form of financial reparation, when the court orders an offender to pay both a surcharge and compensation, but the offender is unable to pay both, the court must reduce the amount of the surcharge (if necessary to nil) (see section 161A(3) of the 2003 Act). Additionally, when an offender is ordered to pay both a fine and a surcharge but does not have the means to pay both, the court may reduce the amount of the fine (section 164(4A) of the Criminal Justice Act 2003). In instances where an offender has the means to pay the financial impositions of the court, there should be no reduction in compensation or fines whenever the surcharge is ordered.

7.12 The revenue will be collected by Her Majesty's Courts and Tribunals Service (HMCTS) through standard enforcement processes. The surcharge will be collected along with other financial impositions in the following order of priority; compensation, surcharge, costs and fines (section 139 of the Magistrates' Courts Act 1981).

7.13 All revenue derived from the victim surcharge will be allocated and administered by the Department for the purposes of funding victim support services. The HMCTS Libra computer system has been upgraded since 2007 and all surcharges ordered both in a magistrates' court or the Crown Court can now be accounted for in terms of how much has been collected by courts for each month and year. Plans to upgrade the

Crown Court Exhibit computer system to account for the surcharge ordered in the Crown Court are currently underway and this will be in place before the end of 2012.

## **8. Consultation outcome**

8.1 The changes implemented by the 2012 Order were subject to a formal consultation procedure between January and April 2012. The consultation '*Getting it right for Victims and Witnesses*' set out a full explanation of the policy proposals and was published with supporting Impact and Equality Impact Assessments.

8.2 The consultation included a number of engagement events across England and Wales, attended by over 300 people from some 200 organisations. Over 350 written responses were received to the consultation.

8.3 Around 120 written responses out of over 350 received set out views on our proposed change to the surcharge. Overall respondents were supportive of the reforms, although there were particular concerns raised about applying the surcharge to juveniles and those sentenced to immediate custody. Having considered the responses no changes were made to the proposals as set out in the consultation, although there will be a phased programme of implementation due to the need for primary legislation to remove the power available to a magistrates' court to order the surcharge to be discharged as extra days when payable in respect of an immediate custodial sentence.

## **9. Guidance**

9.1 Guidance on the current operation of the surcharge is available to HMCTS staff. Updated guidance on the practical application of the surcharge highlighting the reforms will be made available to all court staff on the Department's and the HMCTS intranet prior to its implementation. Judicial College materials and training packs as well as Sentencing Council sentencing guidelines will also be updated to reflect the changes where appropriate.

## **10. Impact**

10.1 The potential impact of the changes given effect by the instrument were initially set out in the Impact Assessments which accompanied the consultation '*Getting it right for Victims and Witnesses*'. The impact assessment has been updated and published on 2 July 2012. The updated Impact Assessment which accompanies the statutory instrument attached to this memorandum and is published on [www.legislation.gov.uk](http://www.legislation.gov.uk).

10.2 The Order will apply to businesses including small firms and sole traders found guilty of an offence and sentenced to a disposal upon which the surcharge would be ordered in either a magistrates' court or the Crown Court. The effects on charities or voluntary bodies are set out in the Impact Assessment and indicate that they may benefit from the additional funding for victim support services which will be generated by the reforms.

10.3 The impact on the public sector is also set out in the Impact Assessment. The main bodies that will be impacted are: Ministry of Justice; Her Majesty's Courts and Tribunals Service through increased administrative and enforcement workloads and HM Treasury; Crown Prosecution Service; and other prosecuting agencies through potential reductions in fines and costs received from offenders. Overall, the reforms will increase spending on victim support services and also ensure that the level of contribution offenders make to the cost of supporting victims of crime is proportionate to the seriousness of the sentence imposed.

## **11. Regulating small business**

11.1 This instrument does not regulate small businesses.

## **12. Monitoring and review**

12.1 The Government is committed to reviewing the operation and implementation of the increase and extension of the surcharge. There will be an operational review scheduled at 6 and 18 months and a policy review 3 years after implementation of the reforms.

## **13. Contacts**

13.1 Jacqui Fincham, Martin Hau and Conchita Castro at the Department can answer any questions regarding this Order.

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