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Victim Surcharge:
Applicability in the Scottish Criminal Justice System

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Abstract

Following the ‘Making Justice Work for Victims and Witnesses’ consultation paper by the Scottish Government, this paper seeks to examine the proposals for a Victim Surcharge. This is specifically analysed as part of wider victim literature, in light of similar schemes which operate abroad, analysis of the consultation responses and interviews. It is argued that the Surcharge follows wider political influences, which have often proven problematic and sometimes counterproductive to victims’ needs. There are tensions between making the Surcharge work and the principle of the Surcharge. If a Victim Surcharge was to be introduced, several problems are anticipated. Firstly, care should be taken to ensure that the Surcharge does not focus upon the narrow construction of ‘victim’. It would also arguably undermine the principle of the Surcharge if all offenders did not pay it. Nevertheless, the Victim Surcharge does provide victims a sense of justice and operates as a point of principle.

Terminology note: When reference is made to ‘Victim Support’, this refers to the organisation. When ‘victim support’ is mentioned, this refers to the wider support offered in general terms, and is not restricted to the one organisation.

Scotland’s justice policy is a devolved competence under the Scotland Act 1998. However, a great deal of the victim policy referred to in the paper was introduced at Westminster by the British Government and only applies to England and Wales, unless specific provision is included in the policy to extend its application. As such a distinction should be understood between the policies of the British and Scottish Governments.

Keywords: Victims, Victimology, Victim Surcharge, Policy, Politics

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Introduction

The proposal for a Victim Surcharge follows examples set by Scotland's neighbours in England and Wales, and Northern Ireland. The Scottish Government are currently in the process of formulating a Victims and Witnesses' Bill, after the 'Making Justice Work for Victims and Witnesses' consultation period closed on 20 July 2012 (Scottish Government, 2012). This Bill has been included in the Scottish Government's legislative plan for the 2012/13 Parliamentary session (Scottish Government news release, 4 September 2012).

Within Scotland, victims have become increasingly prominent in policy making by all parties and have been the centre of proposals in the last decade. This started with the Scottish Strategy in Support of Victims introduced when Scottish Labour were in power;

> "The Scottish Executive has given its wholehearted support to measures that place the needs of victims' right at the heart of our criminal justice system." (Scottish Executive, 2001: 3)

And continues within the recent consultation, introduced by the current SNP administration;

> "The proposals in this paper start from the view that victims should not simply be seen as passive spectators of proceedings or recipients of services but people who have legitimate interests and needs." (Scottish Government, 2012: 2)

A key rationale for the Victim Surcharge is that "[o]ffenders should pay for the injury, loss or distress they have caused" (Scottish Government, 2012: 7). Kenny MacAskill stated in the parliamentary debate on the Victims and Witnesses Bill, "the measures that I am talking about today are being driven not by the need to raise revenue but by a point of principle" (MacAskill, 13 June 2012).

In 2012, the unstable economic climate remains at the background of all policy proposals, and 'economic austerity' proves vital within the political environment as one seeks to evaluate the

proposals of the Scottish Government. There are large cuts in Government funding at all levels; including Government departments and funding for various services provided on the frontline. Funding for the UK-wide Criminal Injuries Compensation Scheme has been reduced by five percent by the British Government in September 2011 (BBC News, 16 September 2011), and there are proposals to cut the number of eligible claimants as savings are made of £50m from the annual £200m budget (The Telegraph, 26 July 2012). Although the Scottish Government insist their funding for victims' programmes is not being cut (MacAskill, 13 June 2012), the economic reality should remain at the back of one's mind.

What is a Victim Surcharge?

A Victim Surcharge is an additional financial disposal placed on those found guilty of a crime. It would operate as another layer of the offender's sentence, in a similar manner to fines and Compensation Orders. At the time of writing (September 2012), the precise workings of the Surcharge are being considered following the consultation period which ended on 20 July 2012[1], but it is likely to be imposed on certain convicted offenders in court on top of their fine or custodial sentence, in addition to possible Compensation Orders. The money would be separate from any fines or Compensation Orders imposed on offenders, and held within a pot for set purposes.

Similar schemes operate in several countries. England and Wales introduced it in 2007 (Domestic Violence, Crime and Victims Act 2004) and more recently in Northern Ireland (Justice Act (Northern Ireland) 2011). Further afield, similar schemes operate in Australia, Belgium, Canada, New Zealand, Sweden and the United States (Bowles, 2010). Such plans are not unique to the current SNP administration though; they were also previously included in the Scottish Labour Manifesto (2011: 52).

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[1] See Appendix A for the list of questions posed in the consultation.

[2] Each country has its own victim support organisation. Victim Support operates in England and Wales, and is distinct from Victim Support Scotland. They largely follow the same agenda and are closely linked

The proposals in the recent consultation were made early in the policy process and a lot of issues were discussed speculatively to gauge opinion on the policy direction. From the consultation paper, the early suggestions for the Victim Surcharge in Scotland would be to impose it on offenders who are given a court fine (potentially rolling it out to custodial and other sentences in the future); the revenues raised from the Surcharge would primarily be used to support victims; it would probably not be used as a measure of direct financial compensation to victims; and it would take priority over payment of fines, but would rank behind Compensation Orders (Scottish Government, 2012: 39-41; experience with the Victims' policy team in Edinburgh).

Many of the technical details of the Surcharge are beyond the scope of this paper because of space constraints. For example, whether a Surcharge should be flat-rate or proportionate, the levels it should be set at and how it would be collected. Such questions are worthy of discussion, but are best analysed by key-stakeholders in the Scottish Government and Court Service. This paper, however, seeks to analyse the Victim Surcharge at a fairly high level, examine it as a matter of principle and evaluate it from an academic and theoretical viewpoint.

Structure of paper

Although an evaluation of the "applicability" of the Surcharge is subjective to the individual author, understanding the principles underlying the Surcharge amongst wider victim policy will highlight the conflicts between principle and making the Surcharge work. By considering other jurisdictions, it should be possible to gain a greater understanding of these issues.

The paper is primarily written as a University Masters dissertation, but the research is linked directly with the policy process in the Scottish Government. This should help to encourage close collaboration between the academic community and policy environment. It will provide academic scrutiny of the policy and ensure that the policy-makers consider key questions. The relationship is itself a key interest of the present author and as such comment will also be

made on this throughout. The paper aims to remain reflexive of the researcher's role within the policy environment and provide an interesting insight into the policy-making process.

It was stated over 25 years ago that victims policy is characterised by a "reluctance to discuss general issues and underlying principles" (Ashworth 1986: 86). Therefore this paper flows from the literature as a particular focus is placed on the literature reviews in chapters one and two in order to gain a greater understanding of the principles and themes within academic commentary. Chapter one considers the historical perspective and development of victim policy to understand the context within which Victim Surcharge has stemmed from. To fully evaluate the applicability of the Surcharge, it is helpful to understand the policy framework within which the Victim Surcharge will operate and wider themes within victim policy. Before considering the Victim Surcharge in detail, the key conflicts between the underlying principles are identified.

Chapter two more specifically considers the Victim Surcharge, evaluating similar Surcharge schemes which operate abroad highlighting the common rationale and workings of the schemes.

Chapter three articulates the methodological elements of this dissertation and explains the application of the primary research; primarily interviews and consultation analysis.

Chapter four then analyses this primary research, extracting key themes and relating this to earlier literature discussion. All this should help understand the applicability of the Victim Surcharge within the Scottish criminal justice system and demonstrate that there are challenges to the application of the Surcharge as conflicts consistently arise between principle and making it work.

1. Victims' Literature

Before evaluating the Victim Surcharge, the development of victim policy provides important context. This will be developed with the emerging themes within victim literature, which will be taken forward and analysed throughout this paper. This discussion will be drawn from victimology, and also wider afield on policy discussion. Therefore the traditional criticisms of victim policy will be raised before specifically evaluating the Victim Surcharge.

1.1 Historical perspective

Victim campaigning and the provision of financial schemes have been closely linked in the past. Campaigning for the use of compensation can be dated back to at least 1900 when the Howard League for Penal Reform advocated state-funded compensation and direct compensation to victims by offenders (Williams, 2005: 14). In the UK, the organised "victims' movement" in the 1960s initially focused on the introduction of compensation to victims of crime (Newburn, 2003: 226). The politicisation of the victim was witnessed at the same time as there was a reconstruction of the victim from a complainant in the criminal justice system to a consumer of criminal justice services (Miers, 1978). Specifically, Margery Fry championed compensation as a form of state insurance (Williams, 2005: 14), and the Criminal Injuries Compensation Scheme (CICS) was introduced in 1964 (Newburn, 2003: 227-228). This represented an increasing victim focus with criminal justice policy, but there was criticism of the political dimensions as victims were merely "political placebos" (Chappell, 1972).

Since the 1970s, Victim Support[2] have become an increasingly important organisation (Newburn, 2003: 240). Traditionally they limited themselves to public comment on the needs

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[2] Each country has its own victim support organisation. Victim Support operates in England and Wales, and is distinct from Victim Support Scotland. They largely follow the same agenda and are closely linked

of the victim, but as they have grown in subsequent decades, they have also become increasingly involved in the political environment. Victim Support have become interested in the rights of the victim and have taken assertive policy positions in recent decades; which appeared to start when they published a policy paper entitled ‘The Rights of Victims of Crime’ (Victim Support, 1995), which coincided with the freeze in victim funding in the period 1996-98 (Williams, 1999: 13).

However, there has not been one coherent victims’ movement, and different organisations push for different forms of representation. For example, the feminist movement has helped to challenge the construction of victimisation and gain recognition of crimes committed against women. Much of this success is due to the success of feminist campaigning (Walklate, 2007: 121-122). Nevertheless, a great deal of attention is given to Victim Support in the UK. The Justice Secretary selected Victim Support Scotland’s Edinburgh office to launch the Making Justice Work consultation paper (Victim Support Scotland website, 12 May 2012); demonstrating their influence and the close links with the state.

As the victim movement has developed, the victim lobby is said to have ‘hijacked’ the academic discussion of victim issues during the 1980s and 1990s (Crawford, 2000: 18). Lobbying on behalf of victims has led to increasingly punitive policy responses (Hoyle, 2012: 406). As began in the 1960s, the victims’ movement increasingly view victims as the consumer within the criminal justice system (Spalek, 2006: 23), which suggests that the victim should be the focus and services should be tailored to them, and not the offender. However the criticism is that there is a ‘missionary zeal’ in victimology as the victim movement has strengthened (Fattah, 1992: 12).

However, one should not overplay the victim-led nature of policy as the extent of political manipulation of the victim is clear from the academic writings. Although policy change is introduced to benefit victims, the impetus for reform often comes from powerful institutions and developments beyond victims’ organisations (Rock, 2005). Many commentators have “bemoaned the increasing politicisation of victims’ issues” (Williams, 1999: 13). Victims have come to represent the projection of the politics of penal reform (Rock, 1990). Elias emphasised

the "symbolic politics" reflected within victim issues. His argument is that victims are viewed functionally and used as a tool by officials (Elias, 1986: 140-141). Programs such as victim compensation have political goals as they enhance the state's legitimacy by conveying the Government's apparent concern for victims (Elias, 1986: 239). Hence, policies are used as propaganda and symbolic crusades (Elias, 1993).

Rock details the rising importance of victims within policy circles after New Labour were elected in 1997; most reforms "did not necessarily rest on the arguments of victimology, on accumulating research or on evidence on victim's plight" (Rock, 2004: 564). He comments that "[i]t was not an instance of blue-book policy making. Rather, the process of definition and selection was tangential and piecemeal" (Rock, 2004: 564). Additionally, the Howard League for penal reform has negatively commented on what they perceived to be the belief that victims were regarded as a "growth industry... the concern about the political, academic and media interest in the plight of and provisions for victims is no more than a clever posturing… Victims of crime may be little more than a political tool" (The Howard League, 1997: 11). Thus, the development of the interest in victims is intertwined as victims' campaigning developed and exploitive politics were utilised.

1.2 Modern victim policy

Today, many different types of scheme operate to help victims. These can be differentiated and place different focuses on the victim or offender: on direct help to victims or indirect help; on the needs or rights of the victim. These distinctions will be explained as the various schemes are detailed.

Fines are the most common criminal disposal used in criminal courts, and made up 64 percent of penalties imposed on offenders in Scotland in 2003 (Sentencing Commission for Scotland, 2006: 5). Fines appear to represent a focus on the offender as they are a punitive measure. However, the use of fine proceeds is relatively complex as the money collected in Scotland goes

to the UK Treasury, but the Scottish Government then receives a block grant back and this money can be used as the Government decides (The Herald, 5 January 2012).

Beyond fines, there are however several schemes which consider the victim. For example, CICS payments provide direct compensation to the victim from the state, without the need for recourse to court (Miers, 2007). They address some of the serious effects of crime and overcome the problems of direct payment from offenders since offenders are generally of limited financial resources and compensation would be very unlikely without state intervention (Ashworth, 1986). In 2009/10, over £209m was paid in compensation to 70,000 victims (Criminal Injuries Compensation Authority (CICA), 2010). However, as will be explored later in this chapter, there are limitations and criticism of the CICS as many victims are not eligible for compensation (Miers, 2007).

In the court system, there is a long tradition of considering the victim and making offenders pay compensation. Both the Malicious Damage Act of 1861 and the Forfeiture Act 1870 provided courts the power to order convicted felons to pay for loss and damage of property (Newburn, 2003: 229). It was mooted by the British Government in 2004 that CICA pay-outs, together with the costs of administering the payment may be retrospectively claimed back against offenders in the civil courts (Home Office, 2004). This is a long standing idea that was recommended by the Hodgson Committee in 1984 (Home Office, 1984), but can only be ordered in very limited circumstances at present (Domestic Violence, Crime and Victims Act 2004, s57).

Offenders occasionally make payments to victims through court-ordered Compensation Orders. These payments are direct from the offender to the victim but not mandatorily imposed by the court; only 14.7 percent of offenders in England and Wales were given Compensation Orders in 2009 (Ministry of Justice, 2010: 59, table 4.2). In Scotland, Compensation Orders operate under the Criminal Procedure (Scotland) Act 1995. By directly providing financial aid to an individual victim, this is also regarded as a direct form of aid for victims who go through the court process. “[M]aking the offender pay is everyone’s first choice, as it embodies the most elemental notion of justice” (Karman, 2007: 309). In England and Wales, Victim Support

recognise that “financial compensation plays an important symbolic role in providing victims with formal recognition of their plight” (National Association of Victim Support Services, 2003).

There is difficultly relying on offenders paying financial measures as most crime victims will never receive restitution or compensation from the offender because most offenders are not caught and convicted (Karman, 2007: 328), or the offenders are unable or unwilling to provide meaningful sums (Karman, 2007: 337). Newburn has remarked that “financial reparation remains at best an expensive symbolic exercise with confused aims”, and policies fail to address the needs or rights of the crime victim (Newburn, 2003: 231).

However, other policy indirectly helps victims. What is meant by this is that one does not need to be an individual victim who has gone through the court process to benefit. They can help a wider number of persons indirectly by providing for community changes or victims’ organisations. For example, the Proceeds of Crime Act 2002 allows criminals to be stripped of illegally acquired gains. The Scottish Government introduced the CashBack for Communities in 2007 which invests such proceeds into programmes to help “people at risk”, often young people, in the aim to turn them away from crime (Scottish Government website(a)).

The theme of ‘payback by offenders’ therefore appears within this recent policy. Community Payback Orders in Scotland also embody this idea, even though they are not financial disposals (Criminal Justice and Licensing (Scotland) Act 2010, s14, amending Criminal Procedure (Scotland) Act 1995). “[O]ffenders are being punished by being sent out to improve streets and neighbourhoods to repay communities” (Scottish Government website(b)). This again relates to the elemental notion of justice for victims which seems to be emphasised throughout policy; the words used, “payback” and “cashback”, suggest that there is an effort to portray that the offender is being punished to benefit the victim.

Ashworth suggests that the offender’s duty to compensate the victim arises directly from the crime, but emphasises the residual role of the state to fund victims and provide for victims (Ashworth, 1986: 121-122). An importance should be attached to the role of the state and they should act in the public interest, which is not always equal to the victim’s interest (Ashworth,

1986). Similarly Fohring (forthcoming) has emphasised that the duty should be placed on the state for compensation, and reliance should not be placed on the offender. Thus criticism may follow if the Victim Surcharge is trying to lessen the burden or the role of the state. Schemes such as CICS demonstrate that the state plays a role in the provision of services to victims; whereas direct methods of compensation, such as Compensation Orders, emphasise the offender's role.

Beyond these financial measures, other policy emphasises victims' rights. Victim Personal Statements introduced under the Victims Charter in 1996, allow victims to explain how crime impacted upon them financially, physically or emotionally (Hoyle, 2012: 412). In Scotland, a Victim Notification Scheme operates which notifies the victim about the status of the offender when a sentence of 18 months or more is passed (Victims of Crime in Scotland website). Additionally, minimum standards of service within criminal justice agencies were most recently reaffirmed within England and Wales in 2006 with The Code of Practice for Victims of Crime (Domestic Violence, Crime and Victims' Act 2004, s32).

Within the England and Wales, the Victims' Charter has been criticised as it does not provide any real substantive rights for victims (Zedner, 2002; Walklate, 2007). Additionally, Rock is dismissive of other changes; the National Victims' Advisory Panel provided victims a symbolic voice and the Commissioner for Victims and Witnesses was a symbolic champion for victims' interests (Rock, 2004:571). Although criticism is expressed, there is arguably symbolic functioning. The Victims' Charter demonstrates a symbolic recognition of the problems that victims face, recognises their needs and demonstrates commitment to victim issues (Booth and Carrington, 2007: 384). Just because policies are symbolic, it does not mean that they should be automatically dismissed.

Thus political manipulation of the victim, at the expense of the offender, may be an important form of justice. Emotions occupy a central position within the criminal justice system and penal policy (Karstedt, 2002: 300); and victim policy can legitimately operate to appease the victims' emotions. Policies are often symbolic with a "symbolic reassurance" function (Edelman, 1964). The justice system and punishment is symbolic;

> "The predominant purpose of criminal liability is to declare public disapproval of the offender's conduct, by means of public trial and conviction, and to punish the offender by imposing a penal sanction (although this may in some cases be no more than a nominal measure)." (Ashworth, 1986: 89)

Therefore policy meets populist demands, but criticisms persist; "[n]ot only are symbolic changes made which do not really benefit victims, they are made at the expense of other groups in the criminal justice system (in practice, principally offenders)" (Williams, 2005: 12) Policy often operates as a 'zero-sum game' as there is a desire to rebalance justice between the provisions for victims and offenders (Hickman, 2004). Additionally, the utilisation of the ideal victim leads to more punitive responses to crime and disorder (Garland, 2001). Similarly, 'victims in the service of severity' is another theory that has been advocated as victims of crime are called in aid of political arguments for harsher penal policies (Ashworth, 2000).

This emphasises the concept of true victimhood (Cole, 2006), which means that some victims can be seen as 'good' and manipulated for political purposes as there is natural sympathy for the victim. The true victim is a 'noble victim' and their innocence is an important virtue. This concept means that victims are often split into 'deserving' and 'undeserving' victims. Mainly those who are perceived to be deserving victims are targeted by victim policy. This is demonstrated by the CICS which only recompenses "deserving victims" and many victims have been denied recourse to victim compensation (Mawby and Gill, 1987: 42; eligibility criteria contained in CICS 2008). As a result, around a third of all applications for compensation are refused because of the applicant's conduct or unspent convictions (Goodey, 2005: 146). In practice, these distinctions have been criticised by Victim Support as it leads to re-victimisation (Victim Support, 2003).

Thus linking back to the symbolic purpose of victim policy, the limited nature of the CICS means that it largely operates as a symbolic policy (Mawby and Walklate, 1994: 75). Ashworth states there is "victim prostitution" as victims are used and taken advantage of (Ashworth, 2000: 186). These dangers of political manipulation must be strongly guarded against as there has been concern that victims of crime are not just a symbolic reference point, but also a dominant

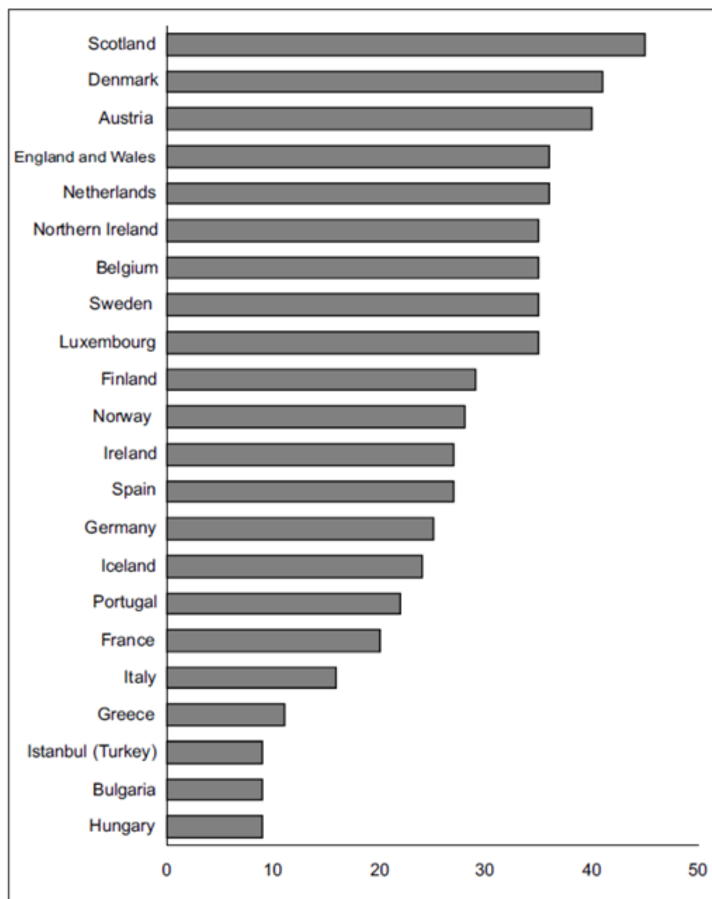
one as its role has significantly heightened within the media environment (Garland and Sparks, 2000).

Thus there are various overlapping trends and victims' policy is complex. There have been two divergent trends witnessed (Ashworth, 2000; Newburn, 2003); a movement towards penal severity (Garland, 2001), whilst greater attention being paid to the victim's perspective (Crawford and Goodey, 2000). On top of this, methods of restorative justice represent a shift in the approach used (Dignan, 2007). It is a movement away from punitive justice as it, symbolically at least, brings offenders and victims together and moves away from the traditional adversarial relationship. This model appears largely at odds with the approaches used in traditional victim policy which separate victims and offender. Therefore trying to place the Victim Surcharge within already complex and inconsistent victim policy will be difficult.

As a form of indirect help, voluntary organisations have a particularly important role in Scotland. They provide help to many victims who are not involved in the criminal justice process, and operate without regard to offenders. In Scotland, there are estimated to be 95,000 victims and 75,000 witnesses, and Victim Support Scotland costs €6.3m. By comparison, in Sweden, which has a larger population, there are 49,000 victims and witnesses, and €1.5m is spent on their equivalent of Victim Support, Brottsofferjourernas Riksförbund (European Forum for Victim Services, 2006-07: 7). Although caution needs to be exercised when using quantitative comparisons between member states, an indication of the importance and work of victim services in Scotland is indicated by the favourable victim satisfaction within Scotland compared to other countries; see figure 1 copied below (Van Dilk and Groenhuijsen, 2007: 376).

Even though the voluntary sector is very important, the state still plays the central role as it supports and funds the voluntary sector and their provision for victims; the Scottish Government contributes £4m per year to Victim Support Scotland funding and provides grants to other organisations (Scottish Government website(c)).

Figure 1:



Ranking of countries on composite index of victim satisfaction

The various schemes mentioned demonstrate the lack of cohesion in victim policy, or at least a very complex array of policies with different focuses on victims and offenders. Therefore understanding the Victim Surcharge amongst many schemes is problematic.

1.3 Fitting in the Victim Surcharge

Differentiating between financial penalties is perhaps unnecessary for offenders. In the explanation provided online in England and Wales they are considered together in an explanation to offenders under the heading of ‘court fines’ (DirectGov website), and therefore financial disposals might be regarded as the same thing for the offender who has to pay the

money. Nevertheless conceptually it is still an important consideration to understand where the Surcharge sits.

Upon the basis of the various schemes described in this chapter, there are conflicts between competing principles. The very idea of the Surcharge demonstrates that more emphasis is being placed upon the offender. Like the Compensation Order, the Surcharge embodies a sense of justice as offenders are paying victims for the harm they have caused, albeit indirectly. It also helps victims and strengthens their rights as they become the focus of proceeds of the policy. Thus the Surcharge seems to cross boundaries.

Additionally, on a general level, the focus on the victim does raise wider questions about the role and purpose of criminal justice (Zedner, 1994: 1240). Victim Support's Chief Executive has stated; "the fundamental problem is that however much we try to tweak the system to help victims and witnesses, we are still trying to make it do something it was not designed to do." (Guy, 2009) The wider principles of the fair justice must be considered. Offenders must remain innocent until proven guilty, and thus, the adversarial system can place victims in a negative position since they are only "presumed" victims legally until there is a conviction (Elias, 1986: 139). Within the justice system, victims' interests are not the main concern, it is truth and justice. The recent victim measures which 'rebalance justice' (Home Office, 2002) and place victims first (Scottish Executive, 2001) raise the question; can victim policy truly achieve some of the promises it seeks to deliver?

Thus there is a clear problem of trying to conceptually fit the Surcharge amongst existing victim policy. Nevertheless, there can be benefits with indirectly helping victims. A criticism of the recent developments in victim policy in England and Wales is that they just address the three percent of victims who engage with the criminal justice process (Walklate, 2012: 118). This applies to direct measures of compensation and other methods which help address some of the direct financial strain placed on victims. Financial strain is common amongst almost all victims, both in violent and non-violent crimes, and therefore it has been suggested that financial compensation should not be limited to victims of violent crime (Fohring, forthcoming). Research often suggests that the emotional impact of crime is more important than physical

pain or financial loss (Reeves and Mulley, 2000: 127). Similarly it is often stated that victims themselves identify their desire for information and support (Hoyle, 2012: 405). Victims also experience secondary victimisation as they receive inadequate treatment and support as they progress through the difficulties of the justice system (Hoyle, 2012: 407-414). Many of the programmes to help address such problems are run by voluntary organisations, such as Victim Support and Women's Aid. Victim organisations can help engage with those victims who do not want to get involved with the criminal justice system itself and provide wider support for victims.

Victim Support Scotland's manifesto also calls for more creativity in the funding of victim services, including the use of a Surcharge on all offenders (Victim Support Scotland, 2011: 2), and in England and Wales, Victim Support continue to emphasise that they aim to strengthen their funding base, and raise more money (Victim Support, 2011: 7). Thus it is apparent that there is potential utility of a Victim Surcharge if it can provide extra money as additional revenue can help victims indirectly. The Surcharge could be viewed as a method to create an additional revenue stream from offenders to victims' organisations. However, for a Surcharge to successfully operate, the link between the state and voluntary sector would be increased as the voluntary sector would be increasingly reliant on funds collected by the state. This could create problems if funding was to be cut. Nevertheless, the Scottish Government has insisted that the Surcharge is not filling holes created by cuts, and the funding from the Government to victims is not being cut (MacAskill, 13 June 2012).

Therefore the Surcharge does not solely fit within any conceptual framework and encapsulates a lot more. It suggests conflicts within policy between victims' needs and victims' rights. Although these may well be inconsistencies and difficulties, this should not detract from the potential to utilise the Surcharge to help victims.

- **1.3.1 Politicised framing of issues**

As has been identified throughout this chapter, academic commentary is quite critical of the increasing political utilisation of victims' issues. Greenspan and Doob draw the comparison to marketing since criminal justice policies attempt to win votes, and "developed not to serve public or societal needs" (Greenspan and Doob, 2012). Therefore victim policy often emerges to meet political aims; which could be a danger of the Surcharge. Policy should not focus solely on victims' demands for justice. Ashworth notes that sentencing should not be for the victims' desire, but should be wider in the public interest as there is the wider concern to prevent further crime (Ashworth 1986: 119). Although political aims might sometimes tie with symbolic justice for the victim, manipulation of a Surcharge should be avoided.

Elias suggests that victims must stop being manipulated and instead victimisation must be taken seriously (Elias, 1993: 111). An alternative strategy "would not perpetuate top-down, official solutions that co-opt victim movements and citizen action, It would analyse the crime problem piece-meal or apart from contemporary social conditions." (Elias, 1993: 118).

- **1.3.2 The 'victim'**

Under the current plans formulated within the consultation, all offenders who are fined would pay the Surcharge. However, victim policy can be based upon problematic constructions.

The main voice and focus of campaigning are those well-known, 'traditional' victims of crime. However, the definition of the victim is contested (Hoyle, 2012: 398). A definition is provided within the Victim's Charter in England and Wales; "all individual victims of theft, burglary, criminal damage, arson, assault, racial harassment, sexual crimes and homicide" (Home Office, 1996). However the "victimisation" concept is a social construct (Elias, 1986:28). It is ill-defined and variable constructions are possible; victim policy therefore neglects many victims.

Two separate issues are identified here; there are 'victims' who are not regarded as victims, and there other victims who are marginalised within policy. For example, there is a lack of

recognition towards crime committed by corporations, or at least a lack of regard within the criminal justice realm (Whyte, 2007). Similarly Intellectual Property Crime is often wrongly regarded as 'victimless' (Waycot, 2008). Road Traffic Crimes are also said to be mistakenly considered 'victimless' (see, for example, Brake, a road safety charity). However, there have been attempts in recent years to tackle traditionally-viewed 'victimless' crimes and identify such victims; for example, the Corporate Manslaughter and Homicide Act 2007 aims to tackle the crimes committed by corporations. Therefore 'victims' of corporate crime are on the periphery of the 'victim' concept. Similarly attempts have been made to increase the criminalisation of crimes against animals as increased powers of prosecution were introduced under the Animal Welfare Act 2006. For example in 2011, there were 1341 offenders convicted of animal cruelty under this Act in the criminal courts in England and Wales (RSPCA Prosecution Department, 2011). Although this is in England and Wales, offenders have also been convicted in Scottish courts.

The other trend is that the 'victims' are not regarded as victims; criminalising actions does not mean that the victim of that crime automatically becomes a significant focus in victim policy. Animals are themselves victims of abuse and neglect[3], but are considered within Environmental policy by the Scottish Government. For example, The Partnership Against Wildlife Crime Scotland operates within the Environmental division (PAW Scotland). So although divisions do deal with these victims, they are not within the traditional victim environment, and would possibly not benefit from the provisions within victim policy.

It is possible to gain a greater understanding of these legal and regulatory constructions by reflecting on the deeper social constructions underpinning this. For example, traditionally the reasons why animals are not regarded as victims is that animal protection law is shaped by human interaction, as are most laws, and laws protect human interests (Bierne, 2009). Victim policy therefore neglects many victims and their victim status continues to be marginalised.

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[3] When considering animal welfare, the construction of the 'victim' is a highly debated topic. Many disagree with the arguably narrow construction of the law and advocate that animals are 'victims' of a great deal of human activity (Bierne, 2009).

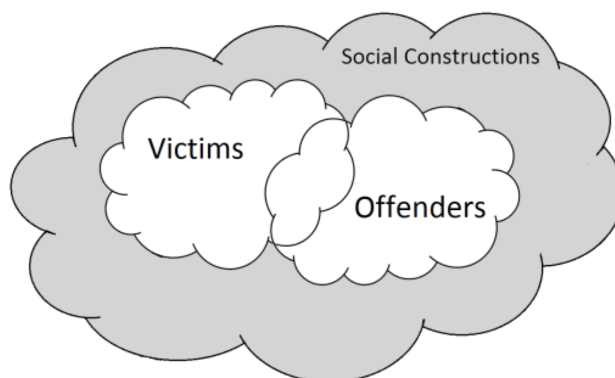
It would therefore seem that a “leaky net” operates within victim policy. On top of the fact that only some of the victims who are targeted by victim policy come forward and seek help, many slip through the net because of narrow construction of victim policy.

Additionally, many measures exist to aid victims largely conform to an image of the ‘ideal victim’ (Christie, 1986), whom is generally perceived to be the victim of interpersonal crime (Whyte, 2007: 447). This pervading image means that the public seek to make clear distinctions between the victim and the offender (Hoyle, 2012: 406), which in reality is not possible. As Williams says;

> “[there is a] false dichotomy between the interests of victims and those of offenders, which has led to polarised discussion and policy making based on an assumption that the interests of victims and those of offenders are always diametrically and automatically opposed” (Williams, 1999: 81)

As demonstrated in figure 2, it is a false assumption that victims and offenders are largely discrete groups which rarely overlap;

Figure 2:



This leads to ineffective measures and choices are made between offender and victim services (Williams, 1999: 81). Essentially it is an encapsulation of the fallacy of a ‘zero-sum relationship’. The ‘zero-sum game’ describes the necessity of rebalancing justice between the provisions for victims and offenders (Hickman, 2004). Protecting victims is often wrongly believed to be at the expense of the offender. This also fuels the anger in popular discussion as things are changed in

favour of offenders in the belief that this means the scales have been tipped in favour of the wrong side (Green, 2007: 91). The rhetoric of 'rebalancing justice' has gained ground in the UK political debate recently (Home Office, 2002), implying that the rights of one side are gained at the expense of the other (Green, 2007: 91). As suggested in the introduction, the Victim Surcharge seems to stem from 'rebalancing justice', which demonstrates a theoretical problem within the proposals.

- **1.3.3 The ability to pay**

There is a legal requirement to give consideration to the offender's means "so far as known to the court" when determining the level of a fine (Criminal Procedure (Scotland) Act 1995, s211(7)). The danger to offenders of irresponsive penal policy is strongly stated in Scotland;

> "So far as those offenders who have very little or no income are concerned, we recommend that they should not be fined and that courts should impose an alternative sanction, such as a SAO [Supervised Attendance Order] or a Community Reparation Order. Imposing a financial penalty in such cases is in our view simply setting the offender up to fail" (Sentencing Commission for Scotland, 2006: Chairman's foreword, no page number given).

Similarly, Compensation Orders often struggle to achieve meaningful funds; the offender's ability to pay can be difficult and enforcement of financial penalties is problematic (Green, 2007: 103). However, a Surcharge would not be intended as a direct method of compensation to the victim, but instead to a central fund, which would hopefully avoid any direct adverse effects on victims. Nevertheless, operating a fund from revenue collected from offenders can also be unreliable;

> "Due to the unique way in which CashBack is funded, it is inherently difficult to forecast when new monies will become available. There is no Government budget for CashBack and the Programme relies on the excellent work of the Scottish Courts Service, the

> Crown Office and Procurator Fiscal's Service and all the other agencies involved in enforcing the law, to fully recover the ill-gotten gains of criminals in order that CashBack can invest them back into communities." (Scottish Government website(a))

Since financial measures should be evaluated realistically, it appears that the Surcharge would run into difficulties as offenders lack the means to pay. It is therefore suggested that victim policy, more specifically the Surcharge, does consider the offender's position.

Therefore, going forward from the literature suggests the Victim Surcharge should be approached with caution. Contemporary victim policy generally appears at odds with academic commentary, but there does appear to be an important symbolic and populist value. The politicised nature of victim policy may be criticised by academics, but the symbolic value cannot be ignored. The subsequent discussion seeks to understand this popularism, as well as some of the critical academic themes identified in this chapter.

2. The Victim Surcharge

The potential inclusion of the Victim Surcharge in Scotland follows implementation of a Victim Surcharge in England and Wales in 2007 (Domestic Violence, Crime and Victims Act 2004), and more recently the Offender Levy in Northern Ireland (Justice Act (Northern Ireland) 2011). These close neighbours would be the easiest examples to follow, but consideration must also be given to the other schemes which have been implemented across the world.

2.1 The different schemes which operate internationally

The idea of surcharging offenders to pay for victim services began in the USA with the establishment of a Crime Victims Fund at federal level under the 1984 Federal Victims of Crime Act (Elias, 1993: 33). This is funded primarily from offenders and redistributes money to victim services and individual victims. This Fund has operated in America for just under 30 years and although it initially was met with scepticism, it is said to longer attract controversy (Doerner and Lab, 2002). However, in America, the majority of crime is prosecuted at state level and most states have followed the federal example and also impose their own Surcharge (Bowles, 2010: 21-24).

Victim policy often develops in a particular country and there is “international transmission” as it travels to another jurisdiction (Booth and Carrington, 2007). However there is a lack of comparative research on victims’ policy, and frequently work fails to cite work from other European jurisdictions (Hoyle, 2012: 401). However, a very informative research report was conducted prior to the introduction of the Northern Irish Offender Levy which provides a detailed overview of the schemes which operate in Australia, Belgium, Canada, New Zealand, Sweden, England and Wales and the United States of America (Bowles, 2010). All of these countries have schemes which operate on a basis of making offenders pay for some form of provision for victims, whether this is into a central Victims’ Fund or directly to victims as

compensation. This report provides an excellent descriptive summary of the schemes in different countries.

2.2 The rationale underpinning the Surcharge

Surcharge-type schemes are underpinned by a similar rationale; they aim to make offenders more accountable, helping to provide more balance within criminal justice (Bowles, 2010: 35). The consistent use of a 'balance' metaphor between victim and offenders highlight the theories mentioned previously, and echoes a 'zero-sum relationship' since offenders are targeted to enhance the status of victims;

> "The development of an offenders' levy is seen in many countries as a natural progression towards strengthening the position of the victim, historically overshadowed by the state taking responsibility for prosecuting offenders. It can also be seen as a means of recognising and signalling that offending imposes costs that extend beyond the immediate victims of offences to the wider society" (Bowles, 2010: 35)

This demonstrates a punitive rhetoric and emphasises the symbolic importance of the Surcharge for victims. As suggested in chapter one, it connects the victim and offender within a zero-sum relationship, which portrays inaccurate constructs of both offenders and victims.

However, "[t]he purpose of victims' funds, whether they rely on offender levies or other channels of funding, is to provide broader-based support to victims at large, reaching beyond the financial compensation arrangements which have become well-embedded in many countries" (Bowles, 2010: 35). This links to the economic pressures upon policies; "[w]e want to see a shift away from compensation funded by the taxpayer to a situation in which more offenders take personal responsibility for the harm they caused by offering an apology or by making the appropriate financial or practical reparation." (Ministry of Justice, 2012a: 10)

2.3 Different provisions included in the different schemes

- 2.3.1 Scope of the Surcharge

There is some differentiation between countries and the application of the levy varies. Some countries impose a levy on all offenders, whereas others impose it on a narrower selection of offenders. Relating this to the foregoing discussion in the previous chapter, it is suggested that applying the Surcharge more widely counteracts some of the problems related to the construction of the victim.

The Surcharges that operate in Canada, New Zealand and New South Wales, Australia and most schemes in America cover all offenders, or at least all offenders caught by the constructions of the criminal justice system (Bowles, 2010: 26-31). Sweden, however, imposes a narrower Surcharge; only those convicted of an offence punishable by imprisonment pay the Surcharge, irrespective of whether the offender receives a custodial sentence (Bowles, 2010: 36). Belgium similarly operates the Surcharge for the most serious offence (Bowles, 2010: 28). These approaches would seem to embody an element of fairness and consistency within the underlying principle as the most serious offenders pay the Surcharge. This is not included in the Scottish plans at the moment, which would seem to undermine the principle of the Surcharge.

The schemes in the USA incorporate a wider construction of offenders as the Surcharge can be imposed on corporations (Bowles, 2010: 36). Interestingly the Surcharge scheme which operates in America has extended its scope to provide wider funding streams, which demonstrates that it has an importance beyond symbolism. The funding has become a legitimate revenue stream. "Just as some victim services expand assistance to victims involved in noncriminal situations, so should revenues derived from non-criminal case proceedings be used to support victim services." (Derene, 2005: 21)

In England and Wales, the Surcharge was first introduced to those who received court fines (BBC News, 8 March 2007). However, the implementation of the Surcharge has quickly been extended to include to other court disposals, including custodial sentences (Ministry of Justice, 2012b), which suggests more consistent application of the underlying principle. Therefore

Scotland's plan to only impose the Surcharge on those offenders who have been fined is at odds with implementation elsewhere, and may undermine the symbolism of the policy.

- **2.3.2 Right to vary and waive the Surcharge**

The majority of schemes are set at levels without judge discretion to vary or waive the Surcharge. The use of such discretion in Canada was criticised prior to the introduction of the Northern Ireland Offender Levy (Bowles, 2010). It has been suggested that when judges are given the ability not to impose a Surcharge, it has been overused, even when there is no valid reasoning to waive the Surcharge (Laws and Sullivan, 2006). As stated in an evaluation in Canada;

> "At present, the findings from this study indicate that the rationale underlying the federal victim surcharge is not being realized in New Brunswick – that is to make offenders accountable in some way to victims and to generate revenues for victim services. Offenders of serious crimes (Table 6), offenders who receive a custodial sentence (Table 7), and offenders who have been convicted of crimes involving victims (Table 8) are all having the federal victim surcharge waived." (Laws and Sullivan, 2006: 55)[4]

In England and Wales, provisions are made to reduce fines before the Surcharge if the offender has insufficient means to pay them both, and similarly the Surcharge can be reduced if the offender has insufficient means to pay the Surcharge and a Compensation Order (Domestic Violence, Crime and Victims Act 2004; Bowles, 2010: 14-15). In Alabama, America, the specific amount of the Surcharge is left to the discretion of the court, within amounts limited by statute (Bowles, 2010: 31).

The right to waive the Surcharge may be necessary to take account of the offenders' ability to pay, but it leads to an anomaly in achieving the Surcharge's aims. Making it work may

[4] The tables are not included in this paper.

undermine the principle of the Surcharge, undermining the principle of justice for victims. The "status of the levy becomes somewhat devalued" since it provides the impression it is "an unnecessary imposition on top of a fine" (Bowles, 2010: 41). Therefore the Northern Irish report recommends that the judge's ability not to impose or limit the levy should be limited as they do not want to hinder the principle that the Surcharge is conveying. Beyond Alabama, Canada and England and Wales, the individual court's discretion is limited and in most places the Surcharge operates at fixed levels according to the type of crime committed.

The fact that the Surcharge often seems to operate beyond the discretion of the court suggests that it functions without specific regard to the offender, and more as a symbolic punishment imposed on offenders.

Similarly the Surcharge is prioritised over fines since "the direct relationship between providing services for victims and offenders' accountability to those they have wronged suggests that the offenders' levy should take precedence over other financial penalties imposed by the courts" (Bowles, 2010: 41). This once again highlights the symbolism of the Surcharge.

In England and Wales, "where the offender has means to pay, there should be no adjustment to the size of the fine or the Compensation Order because a levy has been imposed. The effect of this the status of the levy is maintained as an additional and independent penalty to be exacted for a specific purpose or set of purposes and is not devalued as a symbolic payment" (Bowles, 2010: 42). It is recommended that priority should be provided to the Surcharge since it "makes the point to offenders that they are accountable to society for their crimes they have committed and their sentence should, in part, reflect this fact" (Bowles, 2010: 42).

Nevertheless, the size of the Surcharge depends on the other disposal, for example the size of the fine (Ministry of Justice, 2012b). By linking a set Surcharge to a fine, it does indirectly impose correlation between the Surcharge and the offenders' ability to pay since the fine is adapted to meet the offenders' circumstances. The Criminal Justice Act 2003, s164(4A) allows the reduction of a fine where the offender has insufficient means to pay the Surcharge and fine. Since the Surcharge has been extended to those sentenced to custodial sentences in England

and Wales, concern has been raised regarding the failure to take account of the ability to pay since it may increase financial hardship if they are made to pay it from their own personal money while in prison, or after their release (Ministry of Justice, 2012c).

In common with the payment of fines in Scotland, the payment of a Surcharge is likely to be problematic. For example, only 58% of Sheriff Court fines and 64% of JP Court fines imposed in 2008/09 had been paid in full by January 2010 (Scottish Centre for Social Research, 2011). It would be fines imposed in the Sheriff and Justice of the Peace courts that, under present indications, are most likely to attract the Surcharge.

- **2.3.3 What the Surcharge pays for**

In chapter one it was noted that a danger of the narrow construction of the victim is that only certain mainstream victims and organisations may benefit from the Surcharge. In different countries, the Surcharge goes to victims either as provision to victim assistance and services, or as financial compensation to victims (Bowles, 2010: 49-50). There are slight differences in how these schemes are administered, but broadly they support central victim funds.

As with the other policies explored in chapter one, the Surcharge has created difficulties with variable levels of funding;

> "The benefit of this designation is that the fund is a protected entity not subject to the typical budgetary fluctuations that occur with differing governing priorities. Thus, the money cannot be funnelled towards competing government priorities and can only be used to fund victim services. The drawback of this special designation is that the account cannot run a deficit from year-to-year. This potentially jeopardizes victim services, which is heavily dependent on victim surcharge revenue from the previous fiscal year. In short, less monies generated by the victim surcharge regime translates into fewer services for victims of crime in the province." (Laws and Sullivan, 2006: 13)

Victim services may come to rely on Surcharge funding. However, to protect the funding, the operation of the Californian fund could be used as an example. A cap is imposed on the spending in particular years to "to protect against wide fluctuations in receipts into the Fund, and to ensure a stable level of funding will remain available for these programs in future years." (US Congress 1999-2000)

The revenue receipts from the Surcharge in England and Wales (estimated £10.4m for 2010-2011) were less than the £12.19m budget for services allocated for 'proceeds from the Surcharge' (Blunt, 3 March 2011: column 582W). This is worth noting and demonstrates the Surcharge may not lessen the financial burden placed on the state.

If more specific consideration is given to the allocation of funds in England and Wales, it would appear that the victims that receive funds are generally those victims who are within mainstream focus as remarked in chapter one. The revenues of the Surcharge were spent on an Independent Domestic Violence Services Adviser Services, Witness Care Units, Victim Support Plus and the Victims Fund, which was allocated to organisations tackling sexual violence, hate crime and homicide (Blunt, Parliamentary Question answer). As highlighted in chapter one, this continues to demonstrate the mainstream focus of victim policy. In Northern Ireland, allocation only adds to the criticism of the political reality of victim policy. This is because the allocation of the Victim Fund is set by the policy team, and can vary according to the government's agenda (observation from visit to Northern Ireland with policy team). This emphasises the political focus of the victims' agenda; which was a particular criticism within the previous chapter.

2.4 Evaluation of the schemes internationally

Within victim literature, the Surcharge often receives little attention. From considering documents and looking for evaluations conducted into the schemes themselves, the research that exists appears incomplete. The evaluations conducted in each country after the Surcharge has been introduced often focus on specific mechanics of the Surcharge, and no longer consider the top-level principle or whether the Surcharge should continue to operate. Gaps

within the policy are identified and the Surcharge is adapted. It does not appear that Surcharge schemes have ever been removed after their introduction, but instead countries have expanded their own schemes. For example, England and Wales have significantly extended their original Surcharge scheme they introduced in 2007 following their 2012 consultation (Ministry of Justice, 2012b). Similarly, there is significant international transmission of the Surcharge as countries copy each other and introduce it themselves.

This suggests the Victim Surcharge has a certain popularity and longevity, which could be construed as a vindication of its effectiveness. Most recently, Northern Ireland's introduction followed their detailed consideration of international schemes. However, when reading this evaluation report, it appears as if it is written in the knowledge the Surcharge will be introduced in one form or another; which suggests a limitation in the evaluations which currently exist. It does not specifically examine the top-level principle of the Surcharge, but instead the precise workings of the Surcharge. Internationally, there would appear to be a lack of evidence examining whether the schemes are effective, beyond the political reality. It does not appear that there is much evidence of direct benefit to the victim by introducing the Surcharge; there appears to be an assumption that providing increased revenue to victims' organisations is itself a positive. Although additional money to victims' organisations is positive, there is a lapse in evidence, or at least it is hidden by political screens, if it improves services.

As this paper moves onto detail primary research, Scotland could continue to follow the international transmission of Surcharge schemes. However, it is suggested that it should not be used as a method of political manipulation of victims' issues. It should be a policy that helps victims.

3. Methodology

This research was conducted in conjunction with the Scottish Government. As noted earlier, this project was linked with the early stages of planned legislation, which included the provision for the Victim Surcharge, during and after the Making Justice Work for Victims and Witnesses consultation (Scottish Government, 2012). The project was split between time spent at the University of Glasgow and in Edinburgh working at St. Andrews' House, with access to the Scottish Government Victims' policy team.

It has been suggested that all research is largely political and influenced by one's own opinions (Becker, 1967), but this is especially so within the policy formation context. This may appear an odd statement considering this paper has developed into quite a critical political piece, but whilst one is criticising politics, an author cannot pretend to be non-political. This means that the applicability of the Victim Surcharge remains a subjective opinion, therefore the use of qualitative research provides a deeper understanding into these opinions. Additionally, the use of reflexivity will provide greater transparency as the researcher's inherent bias is acknowledged and the explanations behind subjective opinions are explored (Seale, 1999: 159-177). This should add validity to the work, whilst providing an interesting insight into the policy-making environment.

This research project was approached using grounded theory (Glaser and Strauss, 1967). Although it is acknowledged that it is not possible for research to be 'truly' grounded since primary research is conducted on the back of a literature review and identified applications of the Victim Surcharge, this 'bottom-up' approach will be utilised as far as possible. With this inductive method, no hypothesis is used before gathering research. Using the broad objectives identified so far in this discussion, the aim was to gather research on these issues and remain open to emerging categories or theories which would group the data. Therefore the question and focus within the topic set earlier was adapted slightly during the research project. Some initial data was collected and then analysed using "theoretical coding" to establish tentative

links between categorises (Willig, 2001: 34). Additionally, the emergence of theory will be traced using "memo-writing" (Willig, 2001: 36). This kept track of the developing theory and provided a written record of theory development, justifying developing category labels and emergent relationships. The process was largely iterative as there was a process of going back and forth between theory and data collection (Bryman, 2008: 372). The research increasingly focused upon an emerging theory as the research moves towards theoretical saturation of emergent themes and categories (Willig, 2001: 38).

Adopting interpretivist and constructionist approaches, the primary research builds upon the literature reviews in chapters one and two, and uses interviews and consultation responses. An interpretivist epistemology was particularly important within the policy environment because problems that victims' experience and the failings in the system are best developed by narratives, which cannot be understood using a positivist understanding. Interpretivism appreciates each individual's unique understanding of their experience, suggesting interviews are an appropriate method for research (Bryman, 2008: 14-15).

In considering a constructionist ontological stance, it is suggested that knowledge of the social world is based upon one's constructions within individual social factors (Bryman, 2008: 18). As has been emphasised strongly within the discussion of the victim definition, inherent perceptions exist within research which alters the constructions that individual researchers can place upon the data presented before them.

Therefore qualitative data is gathered. It does not aim to be representative, but instead provides a detailed understanding and insight into the applicability of the Victim Surcharge within Scotland.

3.1 Ethical considerations

The project received ethical approval from the University of Glasgow[5] and security clearance was acquired for the work at the Government. It was a low-risk project as research was conducted with professionals within their professional capacity. No direct victims were involved in the research and there should have been very little danger of harm to victims.

However, the placement at the Scottish Government provided access to unredacted consultation responses, which meant sensitive information was placed in the hands of the researcher. Therefore, this particular information was evaluated in Government offices, remaining secure, was never copied and no further note was made of this information. Additionally, consultation respondents voluntarily responded and it is implied that they agreed for it to be analysed when considering the proposals.

When quoting consultation respondents in this paper, no individuals are named, however a choice has been made to name organisations that ticked the box on the front page of their response agreeing to the public release of their response and quote from the redacted consultation responses. This is because such responses will be publically released in due course. Naming organisations should add validity to the analysis as helps to match opinions with the respondents.

Discretion was shown when conducting work within the policy environment. No sensitive information will be disclosed within this paper. This paper aims to provide some reflection on the policy environment, but the value of such reflection is limited when one cannot quote discussions as policy is devised. Since this is an ethical requirement, representing any dynamics in the policy environment would betray the trust of those with whom the placement was conducted alongside.

[5] The ethics approval letter from the University of Glasgow is included in Appendix C.

3.2 Methods

The literature analysed in chapters one and two was in the public domain. Additionally, the nature of policy means that a great deal of information is made public in the legislative process to ensure there is transparency and proper scrutiny of the policy. Therefore the research involved secondary research of publically available documents. With grounded theory, themes emerged from this literature and were focused on in the primary research.

- **3.2.1 Interviews**

Interviews were arranged to gain a deeper understanding of, and extract additional data on, issues identified in the literature review. Attempts were made to arrange interviews via email contact. Various organisations representing victims were contacted; as well as academics who had written on under-represented victims; sheriffs and criminal defence solicitors who could hopefully provide some insight into the criminal procedure and the viewpoint of offenders.

An initial research plan was formulated which placed a particular emphasis on the use of the data extracted from interviews. However, the difficulties of arranging interviews were perhaps underestimated; especially when conducting research as a University student. It is understood it is always a learning experience for researchers when they first attempt to arrange interviews. Initially, interviews were planned prior to analysis of the consultation responses, which were submitted by 20 July. However, seeking to gain comment from persons who were still to produce their official comment on the consultation was, with hindsight, slightly flawed as these persons may have been reluctant to comment whilst considering their official position. Additionally some of the individual persons, such as sheriffs, contacted may have been reluctant to provide individual responses on record; even though confidentiality was offered. Although emails were also sent largely from the researcher’s Government email address, it was made clear to respondents that the research was conducted independent of Government and as a University student. However, sending emails to respondents from the Government may have put off some respondents from replying if they were critical of the policy process, or if

they wrongly assumed that their comments might have adversely affected their position relative to wider Government policy.

Two interviews were arranged through personal contacts with criminal defence solicitors. One interview was with Neil Stewart, who was happy to be named. This was conducted face-to-face in Glasgow. The other telephone interview was with an experienced solicitor who accepted anonymity. The interviewees both have extensive experience representing offenders.

A third interview was over the telephone with David Whyte, a criminologist who has written extensively on corporate crime and also the victims of corporate crime (Whyte, 2007). He was also happy to be named. Unlike the other interviews, this interview was not recorded; this was because it was arranged at short notice when there was no recording equipment to hand. Nevertheless the interview went ahead because of the difficulties arranging the other interviews and a degree of research flexibility is advocated to get data. However this is not anticipated to be especially problematic as notes were taken during the interview and the situation was explained to the interviewee.

The final face-to-face interview was arranged with a member of the Victims policy team in Edinburgh. This respondent also agreed to anonymity.

All the interviews were conducted in a semi-structured manner. This ensured flexibility in the direction of the interview and allowed interviewees to raise the particular issues they deemed important. Although the interviews were originally planned earlier in the research project, the later dates may have proved beneficial since it ensured that strong themes had emerged from the literature and other research prior to this, providing the chance to follow-up on some issues which had been previously raised.

Although it was slightly disappointing that only four interviews were arranged, several of those organisations contacted did provide responses to the consultation. Therefore the opinions of victims' organisations should still be included in this research, which should mean that there is little reduction in the data collected. Additionally, since the project was conducted with flexibility, there was an increasing emphasis placed on the qualitative responses provided by

the consultation and from the themes extracted from the literature. As such, the data extracted from the interviews will be analysed together with the various issues and themes that arose throughout the whole research project to ensure that data is not considered in isolation. This ensures integration of the various results and helps highlight the overlapping themes that continue to arise throughout the research.

- 3.2.2 Consultation responses[6]

Primary analysis was conducted on the 74 responses to the 'Making Justice Work for Victims and Witnesses' consultation. Since these were not publically released during the period of this research paper, this analysis was conducted in the secure Government offices in Edinburgh. The Government have agreed that the present research report be conducted, and are due to publish the consultation responses in due course.

This consisted of basic thematic analysis coding (Bryman, 2012: 578-581); going through all the responses and looking at the responses provided to the questions 40-49 specifically on the Victim Surcharge. It is important to analyse not isolate and lose the context of the proposals for the Victim Surcharge (Bryman, 2012: 578). This is a danger of coding, and as such, other questions were considered; questions on other financial disposals such as Compensation Orders (question 39), restitution to police officers (question 51), and the explanation on what more could be done for victims in sentencing policy (questions 33, 36 and 38) and wider within the justice system (questions 8-10, and 13). It is a method which proves to be quite subjective, and inevitably there would be differences if the data was analysed by another researcher. However, all the coding in the present project is done by the one researcher, which should provide some reliability within the project.

[6] The consultation questions are included for reference in the Appendix A

15 of the 74 respondents requested complete confidentiality in their consultation response, and since the ethical requirement to maintain confidentiality is strict, some analysis made into the types of respondents will be incomplete.

- **3.2.3 Reflections from the policy-making environment**

Although no participant observation or ethnography was conducted, reflections are made in this paper based upon the placement at the Scottish Government in Edinburgh which should reflect more generally on the development of the Victim Surcharge. These comments are more on the general policy-making environment, reflecting on the use of evidence and are not made in regard to any particular individuals. This should prove insightful and add validity to the data gathered since it demonstrates the context behind the development of the Victim Surcharge.

3.3 Ensuring validity of results

Therefore when evaluating the validity of these various methods, it is hoped that triangulation of information has been achieved: the secondary data used for content analysis; the primary data from the consultation responses; and the primary data acquired from interviews. All this data was evaluated together, helping to confirm emerging theory and results.

Since victim policy can be quite an emotive subject, it may be natural to feel sympathy for the plight of victims and advocate victims' interests (Karman, 2007: 3). However, it is problematic to insist on fully objective research and to ensure validity, this research remains reflexive (Seale, 1999: 159-177). Although this depends how self-aware one is, the researcher's inherent bias is acknowledged, as well as one's position within the research environment. The researcher's own interpretations and understandings should not affect the validity of research. Providing the potential for bias is acknowledged by the researcher (as it is has been), then it should not detract from the conclusions presented. Nevertheless, the present research will try to avoid automatic presumptions and opposing opinions are included.

4. Findings and Discussion

It was apparent that similar issues ran through the qualitative findings from the consultation responses, interviews and the reflections from the policy-making environment, which build upon the themes extracted in the literature review.

4.1 Interviews

Depending on the respondent interviewed, different themes were prominent in the discussion. In the interview with the civil servant working on the Victim Surcharge, it seemed that the focus remained largely technical on the precise details of the Surcharge. This is unsurprising considering the policy teams are concerned with the workings of Government policy. Also it appeared consideration had moved beyond the evaluation whether or not the Surcharge will be introduced. This might, as suggested in chapter two, highlight a lack of top-level evaluation of the Surcharge.

In both interviews with the Criminal Defence solicitors, the difficulties of the collecting an additional financial disposal were emphasised. Additionally, the interview with criminologist David Whyte proved critical of mainstream policy directions. This largely echoed his interests in white-collar crime and his recent work on victims of corporate crime (Whyte, 2007). This interview only covered victims of corporate actions, but relates to the wider under-representation of victims identified in chapter one.

4.2 ‘Making Justice Work for Victims and Witnesses’ consultation

It should firstly be noted that the Government’s official analysis of consultation responses will be published in due course, and will describe the responses in more detail, but limitations of

space in the present paper restrict such extensive description. Although the numbers of respondents to individual questions in the consultation are quoted, the validity should be viewed with caution as they have not been quantitatively evaluated. This would provide further value to the analysis, but will be done within the Scottish Government's own analysis of the consultation responses. Instead the analysis of responses herewith contained should only be regarded as indicative as they seek to build upon themes extracted in the literature.

The results from the consultation are summarised in Table A and demonstrate the Victim Surcharge received support; 28 out of the 45 responses supported the principle of adopting the Surcharge. The responses frequently expressed the belief, in common with stated principle underlying the Victim Surcharge that offenders 'should pay'.

However, one disadvantage of a consultation is that the questions are based on the Government's suggestions and ask whether respondents agree with the proposals. This might lead respondents to agree with the suggestions put forward within the consultation as they have limited options. This is one of the difficulties with gauging opinions via consultation analysis. To gain a deeper understanding, individual responses within the boxes for additional information are analysed, and the context of the wider consultation responses are considered. All these results will be merged and analysed within the following discussion.

Table 1: Summary of quantitative responses to consultation

Question	Response		No definitive yes/no answer given, but comments provided
39: Do you agree that courts should be required to consider the issue of compensation in all cases where an identifiable victim has suffered injury, loss or distress?	Yes: 35	No: 6	7
40: Do you support the principle of adopting a victim surcharge?	Yes: 28	No: 7	10
41: Do you agree that the surcharge should only be applied to court fines in the first instance?	Yes: 16	No: 10	6
42: Should we consider the possibility that legislation could include a provision to roll out application of the surcharge to custodial sentences, community sentences and direct measures at a later date?	Yes: 17	No: 9	10
43: Do you agree that revenue accumulated from the surcharge should be used primarily to support victims?	Yes: 28	No: 2	3
44: Do you think the surcharge should be a flat rate or a variable scheme that reflects the size of a financial penalty?	Flat rate: 5	Variable: 20	5
49: Do you agree that priority should be given to any compensation payment to the victim, followed by the surcharge and then the principal fine?	Yes: 28	No: 1	5

4.3 Recurrent themes within the findings

- 4.3.1 The principle of the Surcharge

Judging from the number of ‘yes’ responses to question 40, the majority (28 out of 45 responses) appeared to support the principle underpinning the Surcharge. Generally those responses that ticked ‘yes’ here did not provide much additional comment on their reasoning why they supported it, which might suggest that the principle itself has support at a simplistic level. “In theory at least, it seems quite fair, as the Government need to be seen to be doing something to protect victims” (Stewart, 2011). This seems to suggest that the findings confirm a form of support for symbolism and justice represented by the Surcharge, which was similarly highlighted in the literature.

Also, there is support for offenders being accountable within the responses to question 39 on Compensation Orders; as seven responses noted that the order holds offenders directly accountable or ensures offenders are aware of the victims in their crime. Thus the underlying principle of justice and accountability has support.

Even within some of the ‘no’ responses, there was support for the idea of central funding for victim services, but the seven ‘no’ responses all mentioned the technical problems of collecting and setting a Surcharge. This was the main reason provided for disagreeing with the Surcharge.

There is uncertainty how fines are utilised and the identifiable purpose of Surcharge’s revenue was positively remarked by both by the Scottish Centre for Crime and Justice Research in their consultation response and by defence solicitor Neil Stewart in his interview.

Victim Support Scotland, and some other individual responses, suggested that all offenders should pay the Surcharge. This was as a matter of principle, as the most serious offences would avoid the Surcharge. As suggested in chapter two, it would appear to be a significant gap in the underlying principle if the most serious offenders, those who get custodial sentences, do not pay the Surcharge. Seven of the ten ‘no’ responses to question 41 (“Do you agree that the surcharge should only be applied to court fines in the first instance?”) were upon the basis that

all those convicted should pay the Surcharge. 17 'yes' responses to question 42 ("Should we consider the possibility that legislation could include a provision to roll out application of the surcharge to custodial sentences, community sentences and direct measures at a later date?") agreed with possibility of extending the Surcharge to other disposals beyond fines. Of the nine 'no' responses to the same question, four of them stated that it should apply to all offenders now and should not wait for further roll-out; suggesting support for an application of the Surcharge to more offenders. There is inconsistency with the principle in its current form; making offenders, but not the most serious offenders, pay. It would demonstrate more commitment to victims if the principle of the Surcharge was fully implemented and all offenders paid the Surcharge.[7]

- **4.3.2 Respondents and their opinion**

The reaction to the Victim Surcharge from the consultation and within interviews appears to demonstrate that one's reaction to policy ideas largely depend on one's position relative to victims, offenders and the policy-making process. This could be analysed further using quantitative correlation, but when consideration of the type of respondent is paired with their answers it appears that different issues are raised. Those respondents who primarily focused on the overt 'making the offenders pay' principle were generally more favourable. Organisations that represented victims were in favour of the Surcharge. Based upon chapter one, these are organisations with great influence and it demonstrates the symbolic importance to victims that offenders pay.

However those respondents who focused beyond the principle of the Surcharge, and instead considered the precise workings and the practicality, raised more doubts and appeared more

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[7] Methods for extended implementation are intended for inclusion in primary legislation though, and will be evaluated based on the initial evaluation of the scheme based on fines issued in courts. Nevertheless, the initial plans for the Victim Surcharge face such difficulties as this extended implementation would be at some unspecified future date, and in the short term, the principle of the Surcharge would remain patchy.

cautious. All seven 'no' responses mentioned concerns based on the administration of the Surcharge. Similarly, most of the ten non-definitive answers commented on the same problem, and would like to understand such issues before committing to a 'yes' or 'no' answer. However, such considerations did not automatically lead respondents to say 'no' since four respondents in favour of the Surcharge also questioned the practicalities.

Additionally, academic analysis proved critical. Institutions such as the Scottish Centre for Crime and Justice Research, the Faculty of Advocates, the Prison Reform Trust and the Scottish Justices' Association expressed doubts on the wider impact and working of any Surcharge. The Faculty of Advocates commented that it was a "somewhat distasteful concept" and "crude revenue raising device". The Scottish Centre for Crime and Justice Research commented that it was a form of "double punishment" and would be "setting offenders up for failure".

- 4.3.3 Construction of the victim

The plan is that the Surcharge would be imposed on all offenders who are fined, irrespective of the type of victim for the particular crime. This is beneficial since it provides a sense of justice for the victims of all crimes. During the interview with the civil servant, it was commented that no particular type of victim is the focus of the reform and that the policy does not aim to exclude any particular category of victim. However, a fear demonstrated within the findings was that the allocation of the revenue collected would seem to emphasise the particular constructions of victim identified within chapter one; which would seem to weaken the justice for those victims who are not helped.

Although the consultation is open to anyone to respond, the organisations whom the consultation was sent to reflected the mainstream construction of the victim (Scottish Government, 2012: 66-68). This emphasises a similar criticism of victim policy in chapter one. Criticism can also be levelled at the non-mainstream organisations who did not respond, but all this means that the victim policy continues to target those 'victims' regarded within the mainstream construction of crime. Victim Support Scotland's consultation response mentions

the construct of the victim and the lack of recognition for some complainers who do not receive the same special protection because the offender is never identified, charged or prosecuted.

However respondents emphasised the traditional mainstream construction of the victim. No responses were received that from any bodies representing victims of corporate crime or animal cruelty, no mention was made of victims of corporate crimes, animals or any other non-traditional crime. This is a strong and important finding. There is an absence of particular responses and opinions in the research and therefore certain groups fail to have their opinion represented in the policy environment, which builds that the policy environment will represent dominant social constructions. This has been found to be a key theme within the policy making environment; it was one observation that has been made by David Whyte in regard to victims of corporate crime and reflects the wider literature mentioned earlier. Whyte suggested that corporate crime suffers from a “peripheral process of criminalisation” and victims of corporate crimes are left behind because of the structure that is in place. Under-represented groups remain under-represented by the nature of the policy environment.

When the other interview respondents were posed questions about what they made of the potential for inclusion of the victims of corporate crime or animals, the response amongst them all was that they had not considered them within the focus of this policy. It appeared that they were not thought of as victims in the same way; confirming that a particular construction of victim is emphasised in policy reaction. As suggested within chapter one, this is a wider problem beyond one policy team and is a general criticism of the policy environment.

The civil servant confirmed that plans are in place to impose the Surcharge on corporate offenders, which may enhance ‘justice’ by capturing more within the scheme. Additionally, moving away from principle to the economic reality which must realistically be considered within policy evaluation, corporate entities may be the ones with the resources to pay the Surcharge and may enhance the revenue raising possibilities.

The civil servant commented that they would look to other directorates within the Scottish Government to deal with animal welfare and corporate activities. However, as identified in chapter one, if persons or beings are 'victims' then they should be more directly targeted with the proceeds of the Surcharge.

- **4.3.4 'Victimless' crimes**

If all offenders are paying the Surcharge on top of their fine, then all victims should be represented in the allocation of the Surcharge. By distinguishing between different offences that attract the payment of the Surcharge implies that some offences may be 'victimless'. Such a concept is expressly challenged in some literature and emphasises a construction of crime. Northern Ireland had followed this by challenging the notion; "[t]here is no such thing as a victimless crime and the imposition of this levy will reinforce to the offender the impact their actions have had on others" (Ford, 2012). In the consultation, there are no plans to include Fixed Penalty Charges and offenders who receive custodial sentences (Scottish Government, 2012). This is partly because of the technical difficulties in administering a Surcharge in these instances, but this appears to undermine the principle of the Surcharge.

The consultation response from Brake, a road safety charity, identifies a lack of support for victims following road traffic accidents, which are often the result of criminal behaviour. They also mention that such road traffic victims need more support, and some of their services suffer from a lack of funding. Brake advocate that 'victims' need help even in those cases which are not themselves 'criminal'; it is both their and Scotland's Campaign against Irresponsible Drivers' belief that road traffic offences are not victimless.

Victim Support Scotland state in their consultation response "that they feel all victims of violent crime should be entitled to compensation in recognition of their pain and suffering", and that all offenders pay the Surcharge. This may imply that those victims of violent crime are more 'worthy' victims. This notion of victimless crime continues to emphasise similar problems as in the construction of crime. Therefore, it leads to a lack of attention for victims of corporate

crimes and animals who are the victims of crime. This is a key finding which confirms the criticisms presented by the literature.

For those offences that are possibly perceived as 'victimless', a suggestion was also made in a consultation response that it may be regarded as an stealth tax on those offenders. Similarly Stewart raised this as a possible criticism. In contrast, this issue was directly dismissed by Whyte who believed such an attitude is exactly what corporations want because if they push the discussion to the civil realm, they have more resources than the victims and a natural advantage.

- **4.3.5 Ability to pay**

Within the of consultation responses, offenders' inability to pay was consistently mentioned. All seven of the 'no' responses mentioned such concerns, as did those ten responses that did not provide a definitive answer and four of the 'yes' responses. Three of the responses to the question 39 on the Compensation Order also noted this. Both criminal defence solicitors interviewed remarked that the vast majority of clients that they represented were on benefits; they "live very hectic lifestyles, and for one reason or another will struggle to pay any fines" (Stewart). Very similarly, the other criminal defence solicitor stated they live "chaotic lives" and there is no point in issuing financial penalties if they will not be collected. This confirms the problems identified within other victim policy in chapters one and two, and it is advocated that there should be focus on the offender's ability to pay.

As a result of offenders' limited means, the dangers of the impact of the Surcharge were commented on. One consultation response indicated there may be an indirect impact on families, which demonstrates the wider dangers that could result. The Scottish Centre for Crime and Justice Research commented that it would be "setting offenders up for failure" and subsequently will be counterproductive. Similarly, Stewart remarked that if fines are set too high, it can lead to a vicious circle as the offender simply will not be able to pay.

In the analysis of question 44 ("Do you think the Surcharge should be a flat rate or a variable scheme that reflects the size of a financial penalty?"), there was preference for a variable rate of Surcharge. 13 of the 30 respondents remarked that it is important to reflect the offenders' ability to pay. These findings challenge the punitive principles that were demonstrated by the support for the principle of the Surcharge. However, these same responses also mentioned the need for a variable rate to ensure that it related to the seriousness of the offence committed and set in relation to the other punishments. One of the dangers commented on in the responses was that fines and Surcharges should not be set too low as to devalue the principle. This demonstrates that the competing themes within the findings are not necessarily easy to balance.

As made clear in chapters one and two, setting a realistic financial disposal is frequently advocated. The Surcharge should not ignore this simply because there are underlying political motivations for its introduction.

- **4.3.6 Penalty for non-payment**

Linked to the difficulty for offenders to pay, the dangers of increased criminalisation as a result of non-payment were warned by the Scottish Centre for Crime and Justice Research. As with fine default, prison would remain as a further punishment for non-payment.

This issue was thereafter directly raised in the interviews with the criminal defence solicitors to gain a better understanding of this potential problem. They both thought it is not as likely as some may fear that offenders would go to jail for non-payment. This is because sheriffs imposing fines often understand the danger of further criminalisation and offenders are often provided with more time to pay after a Means Enquiry Hearing. In Scotland, offenders can only go to jail for non-payment of fines over £500 (Criminal Defence solicitor; BBC News, 13 July 2007). It has also been suggested that prison for fine default should only be used in the last instance and be treated with caution (Sentencing Commission for Scotland, 2006: 32). Although the imprisonment rate for fine default is falling, in 2009/10, 1,333 people went to prison for

fine default (Scottish Centre for Social Research, 2011:2). It was interesting to note that both criminal defence solicitors interviewed stated their clients prefer financial penalties as their attitude is generally 'anything but prison'. Nevertheless, imposing the Surcharge, together with the other disposals detailed in chapter one raises the likelihood of fine default as the overall financial liability on the offender increases.

- **4.3.7 Restorative Justice**

Two references were made within consultation responses to Restorative Justice and the suggestion that additional use of this would prove beneficial. The Scottish Centre for Crime and Justice Research and the Prison Reform Trust both mentioned that the Victim Surcharge seems at odds with trends towards Restorative Justice in the Scottish Justice System. As in chapter one, this demonstrates a possible lack of coherent policy which might prove to hinder effective moves forward for victims.

- **4.3.8 Needs of the victim**

It is interesting that no comments mentioned the financial concern of victim organisations, or that additional revenue is a need to be addressed. However, the consultation did not directly ask what the needs of victims were and the absence of particular mentioning of financial needs of victims and victims' organisations cannot be widely read into.

- **4.3.9 Confusion about the Surcharge's aims amongst respondents**

It was commented in several consultation responses that there was a lack of detail in the consultation paper, and as a result the respondents felt limited in the comments they could make.

Some respondents had understood the aims of the Surcharge that it would more directly target the individual financial loss to victims and provide direct compensation. This demonstrates an overlap in policy with CICS and Compensation Orders, which are methods of direct help to victims. The fact that these issues were raised even though they are not necessarily the aim of the Surcharge relates to the political statements demonstrating continued victim support funding (MacAskill, 13 June 2012). However CICS eligibility has been cut (The Telegraph, 26 July 2012); and there does appear to be concern about this. Therefore the victim funding issues cannot be analysed in isolation.

- **4.3.10 Use of the fund**

In response to question 43 ("Do you agree that revenue accumulated from the surcharge should be used primarily to support victims?"), 28 respondents answered 'yes'. This demonstrates that the Fund collected should be used primarily to support victims. The civil servant interviewed confirmed that no decisions have been made regarding the use of the Victims' Fund.

When talking about central funding of victim services, there seemed to be two divergent interpretations taken by respondents. It could be used to lessen the burden on the state to provide for service (mentioned by two responses from police organisations in question 40); whereas other responses emphasised that that it should not be an alternative to Government funding and raised concerns for the decrease in the CICS.

The particular difficulty of domestic violence victims is also highlighted. Organisations that represent victims feature prominently in the respondent list of the consultation, such as the various branches of Women's Aid, Zero Tolerance, Dundee Violence Against Women Partnership and Rape Crisis Scotland. As such the position of survivors of domestic abuse are well represented and such victims are well represented in policy responses. This is a problem with direct payments under the Compensation Order (question 39). The continued role of the offender in survivors of domestic abuse's lives is an issue which should be avoided, particularly

through the Compensation Order. This may be a positive reason for the development of the Victim Surcharge, as the Surcharge does not require direct compensation payments from an offender.

The potential that some victim organisations may be overlooked because of the focus of victim policy on the traditional and mainstream victims was remarked by David Whyte. This would also be suggested by the respondent list within the consultation, which largely echoed mainstream, traditional interpretations of victimhood. This seems to be consistent with the previous suggestions within the literature; if a victim's fund is created, it is likely that those organisations traditionally constructed as victims will benefit and organisations which help victims of corporate crime "will not have a chance of funding" (interview with Whyte). Additionally, Whyte suggests that some of the organisations that act on behalf of the under-represented groups are at a disadvantage when seeking funding because they are often the groups that are challenging the Government. Therefore the use of the funds seems likely to continue to be politically influenced and emphasise the traditional constructions.

- **4.3.11 Technical details of the Surcharge**

Within responses throughout the consultation, there was widespread concern, unease and questions regarding the precise workings of the Surcharge. Additionally, interviewees frequently asked if the interviewer could elaborate on how it would work. Since it is still at policy formation stage the precise details are still being considered and it remains unclear how it can work effectively. The technical details are beyond the scope of this research paper, and the policy team and service providers, shall work out the working of technical aspects of the Surcharge; such as a proportionate, discretionary or flat-rate Surcharge.

4.4 Reflections from the policy-making environment

Within Victim Support Scotland's consultation response, it would appear that they expect to be involved further in the policy process. This demonstrates the mainstream involvement of some support charities and that mainstream victim organisations will help shape the policy response.

From the researcher's experience within the policy-making environment, there is quick progression from the top-level decision whether a policy is appropriate, to the more technical workings of policy. This is not automatically a bad thing; often the decision to act does need to be taken quickly and affirmatively. Within the policy team there is a clear focus on the more technical aspects of the Surcharge and understanding how best the policy will work. The principle of the Surcharge seemed to have been led by Ministerial circles and implementation and the workings of the Surcharge were developed within the policy team, possibly in the knowledge that the Surcharge would be introduced. The workings of the policy-environment generally confirmed the observations made as policy was driven from Ministers. During the interview with the civil servant it was commented that there this is part of a whole series of victim-centred reforms. The policy team were largely working on the 'evidence', and understanding how the Victim Surcharge would work. Since this is the stance they adopt, it means that the symbolic importance of the Surcharge was already decided by those in higher circles and as a result, there must be a pressure to make the Surcharge work in some manner and introduce it.

5. Conclusion[8]

Aiming to write an academic piece within the policy environment has proven somewhat frustrating. From the beginning of the project it appeared that, although the aims of policy are to improve the situations of victims, there are other wider influences which clash with the academic debate and the utilisation of evidence. This would appear consistent with Rock's suggestions that "[a]bove all, policy proposals must be phrased politically." (Rock, 1995: 6) "In all of this, it may seem that the argument of policy making does not necessarily model itself on the reasoning of criminology and the social sciences. The reasoning is of lesser importance. It is politically immaterial." (Rock, 1995: 7) Although such a strong stance may not be argued within the present project, one has to remain realistic of the policy-making environment, the demands of politics and specifically evaluate the Victim Surcharge. It appears that policy is often evaluated within policy circles in the knowledge that it will be introduced. This would appear to be weakness of policy evaluation as the ministerial decisions are taken to introduce policy, and subsequently the top-level principle behind policy receives little attention.

As nicely summed up by Karman; "making the offender pay is everyone's first choice, as it embodies the most elemental notion of justice" (Karman, 2007: 309). However, it was stated in 1986 that the "time is ripe for reconsideration of major issues" (Ashworth, 1986). There is still a need to discuss these issues, and this paper has illustrated some of the underlying principles behind the Victim Surcharge.

The findings have clearly demonstrated that there is support for the principles underpinning the Surcharge, even if these are populist principles which might attract criticism from academic quarters. If things are not changed because of the fear of some adverse consequences and inconsistencies in principle, then things would never change for the better. Difficulties within

[8] See also Appendix B for the summary policy findings presented to the Scottish Government. This is a summary of the findings within this paper, as relevant to the policy environment.

policy are inevitable. It is suggested that the Surcharge can be a positive step forward providing some issues are addressed.

Going Forward with the Surcharge

Although the impetus for the Victim Surcharge may be political, and there may be an underlying desire to cut public funding and be seen to be tough on crime, this does not mean that the Victim Surcharge is not a worthwhile policy. Based upon the consultation responses and the importance of symbolic victims' policy, it would appear that the Surcharge would be applicable in Scotland.

Nevertheless there is a need to clarify some issues. The Victim Surcharge highlights conflicts between principle and workings. The conflicts mean that the underlying principles would be undermined. Providing justice for victims would suggest, from the findings, that the Surcharge would preferably be imposed on all offenders, possibly linked to the seriousness of the offence. However, one of the predominant considerations must also be the position of the offender. It cannot solely be considered as a method to rebalance justice in favour of the victim. According to literature, the Surcharge may end up proving counterproductive, as the offender's ability to pay will remain a significant problem. However, it is a case of balance. Conflicts exist in the policy development, but the balance should not automatically be struck in favour of penal popularism.

As stressed within literature, the focus of policy can ignore many 'victims'. Victims of corporate crime, intellectual property crime and animal cruelty are examples. Efforts should be made to avoid a narrow construction of the victim, and since all offenders fined pay the Surcharge, all representations of victims should be targeted by the proceeds of the fund.

When evaluating the Surcharge, it appears inconsistent that the most serious offenders may not end up paying the Surcharge. It undermines the principle of the Surcharge, most foreign

jurisdictions that operate similar schemes impose the scheme on all offenders convicted and the consultation responses frequently remarked that all offenders should pay.

As an optimist, it would be beneficial if victims' policy could become detached from political utilisation. This should not detract from the possibility to positively use a Victim Surcharge. Policy focus should be expansive; the traditional constructions should be challenged if policy is to truly break the values which often hold back change.

This research did not start as a political research paper, but as the research has evolved, it would appear the comment has become increasingly focused on the politics of victims' policy. This is a significant finding itself, and although it stems from the researcher's interests in the policy environment, it also demonstrates the reality that victims' policy remains political.

There is a top-level will which means that the Victim Surcharge is set to be introduced. From examining the response of victim representatives, it has been demonstrated that the Surcharge does prove popular and does have a purpose. Even if there is a political motive; there is also a symbolic sense of justice for victims.

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- Criminal Courts (Sentencing) Act 2000
- Criminal Justice Act 1972
- Criminal Justice Act 2003
- Criminal Justice and Licensing (Scotland) Act 2010
- Criminal Justice (Scotland) Act 1980
- Criminal Procedure (Scotland) Act 1995
- Domestic Violence, Crime and Victims Act 2004
- Federal Victims of Crime Act 1984 [America]
- Forfeiture Act 1870
- Malicious Damage Act of 1861
- Justice Act (Northern Ireland) 2011
- Proceeds of Crime Act 2002

Appendix A: Making Justice Work for Victims and Witnesses Consultation

Summary List of Questions

Q1 Do you agree with the principle of having a case-specific information hub for justice in Scotland?

Q2 Are there any other types of case-specific information that would be of value to victims and witnesses?

Q3 Do you believe a statutory framework is needed to promote information-sharing in the interests of victims and witnesses?

Q4 What protections would need to be built into such a system?

Q5 What information would help victims, witnesses and the public understand different types of sentences better?

Q6 What is the best way to provide information about sentences to victims, witnesses and the public?

Q7 Do you agree that bereaved families in road death cases should be (a) advised when the offender's driving disqualification is rescinded and their driving licence returned to them, and (b) given the chance to register any concerns about return of the driving licence?

Q8 Do you agree with the proposal to create a duty on relevant public bodies to publish minimum standards of service for victims and witnesses?

Q9 Do you agree that standards should encompass both victims and witnesses?

Q10 Are there any other issues that you think standards should cover?

Q11 Do you agree that a closed court should be (a) requested through a motion at the pre-trial hearing (First Diet, Intermediate Diet or Preliminary Hearing), or (b) made a special measure (i.e. the subject of a Child Witness Notice or a Vulnerable Witness Application)?

Q12 Please let us have your views on the possible options for piloting improved care and support for victims and witnesses

Q13 Are there any other models for improving care and support that you would like to tell us about? If so, please provide details.

Q14 Do you agree with the proposal to change the definition of child witness to be up to age 18?

Q15 Do you agree that we should amend the definition of vulnerable witness to match the requirements of the EU Directive on Victims?

Q16 Do you agree the definition of a vulnerable witness - and therefore automatic entitlement to standard special measures – should be extended to include (a) victims of sexual offences, (b) victims of domestic abuse, and (c) those witnesses defined as automatically vulnerable in the final version of the EU Directive on Victims?

Q17 Do you agree that any witnesses who are automatically entitled to standard special measures should be able to opt-out of using them?

Q18 Do you have any comments on the proposal to include in the legislation flexibility to extend the range of standard special measures if necessary in future?

Q19 Do you have any suggestions about how the administrative arrangements for special measures might be streamlined (a) for those witnesses automatically entitled to standard special measures; (b) for other witnesses who may fall into the definition of vulnerable but do not automatically do so; and (c) for those witnesses who wish to opt-out of using the standard special measures to which they are entitled?

Q20 Do you have any concerns about the proposal to put the Guidance on Joint Investigative Interviewing of Child Witnesses in Scotland on a statutory footing?

Q21 Should we seek to remove the presumption that child witnesses under age 12 in prescribed sexual or violence cases should give evidence away from the court building, while retaining the ability for them to do so?

Q22 Should the submission of Child Witness Notices be made a compulsory part of pre-trial hearings?

Q23 Do you have any concerns about the proposal to make clear that section 271M of the Criminal Procedure (Scotland) Act 1995 does include provision for visual recording of evidence?

Q24 Do you believe we need specific provision allowing for visual recording of supplementary evidence?

Q25 Do you agree with the principle of extending the types of special measures available specifically to help meet communication support needs?

Q26 If you agree in principle we should extend the types of special measures available to meet communication support needs, do you have any views at this stage on which option/model (intermediaries, witnesses profiles, some other means) you would favour?

Q27 If the role of Appropriate Adults in relation to suspects is defined in statute, do you believe the same is necessary for their role in relation to victims and witnesses?

Q28 Do you agree that victims of sexual violence should have the right to choose the gender of the person who interviews them?

Q29 Do you agree with the proposal that it should not be necessary to disclose the witness' personal circumstances (e.g. medical details) in applications for standard special measures?

Q30 Do you agree that victims (or parents, carers or relatives) should be given the opportunity to make written representations about what additional conditions might be included in the licence when an offender first becomes eligible for temporary release? Please comment on any concerns you have about this or any implications you think the proposal has.

Q31 Should we seek to introduce Investigative Anonymity Orders in Scotland?

Q32 If you think we should, in what circumstances or for which cases should they be used?

Q33 What mechanisms could be used to ensure victims' interests are taken into account when sentencing policy is developed?

Q34 Do you agree with the proposal to allow victims (or relatives in appropriate cases) to speak to a member of the Parole Board before a Life Prisoner Tribunal considers the release of an offender on licence?

Q35 Do you agree with the proposal to allow Victim Statements to be submitted to the court at any time after the prosecutor moves for sentence (or the accused pleads guilty or is found guilty), but before sentence is passed?

Q36 Do you agree with the proposal to extend eligibility for the Victim Statement scheme so that a carer of a child under age 14, who is not the direct victim of the crime, can make a Victim Statement on their behalf?

Q37 Do you agree with the proposal to amend the definition of carer in relation to the Victim Statement scheme so that the carer who makes the statement on behalf of a child under age 14 does not have to have been the carer at the time of the (alleged) offence?

Q38 What more could be done to acknowledge and take into account the interests of victims and witnesses?

Q39 Do you agree that courts should be required to consider the issue of compensation in all cases where an identifiable victim has suffered injury, loss or distress?

Q40 Do you support the principle of adopting a victim surcharge?

Q41 Do you agree that the surcharge should only be applied to court fines in the first instance?

Q42 Should we consider the possibility that legislation could include a provision to roll out application of the surcharge to custodial sentences, community sentences and direct measures at a later date?

Q43 Do you agree that revenue accumulated from the surcharge should be used primarily to support victims?

Q44 Do you think the surcharge should be a flat rate or a variable scheme that reflects the size of a financial penalty?

Q45 If you think there should be a flat rate surcharge, what level should it be set at - £15, £20, £30, other (please specify)?

Q46 If you think there should be a proportionate surcharge, how do you think this should work - a percentage amount added to the value of the financial penalty, or other (please specify)?

Q47 If you think there should be a proportionate surcharge, do you think there should be minimum and maximum levels set?

Q48 If you think there should be a proportionate surcharge, what should (a) the minimum be, and (b) the maximum be?

Q49 Do you agree that priority should be given to any compensation payment to the victim, followed by the surcharge and then the principal fine? If not, please comment on how you would prioritise the payments?

Q50 Do you agree with the suggestion that there should be restitution orders whereby those who assault police officers may be sentenced to pay into a fund to support treatment and care of police victims?

Q51 Do you agree that the Scottish Government should set the purposes to which the fund to support treatment and care of police victims should be applied?

Q52 Do you think limits for the size of a restitution order should be as described in paragraph 145 (the same limits as exist for compensation orders)?

Q53 Do you agree that priority in collection and enforcement should be given to any compensation payment to the victim, followed by the restitution order and then any fine? If not, please comment on how you would prioritise the payments

Q54 Do you think restitution orders should be extended to groups other than the police? If so, please comment on what group(s) of workers should also benefit from a fund supported by restitution orders

Appendix B: Policy summary of research presented to Scottish Government

Victim Surcharge: Applicability in the Scottish Criminal Justice System

Summary of research and recommendations

Graeme Barton, University of Glasgow

Research Intern, Victim Surcharge

This research project was conducted as part of a student internship during a postgraduate Masters Criminology course. The paper considered the proposals for the Victim Surcharge in light of wider academic work on victims and the policy making environment, and the widespread introduction of the Victim Surcharge in Australia, Belgium, Canada, New Zealand, Sweden, England and Wales and the United States of America.

When evaluating the policy-making environment, it was widely commented in academic discussion that victims' policy is very political and victims are used as 'political placebos'. Thus care must be taken when devising any policy to avoid political manipulation and ensure that the policy introduced has clear aims and objectives to benefit victims.

The surrounding rhetoric of helping victims by 'making offenders pay' encapsulates a widely identified fallacy within victims' policy; that a 'zero-sum relationship' exists between victims and offenders (Hickman, 2004). This does not need to be the case: protection and services offered to victims does not necessarily have to be at the expense of offenders. It can prove counter-productive, as offenders will be more harshly punished and less likely to be rehabilitated if they are punished further to appease a notion of 'justice' for victims. This would also prove at odds with wider trends within criminal justice, such as Restorative Justice, which places an importance on offenders' interests with the aim of reducing reoffending. Therefore, efforts should be made to avoid the utilisation of the Victim Surcharge as a punitive policy.

Additionally, offenders and victims are not necessarily distinct groups of people. Those who are victims are often offenders themselves, and care should be taken to avoid such emphasis in policy.

Specifically considering the Victim Surcharge, it would appear that the underlying principle has received a great deal of support within consultation responses and wider victims' organisations. There is also a political appetite to introduce the Surcharge. The interpretation of such support within this research suggests that the Victims Surcharge is seen as an important element of justice for victims and has a symbolic value.

However, if this symbolic value and perception of justice is to hold strong, it would appear inconsistent in so much as there is a fundamental flaw within proposals if more serious offenders did not pay the Surcharge when they are sentenced to prison. This was highlighted within several consultation responses. Those countries that operate the Surcharge abroad either impose the Surcharge on the most serious offenders only (Belgium impose it on the most serious offences and Sweden impose it only for those offences punishable by imprisonment) or impose it on all offenders (as in Canada, New Zealand, New South Wales, and most schemes in America). Additionally, England and Wales have recently extended the application of the Surcharge to a wider number of offenders. For a detailed consideration of the schemes that operate abroad, refer to the report commissioned prior to the introduction of the Offender Levy in Northern Ireland (Bowles, 2010).

Academic criticism of victims' policy also highlights the lack of regard towards certain under-represented victims within policy: for example, victims of corporate crime, intellectual property crime and animals who are victims of crime. Additionally, it is widely commented in academic commentary that there is no such thing as 'victimless crimes' and the constructions of policy which does not take this into account is open to criticism. As such Northern Ireland's approach to state that there was no such thing as victimless crime seems more appropriate (Ford, 2012). Offenders who are fined for such crimes will contribute to the Surcharge but their victims would not be seen to benefit from the allocation of any Surcharge. Therefore, efforts should be made to ensure inclusive representation of victims with the proceeds of the Surcharge.

Although this may conflict with the principles and aims of the Surcharge, the circumstances of the offender of the offender should be considered, most notably their ability to pay. This was frequently raised as a concern within consultation responses and academic scrutiny of other policies.

Recommendations:

- Efforts should be made to 'de-politicise' the proposals
- The Surcharge does embody some symbolic value and seem to represent a form of justice for victims
- The Surcharge should apply to all offenders
- The Surcharge should take into account the offender's ability to pay, and not increase the criminalisation of offenders
- No crimes are 'victimless'
- Rights of offenders should not be sacrificed to appease victims
- Offenders and victims are not necessarily distinct groups of people
- All types of victims, even those beyond the traditional mainstream focus, should be considered in victims' policy and should benefit from the Surcharge

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University of Glasgow | College of Social Sciences

Ethics Committee for Non Clinical Research Involving Human Subjects

NOTIFICATION OF ETHICS APPLICATION OUTCOME – UG and PGT Applications

Application Type: New *(select as appropriate)*

Application Number: SPS/2011/149/SOCIOLOGY

Applicant's Name: Graeme Barton

Project Title: Feasibility of a 'Victim Surcharge' in Scottish Criminal Justice

Date Application Reviewed: 15 May 2012

APPLICATION OUTCOME

(A) Fully Approved ☒
(select from drop down as appropriate)

Start Date of Approval: 15/5/2011 End Date of Approval: 10/1/2011

If the applicant has been given approval subject to amendments this means they can proceed with their data collection with effect from the date of approval, however they should note the following applies to their application:

Approved Subject to Amendments without the need to submit amendments to the Supervisor ☐

Approved Subject to Amendments made to the satisfaction of the applicant's Supervisor ☐

Approved Subject to Amendments made to the satisfaction of the School Ethics Forum (SEF) ☐

The College Ethics Committee expects the applicant to act responsibly in addressing the recommended amendments.

(B) Application is Not Approved at this Time ☐

Select Option
(select from drop down as appropriate)

Please note the comments in the section below and provide further information where requested.

If you have been asked to resubmit your application in full then please send this to your local School Ethics Forum admin support staff.

Some resubmissions only need to be submitted to an applicant's supervisor. This will apply to essential items that an applicant must address prior to ethical approval being granted, however as the associated research ethics risks are considered to be low, consequently the applicant's response need only be reviewed and cleared by the applicant's supervisor before the research can properly begin. If any application is processed under this outcome the Supervisor will need to inform the School ethics admin support staff that the application has been re-submitted (and include the final outcome).

The following section is only for completion for applications that required amendments to go to SEF

(C) Select Option ☐
(select as appropriate)
This section only applies to applicants whose original application was approved but required amendments.

APPLICATION COMMENTS

Major Recommendations: