

MENTAL HEALTH (SCOTLAND) ACT 2015

EXPLANATORY NOTES

THE STRUCTURE & A SUMMARY OF THE ACT

Part Three – Victims’ Rights

Section 54: Right to information: offender imprisoned

146. Section 16 of the Criminal Justice (Scotland) Act 2003 (the Criminal Justice Act) as amended by the Victims and Witnesses (Scotland) Act 2014, provides that victims of any offence can receive information mainly related to the circumstances in which a prisoner leaves prison. This may be information about: the first time a prisoner is entitled to be considered for temporary release, an escape, transfer to a prison outwith Scotland, release on licence or parole, death of the prisoner or the end of the custodial sentence.
147. The Act amends the Criminal Justice Act to provide for the disclosure of information about mentally disordered offenders (restricted patients) to their victims or their relatives, in certain circumstances. A mentally disordered offender is the term used to describe a person charged with an offence who, upon conviction or acquittal has either been given a mental health disposal by a court authorising compulsory measures of treatment in hospital without limit of time rather than being sentenced to imprisonment, or a prisoner who has been found to be suffering from a mental disorder whilst in prison and who is thereafter transferred into the mental health system.

Amendment of section 16 of the Criminal Justice (Scotland) Act 2003

148. Section 54 of the Act amends section 16 of the Criminal Justice Act to add to the information which a victim can receive under the existing scheme in cases where the offender is in hospital receiving treatment for mental disorder by virtue of a hospital direction or a transfer for treatment direction. In such cases, section 54 of the Act amends section 16 so that victims can receive notification when the offender is unlawfully at large from a hospital, or has been returned to hospital after being unlawfully at large, and when a certificate has been granted, for the first time, allowing unescorted suspension of detention.
149. **Section 54** also extends the order making power in section 16(4) of the Criminal Justice Act by giving the power to the Scottish Ministers to modify section 18A of the Criminal Justice Act by adding, amending, or repealing definitions of terms used in section 16(3).

Section 55: Right to information: compulsion order

150. **Section 55** makes further amendment to the Criminal Justice Act 2003 by inserting new sections 16A, 16B and 16C, which make provision regarding victims’ rights to receive certain information relating to offenders who are subject to a compulsion order and a restriction order (CORO).

New section 16A of the Criminal Justice Act 2003

151. New section 16A provides that where a person over 16 has been made subject to a CORO in proceedings in respect of an offence perpetrated against a natural person, the Scottish Ministers must give the information described in section 16C to the person entitled to receive that information (as determined by section 16B), provided that the person has requested to be given the information. Information about a condition imposed on conditional discharge may only be given where the condition is relevant to the person (as described in section 18A(3)). The information required to be given by section 16A may only be withheld if the Scottish Ministers consider that disclosing the information would be inappropriate due to exceptional circumstances in the case.

New section 16B

152. Section 16B lists those persons who are entitled to ask to be given information under section 16A, namely, the victim of the offence, or if the victim is dead, the spouse, cohabitee, child or parent of the victim, and if the victim died before reaching 16, any other person who cared for the victim before the relevant offence took place.
153. If the victim is under 12, he or she may not ask for information but someone who cares for the victim may ask instead. The section clarifies that a person who asks for information must not be incapable, and must not be a person accused of, or reasonably suspected of being the perpetrator, or been implicated in the perpetration of the offence.

New section 16C

154. Section 16C lists the information that is to be given under section 16A; that is, whether the compulsion order and/or the restriction order has been revoked, whether the decision to revoke the restriction order is under appeal or cannot be appealed against and is therefore final, the date of death of the offender, whether the compulsion order has been modified, any transfer of the offender to a place outwith Scotland, the conditional discharge of the offender, the terms of restrictions which have been placed on the things that the offender may do as a condition of their conditional discharge (i.e. exclusion zones or “no contact” conditions), or the recall of the offender to hospital following conditional discharge.
155. If the offender is subject to a compulsion order and restriction order authorising detention in hospital, additional information may be disclosed including (a) whether the offender is unlawfully at large from hospital, (b) if they have been returned to hospital after having been unlawfully at large, (c) that suspension of detention has been granted for the first time and does not impose a supervision requirement and (d) where suspension of detention mentioned in (c) has been revoked. New definitions of what constitutes being granted suspension of detention for the first time are added by inserted section 18A (mentioned below).
156. Information is to be given in a case where the compulsion order and/or restriction order is revoked and that decision is appealed. The information includes whether (a) the Court of Session has decided to allow, or not allow the appeal against the decision to revoke the order in question i.e. Compulsion Order (in this case the Restriction Order will automatically fall) or the Restriction Order only; (b) that the Court of Session’s decision has (i) been appealed against to the Supreme Court, or (ii) has not been appealed against to the Supreme Court. If the Court of Session does not allow the appeal the decision to revoke the order in question is final. (c) that the Supreme Court has allowed, or not allowed, the appeal against the Court of Session’s decision; (d) if the Supreme Court’s decision means the decision to revoke the order has not been set aside, the latter decision is final; and (e) if the Court of Session’s decision or the Supreme Court’s decision means the patient is once more subject to the order, the information provided will include this fact.

Section 56: right to make representations

New section 17B

157. Section 56 of the Act inserts new sections 17B to 17D to the Criminal Justice Act.
158. Section 17B provides for the victims of mentally disordered offenders to be given a right to make representations in certain cases. A person who has the right to be given information about the offender must, in a case where the offender is subject to a hospital direction or a transfer for treatment direction and qualifies under the Criminal Justice Victim Notification Scheme, be given the chance to make representations before a decision about suspending the offender's detention is made for the first time. Where the offender is subject to a compulsion order and restriction order, an opportunity to make representations must be given before a decision is taken about (i) suspending the offender's detention for the first time (for a definition of this see inserted section 18A); (ii) revoking or varying the compulsion order in any way; (iii) conditionally discharging the offender; or (iv) imposing, altering or removing any conditions applying to the conditional discharge of the offender which might affect the victim or family of the victim as described in section 18A(3). Any representations must be about how the decision in question might affect the victim or the victim's family and the right to make representations only applies if the victim has intimated to the Scottish Ministers a wish to make representations and there is no need to give the victim the opportunity if it is not reasonably practicable to do so.

New section 17C

159. Section 17C provides that representations in relation to decisions under section 193 of the Mental Health Act, made under section 17B(5)(b), may be made orally or in writing. Any other representations made under section 17B (regarding first grant of unescorted suspension of detention or imposing, altering or removing any conditions of discharge) must be made in writing. All representations under that section must reflect how the decision will impact on the victim or the victim's family. Section 17C(2) makes provision for the Scottish Ministers to issue guidance as to how representations, whether written or oral, should be made.

New section 17D

160. Section 17D provides that where a decision has been made under section 17B (mentally disordered offender (restricted patient): victim's right to make representation), if the victim has asked for information about a decision to be given under section 17D then the Scottish Ministers must provide it (even although the Ministers are not required to do so under section 16A) unless there are exceptional circumstances which make it inappropriate to do so.

Section 57: information sharing.

New section 17E

161. Section 57 of the Act inserts new section 17E to the Criminal Justice Act, which provides that, where the Scottish Ministers are required by section 16 or 16A to give a victim information about an offender, they must give notice to the restricted patient's responsible medical officer and, if the offender is subject to a compulsion order and restriction order, the Tribunal.
162. Notice under subsection (1) is to request that the recipient of the notice must give the Scottish Ministers such information as they may require to fulfil their duties to give information to the victim under sections 16, 16A or 17D. The recipient of this notice must comply with the request given. If the Scottish Ministers cease to be required to give anyone information about the offender they must notify all recipients of the notice, which thereafter ceases to apply to persons in receipt of it.

Section 58: associated definitions

New section 18A

163. **Section 58** inserts a new interpretation section to the Criminal Justice Act. Section 18A adds references to the 2003 Act, the Tribunal and transfer for treatment direction. It also defines what is meant by a reference to a certificate under the Mental Health (Scotland) Act 2003 which suspends a person's detention without imposing a supervision requirement, and what it means for such a certificate to be granted for the first time. The latter covers both a person who has been detained and whose detention is suspended for the first time after detention; as well as a person who has been recalled to hospital following conditional discharge. Subsection (3) provides that (for the purposes of sections 16A(3)(b) and 17B(5)(c)) for a condition to be relevant to the victim, the condition must be one which restricts the person contacting an individual or being in a place and the victim must have made a valid request to the Scottish Ministers to be informed about any such condition.

Section 59: Power to make modifications

New section 18B

164. **Section 59** inserts new section 18B to the Criminal Justice Act. Section 18B gives the Scottish Ministers the power to amend sections 16A and 16B of that Act, by substituting a different age for the ages specified in those sections, section 16C by adding descriptions of information, and section 18A by adding, amending or repealing definitions of terms used in 16C.
165. Section 18B further provides that the power to amend by order includes amending section 16A so that information may be given under that section in some or all cases where a person has been made subject to a compulsion order and either, the person has not been made subject to a restriction order or the restriction order to which the person was made subject has been revoked. Section 18B also provides that section 17B may be amended to specify types of decision in respect of which representations may be made.
166. Finally, section 18B(3) gives the Scottish Ministers power to make any necessary, or expedient amendments in consequence of amendments to 16A or 17B, to sections 16C, 17E and 18A, or to the 2003 Act.

Section 60: Amendments to the 2003 Act

Amendment to section 193

167. **Section 60** amends section 193 of the 2003 Act by requiring that where a victim is entitled to make representations before the Tribunal makes a decision, and no opportunity has been given to the victim to make representations, the Tribunal must have regard to any victim's representations before making a decision about what conditions, if any to impose when directing conditional discharge under that section.
168. **Section 60** further amends section 200 of the 2003 Act, by requiring the Scottish Ministers to have regard to any victims' representations made in writing before varying any conditions with regard to a conditional discharge of a patient.
169. Section 60(4) of the Act amends section 224 of the 2003 Act by requiring a responsible medical officer to consider victims' representations before deciding what conditions should be included in any certificate suspending detention.
170. **Section 329** is amended by section 60(5) of the Act to include a definition of victim's representations at the appropriate place in that interpretation section.