

## **POLICY NOTE**

### **THE MENTAL HEALTH (SCOTLAND) ACT 2015 (COMMENCEMENT NO. 5 AND TRANSITIONAL PROVISIONS) ORDER 2017**

#### **SSI 2017/234 (C. 19)**

1. The above instrument is made under sections 61(2) and (3) of the Mental Health (Scotland) Act 2015 (“the Act”). It is not subject to any Parliamentary procedure.

#### **Background**

2. Part 3 of the Act makes amendments to the Mental Health (Care and Treatment) (Scotland) Act 2003 (“the 2003 Mental Health Act”) and the Criminal Justice (Scotland) Act 2003 (“the Criminal Justice Act”). The Criminal Justice Act established a victim notification scheme to allow victims in certain circumstances to be notified of the release or escape of an offender from prison and the right to make representations before certain decisions are taken in relation to that offender.

3. Section 16 of the Criminal Justice Act as amended by the Victims and Witnesses (Scotland) Act 2014, provides that victims of an 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.

4. The Act amends the Criminal Justice Act to provide for the disclosure of specified information about certain mentally disordered offenders (restricted patients) to victims or the relatives of the victim, in certain circumstances. A mentally disordered offender is the term used to describe a person charged with an offence who, upon conviction or acquittal on grounds of lack of criminal responsibility has either been given a mental health disposal by a court authorising compulsory measures of treatment in hospital without limit of time instead of or in addition to a sentence of imprisonment, or a prisoner who has been found to be suffering from a mental disorder whilst in prison and transferred into the mental health system.

5. The Act provides rights to victims, who are entitled by the Act to ask to be given information, and to receive information where a mentally disordered offender is subject to a hospital direction, a transfer for treatment direction, or a compulsion order with a restriction order (CORO). It also provides for the victims of mentally disordered offenders to be given a right to make representations in certain cases.

#### **Policy Objectives**

6. The policy objectives relating to part 3 of the Act are fully described in the Policy Memorandum which accompanied the Bill for the Act (“the Bill”). Further information on the

passage of the Bill through Parliament, and accompanying documents (including the Policy Memorandum) is available at:

<http://www.parliament.scot/parliamentarybusiness/Bills/78451.aspx>

7. In summary, the policy objectives are to provide information to victims and invite representations from victims appropriately whilst providing appropriate protections for sensitive information about patients. This Order brings into force all provisions in part 3 (victims' rights) of the Act, except so far as already brought into force on 5 May 2017 by the Mental Health (Scotland) Act 2015 (Commencement No. 3) Order 2017.

8. To allow victims to register with the scheme before it commences on 30 September 2017 the order specifies that certain provisions will come in to force on 15 September 2017 ("the day of commencement"). These provisions allow victims to intimate their wish to be given information or be afforded the opportunity to make representations. Information sharing provisions in section 57 of the Act are brought into force by the order on the day of commencement to support the initial set-up of the scheme by enabling Scottish Ministers to exchange information with responsible medical officers and the Mental Health Tribunal.

#### **Commencement and Transitional Provisions**

9. The order makes provision relating to transitional arrangements which are intended to ensure that the way in which the information requirements apply to victims of offenders who are already subject to hospital detention before the day of commencement of the provisions is clear and consistent with the policy aims of the scheme. Additionally, the provisions ensure that offenders who remain subject to orders made under previous legislation are treated for the purposes of the provisions introduced by Part 3 of the Act as if subject to orders under current legislation.

10. Article 3 of the order makes provision that victims will not be informed in circumstances where an offender subject to a hospital direction or transfer for treatment direction has returned to hospital having been unlawfully at large, where that offender was returned to hospital before the day of commencement. This is historical information about the offender having returned to hospital after having been unlawfully at large at a time where the victim would not have been entitled to be told about that, which would be of little or no benefit to the victim where the situation has been resolved by the day of commencement.

11. Where a certificate was granted, for the first time, which suspended an offender's detention and did not impose a supervision requirement, article 3 of the order provides that the victim will not be informed about the certificate having been revoked, if it was revoked before the day of commencement. This applies where an offender was subject to a hospital direction or transfer for treatment direction. Certificates may be revoked by the patient's responsible medical officer and again, because of the historical nature of the information, it is unnecessary to disclose this information to victims where it happened before the day of commencement.

12. The order also sets out transitional arrangements, in articles 4 and 5, as to how the scheme applies in respect of victims of two categories of offenders who were subject to criminal proceedings and mental health disposals before the commencement of the 2003 Mental Health Act. Firstly, those who were subject to a transfer direction under the Mental Health (Scotland) Act 1984. Such offenders will be treated, for the purposes of the Criminal Justice Act, as if they were subject to a transfer for treatment direction made under section 136 of the Mental Health (Care and Treatment) (Scotland) Act 2003. Secondly, those offenders who were originally made subject to a hospital order under the Criminal Procedure (Scotland) Act 1995 (before it was amended by the 2003 Mental Health Act) with special restrictions on discharge, as originally defined by the Mental Health (Scotland) Act 1984, are treated, for the purposes of the Criminal Justice Act, as if they were subject to a compulsion order and a restriction order made under the Criminal Procedure (Scotland) Act 1995 (as amended). This ensures that victims are entitled to receive information and make representations in line with the scheme when the mentally disordered offender is subject to a transfer direction or a hospital order with restriction. This is consistent with the way in which these mentally disordered offenders are treated for other purposes under the law at present, by virtue of transitional provisions made in connection with the commencement of the 2003 Mental Health Act.

13. Articles 6 and 7 of the order provide that the victim will only be eligible for certain information where the compulsion order or restriction order, in relation to an offender in respect of whom a victim would be entitled to receive information, has ceased to have effect before the day of commencement. The victim will be entitled to know that the compulsion order or restriction order was revoked (and that revocation is final) or that the offender has died (and the date of the offender's death).

14. Article 7 sets out what is meant by the order ceasing to have effect for the purpose of article 6. This is where either the offender has died while still subject to the compulsion order and restriction order, or where the compulsion order or restriction order is revoked and that revocation is final. With respect to revocation of the compulsion order or restriction order, the order defines what constitutes final revocation of an order. This ensures that the more limited information requirement will only apply where the order was revoked before the day of commencement and – also before that date – the appeals process in respect of that order has been exhausted or where the revocation of the order has not appealed within the time allowed. If the revocation can still be appealed or an appeal is on-going, the transitional arrangements do not apply and the victim is entitled to the full information provided for in the Act.

15. Article 8 provides that there is no requirement to provide victims with certain information in respect of events which occurred before the day of commencement. These events are: that a variation had been made to a compulsion order; recall of the offender from conditional discharge; when an offender previously unlawfully at large had been returned to hospital; where a certificate, which was granted for the first time suspending the offender's detention without a supervision requirement, was revoked. This historical information would be of little or no benefit to victims.

## **Consultation**

16. The Act's provisions on victims' rights were consulted on as part of the wider consultation exercise on the Bill for the Act. This public consultation took place in 2014 and provided respondents with a consultation draft of the Bill. There has been targeted discussion with stakeholders, including the Scottish Prison Service and the Crown Office and Procurator Fiscal Service, on the operational aspects of implementing the scheme and on transitional provisions.

17. NHS Scotland's Forensic Mental Health Services Managed Care Network established an expert group — the Victims Rights' Group — which considered the provisions in part 3 of the Act and provided advice to the Scottish Government as to what guidance would be helpful in implementing the new scheme. Transitional or commencement provisions were designed to take account of the views of practitioners and victims groups who participated in the expert group. Practical issues were a focus, for the group. To ensure smooth operation of the scheme policy officials have committed to meeting with the group in advance of the day of commencement to discuss practical implications of the operation of the scheme.

## **Impact Assessment and Financial Effects**

18. An Equality Impact Assessment (EQIA) was undertaken for the Bill for the Act prior to its introduction to Parliament. The transitional provisions are not expected to have a financial impact.

Scottish Government

Directorate for Population Health