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**FORENSIC NETWORK VICTIMS’ RIGHTS GROUP**

**DRAFT REPORT**

May 2016

Contents

[1. Membership and subgroups 3](#_Toc447288168)

[1.1 Meeting dates and visits 3](#_Toc447288169)

[1.2 Subgroups 3](#_Toc447288170)

[2 Terms of Reference 4](#_Toc447288171)

[3 Introduction 5](#_Toc447288172)

[3.1 The setting up and working of the expert group 5](#_Toc447288173)

[3.2 Victim sensitivity 6](#_Toc447288174)

[3.3 The development of Victim involvement in the Criminal Justice System in Scotland 9](#_Toc447288175)

[3.4 General principles 10](#_Toc447288176)

[4 The current Victim Notification Scheme in operation 13](#_Toc447288177)

[4.1 Victims of Mentally Disordered Offenders 14](#_Toc447288178)

[4.2 Existing involvement in MHT under the Mental Health Care and Treatment Act 2003 and the likely impact of the 2015 Act 15](#_Toc447288179)

[4.3 An outline of the current VNS in practice 17](#_Toc447288180)

[4.4 The development of Victim Notification in The Mental Health Act 2015 20](#_Toc447288181)

[4.5 The Mental Health Act 2015 22](#_Toc447288182)

[4.6 The MDOVS in operation 24](#_Toc447288183)

[4.7 Information to be given to victims is described under section 16C of the 2015 Act 25](#_Toc447288184)

[5 The MDO Victim scheme –recommendations 26](#_Toc447288185)

[6 Appendix 1 Flowchart of the 2003 Act scheme in operation 29](#_Toc447288186)

[7 Appendix 2 – example of a letter currently sent to a victim registered under the 2003 Act scheme 30](#_Toc447288187)

[8 Appendix 3 Example of information to form the basis of a General information leaflet 32](#_Toc447288188)

[9 GLOSSARY 36](#_Toc447288189)

# Membership and subgroups

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## Meeting dates and visits

5th June 2014 A meeting of the whole group at The Royal College of Psychiatrists in Scotland, Queen Street.

4th September 2014 A meeting of the whole Group at St Andrews House.

4th December 2014 A meeting of the whole group at The Royal College of Psychiatrists in Scotland, Queen Street.

4th February 2015 Chair teleconference with Family Liaison Officer Police Scotland lead.

5th February 2015 Chair Visit to Crown Office and discussions with Paul Beaton, lead for Victim Information and Advice.

12th February 2015 Chair Visit to Victim Notification Team SPS Headquarters.

12th February 2015 Chair Visit to Victim Support Scotland.

26th March 2015 A meeting of the whole Group at St Andrews House.

4th June 2015 A meeting of the whole Group at St Andrews House.

29th October 2015 A meeting of the whole Group at St Andrews House.

21 January 2016 A meeting of the whole Group at The Royal College of Psychiatrists in Scotland, Queen Street.

24th March 2016 A meeting of the whole Group at St Andrews House.

## Subgroups

Victim Sensitivity SC, JH, AM.

Mental Health Tribunals RH, CM, JH, SC

Operation of Orders FL, JS, GS, RT, EO, VG, HM

# Terms of Reference

1. Recommend guidance for provision of s43 – 47 of Part 3 of Mental Health Scotland Bill (now the Mental Health (Scotland) Act 2015 (the “2015 Act”)) establishing victims’ rights within Forensic Mental Health Services.  This should include processes on the **right to information and the right to make representations:**

**Representations**

* first occasion of unescorted Suspension of Detention (SUS) (including first occasion of unescorted SUS after recall  from CD);
* revoking or varying the Compulsion Order;
* revoking the restriction order;
* conditionally discharging the patient;
* imposing or varying any conditions of conditional discharge (CD) which affect the victim

And the **Right to Information:**

* Whether compulsion order has been modified or revoked;
* Whether the restriction order has been revoked;
* The date of the death of the offender;
* Any transfer of the offender to a place outwith Scotland;
* The conditional discharge of the offender;
* Recall from CD;
* Abscond/escape of offender and when he/she has been returned;
* Appeal/SUS – different provisions apply as to whether opt in is for information only or opt in includes information and right to make representations.

1. Explore interaction of the Mental Health Bill with the Mental Health (Care and Treatment) (Scotland) Act 2003 – ie there will be two systems running in tandem in relation to tribunal hearings ie (1) VNS and (2)  those who do not qualify under the scheme, or do not opt in, or in excessive security appeals which is not covered by VNS.
2. Distinguish between the needs of family and non-family victims as well as differentiating between engaged and non-engaged family victims. There is a statutory definition.  It is inevitable we will be operating two different systems – those who fall within the statutory scheme and those that do not.  Victims may be people who also perceive themselves to be carers with additional/relevant rights under the Carers Act with a carer defined as someone who provides or intends to provide care to another person. Therefore include consideration of the overlap with Carers’ rights under this new carers’ legislation.
3. Identify appropriate treatments or supports that should be available.
4. Detail who is responsible for doing what, when with regard to the extended rights of victims.
5. Outlining Training requirements and the costs of delivering this.
6. Provide a timely report in line with legislative progress.

# Introduction

The need to engage with victims of violent crime in the criminal justice process is established both in domestic policy and legislation, informed by international statements of best practice. In Scotland, the right to be heard at key stages in an offender’s rehabilitation and receive certain information was established in Scotland’s Victim Notification Scheme (VNS), which became active in 2004. This remains an evolving field with recent changes to the VNS in Scotland following the Victims and Witnesses (Scotland) Act 2014 (the 2014 Act) and ongoing international developments regarding the influence of victims in the criminal justice decision making process – in particular the 2012 European Union Directive concerning victims. The 2014 Act clarifies the duties on organisations involved in the Criminal Justice System to create standards for the service they provide to victims. It also states statutory principles regarding how victims should be supported.

Evidence suggests that victims of crime require information for a number of reasons: to satisfy the expectation that it is a victim's right to receive case progress information; to help victims adjust following their traumatic experience – helping to sublimate emotions of anger and the desire for retribution; and to reduce fears of repeat victimisation. These information needs may be more pronounced for victims of serious violent and sexual crimes. Provision of information therefore meets a legitimate need, and can help to alleviate, at least to some degree, the sometimes severe effect that a crime can have on an individual. Victim liaison may also help avoid certain scenarios such as proximity of residence between victim and an offender who has progressed to community management. Such victim sensitivity is also part of an offender’s rehabilitation and need not be anti therapeutic in the widest sense. For mentally disordered offenders the most common victims of violence are other family members – to meet those victims’ needs is to meet the needs of a traumatised family of which the patient is still a part, and in which a victim of the violence may also be in a caring role as defined and understood by carers’ legislation and policy.

Although victim sensitivity has always been part of the management of patients within forensic mental health services this has not been addressed in a comprehensive way or within wider Criminal Justice victim support developments. The Mental Health (Scotland) Act 2015 addresses this gap by extending victim notification for those who have been subject to a criminal act by individuals who are then subject to particular mental health outcomes by the Courts. This development complements the rights of victims to be considered interested parties by the Mental Health Tribunal – a right established in the Mental Health (Care and Treatment)(Scotland) Act 2003, but only utilised in a small number of cases.

## The setting up and working of the expert group

It was identified at an early stage that an expert group should inform the implementation of the new scheme for victims of mentally disordered offenders. Unusually the group commenced its work before the enactment of legislation; this had the disadvantage of aspects of the legislation not being finalised and therefore impeding firm proposals, but had the advantage that those proposals could be swiftly drafted following legislation allowing for early legislative commencement. It also allowed for something of an iterative process with the Bill team with some suggestions by the group influencing the drafting of the final legislation. The group met in full on eight occasions between June 2014 to March 2016. In addition the Chair, secretary and occasionally other members of the group took part in visits in February 2015 to the Victim Notification Scheme office, Victim Support and Crown Office.

## Victim sensitivity

In 1985 a declaration of the United Nations addressed the rights of victims: *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*. The declaration also gave a definition of ‘victim’:

A. Victims of Crime

1. "Victims" means persons who, individually or collectively, have suffered

harm, including physical or mental injury, emotional suffering, economic loss

or substantial impairment of their fundamental rights, through acts or

omissions that are in violation of criminal laws operative within Member

States, including those laws proscribing criminal abuse of power.

2. A person may be considered a victim, under this Declaration, regardless

of whether the perpetrator is identified, apprehended, prosecuted or convicted

and regardless of the familial relationship between the perpetrator and the

victim. The term "victim" also includes, where appropriate, the immediate

family or dependants of the direct victim and persons who have suffered harm

in intervening to assist victims in distress or to prevent victimization.

3. The provisions contained herein shall be applicable to all, without

distinction of any kind, such as race, colour, sex, age, language, religion,

nationality, political or other opinion, cultural beliefs or practices,

property, birth or family status, ethnic or social origin, and disability.”

In the context of forensic mental health services many victims of violence from mentally disordered offenders (MDOs) are relatives who have acted in a caring role. Stranger victims of homicide for example are less commonly found with a MDO compared to someone without a major mental illness. The needs of a family member victim who is still active in a caring role, a family relative or acquaintance who is estranged and a victim who was a stranger to the perpetrator are all different. Victims may also be identified in paragraph 2 above – someone who is close to the immediate victim and who has suffered as a result. Within forensic mental health many of the patients may have at one time or another been victims of violence, abuse or neglect as well as being a perpetrator.

The scope of who might be considered a victim is broad. Although the new legislation addresses certain important aspects of how victims should be responded to it is unlikely to be the last word. More than a simple introduction of a new notification scheme, the developments in Scotland over the last 15 years mark a change of attitude and emphasis in how victims and the experience of being a victim is viewed.

There are certain entitlements the Victim sensitivity subgroup identified all victims of those with mental health problems should have a right:

1. to be recognised as a victim;
2. to have all relevant agencies abide by the principles of openness, transparency and information sharing;
3. to timely and accurate information;
4. to be involved and receive any information pertaining to an investigation or review following a mental health service user’s involvement in an offence;
5. to support and advocacy from appropriate organisations;
6. to give evidence in person before a Mental Health Tribunal;
7. for recognition from services that victims may have ongoing concerns for their personal safety;
8. to communication in plain English;
9. to have access to services which are trained in victim awareness and the presentation of psychological trauma;
10. to a single point of contact;
11. that all agencies understand and adhere to the General Principles of the Victims and Witnesses (Scotland) Act 2014.

Current arrangements for victims of MDOs fall far short of these aspirations. Victims are commonly also family members, who with the consent of their relative may participate in care programming or receive information as a named person under the Act. They are primarily seen as carers without necessarily any thought to their experience of being a victim. There is a lack of awareness amongst mental health services of what victim services those individuals may be signposted to. There is a lack of awareness of how the experience of being a victim may affect an individual’s role as a carer. The Scottish Strategy for Victims and recent Victims’ legislation is not widely known about within forensic mental health services and is not considered something of particular relevance. The provision of information about the forensic mental health system and processes is patchy and is presented for an individual acting in a caring role.

Currently victims of MDOs who contact the Scottish Government restricted patients team receive an information leaflet (Appendix 3) and are signposted to contact the Mental Health Tribunal. A tribunal may consider a victim an interested party and receive submissions from them in writing or in person. But there is no mechanism to inform victims they can exercise this right. The information leaflet from Scottish Government is focused on Restricted Patients and gives some additional signposting to victim support but no communication from the Mental Health Tribunal indicates where victims might receive support and help. Communication from those organisations has not been shared with victim organisations in advance with the aim of arriving at plain and clear communication.

Victims of restricted patients may also express their views via the restricted patient team who will currently take them into account when considering geographical restrictions for leave or prior to discharge, but there is no mechanism for the victim to know they can do this.

Those first contacts with victims: Family Liaison Officers (in certain cases) and Victim Information and Advice personnel have little or no training in forensic mental health processes. There is little or no awareness of the role of the restricted patient team and the information they can give or of the possibility of representations to a Mental Health Tribunal. It is common that in cases where a MDO poses a serious risk to the public they are subject to an Interim Compulsion Order for up to a year prior to final outcome of a case – knowledge of that possibility at an early stage is likely to be helpful to victims but there is unlikely to be anyone in contact with them to warn them of this possibility.

The Mental Health (Scotland) Act 2015 addresses many of these gaps, but the spirit of the legislation and its policy context also call for a fundamental reexamination of how mental health staff are trained in victim awareness. That will not only help those who will now be able to take part in the Mentally Disordered Offender Victim Scheme (MDOVS), but will help staff who have been victims themselves to better appreciate their own experiences and regulate their own recovery from trauma and further will help services better appreciate the impact of trauma on patients.

Section 16A of the Criminal Justice (Scotland) Act 2003 (as amended by section 55 of the Mental Health (Scotland) Act 2015) creates a new right to receive information about certain patients subject to a compulsion order and a restriction order (CORO). The right may be exercised by the person who was the subject of the offence by the patient or, if that person is dead, any or all of the four persons listed highest in this list: spouse, cohabitee, son, daughter or person in respect of whom deceased had parental rights, father or mother or person who had parental rights in respect of the deceased, brother or sister, grandparent, grandchild, uncle or aunt, nephew or niece.

The right is to the following information: revocation of the compulsion order; revocation of the restriction order; variation of the compulsion order; conditional discharge of the patient; the terms of the conditions of conditional discharge; that the patient has been recalled to hospital; that the patient has been transferred out with Scotland; that the patient is unlawfully at large from hospital; that the patient has been returned to hospital after absconding; that first certificate granting unaccompanied suspension of detention and revocation of that certificate; the date of the patient’s death.

Given that much of this information (other than the information being information of a Tribunal decision) has not previously been readily available to victims and family members of victims, the group envisages that victims and family members of victims will wish to avail themselves of this new right.

New section 17B of the Criminal Justice (Scotland) Act 2003 (to be inserted by section 56 of the Mental Health (Scotland) Act 2015) creates a new right to make representations about patients subject to a CORO to the responsible medical officer (RMO) about granting for the first time unaccompanied suspension of detention and to the Scottish Ministers before making decision to impose, alter or remove conditions of discharge relevant to the victim. The right may be exercised by the person who was the subject of the offence by the patient or, if that person is dead, any or all of the four persons listed highest in this list; spouse; cohabitee, son, daughter or person in respect of whom deceased had parental rights, father or mother or person who had parental rights in respect of the deceased, brother or sister, grandparent, grandchild, uncle or aunt, nephew or niece.

However the right provided by new section 17B to make representations to the Tribunal before it makes a decision under section 193 of the 2003 Act (to revoke the compulsion order, to revoke the restriction order, to vary the compulsion order, to conditionally discharge the patient, or to do none of those things) is narrower than the rights under the existing provisions of the 2003 Act. It may be exercised only by the people in the list given above, whereas under the 2003 Act the right can be exercised by “any … person appearing to Tribunal to have an interest”. Further, the right cannot be exercised in a case where an application is made by, or on behalf of the patient, for an order that the patient is being detained in conditions of excessive security under sections 264 or 268 of the 2003. Act.

Further, while under the provisions for the 2003 Act the Tribunal must afford “any … person appearing to the Tribunal to have an interest” the right to make representations before making its decision under section 193 or under the excessive security provisions, new section 193(9A) of the 2003 Act (to be inserted by section 60 of the 2015 Act) provides that representations made under the Criminal Justice (Scotland) Act 2003 (as amended by the Mental Health (Scotland) Act 2015) are to be made to the Tribunal only where the person has not already been afforded the opportunity to make representations under the existing provisions of the 2003 Act; and then that the Tribunal must have regard to them only “before making a decision about what (if any) conditions to impose on the patient’s conditional discharge”. For the forgoing reasons it appears to the group the victims and family members of victims may prefer to make representations to the Tribunal under the existing provisions of the 2003 Act.

## The development of Victim involvement in the Criminal Justice System in Scotland

The Scottish Strategy for Victims was published in 2001. The Strategy noted the devastating effect that crime can have on victims and those close to them. It recognises that constructive intervention, particularly in the immediate aftermath of the event, can have a significant effect on how quickly and how well victims can come to terms with their experiences. The Strategy was based on international guidance, in particular the *‘UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power’* which calls for victims to be treated with compassion and respect for their dignity; and to developing thinking in the European context on the position of victims in criminal proceedings.

This Strategy recognised that the responsibility for supporting victims of crime goes beyond the concerns of criminal justice agencies alone. As well as the crucial roles of the Police, Scottish Court Service, Crown Office, Procurator Fiscal Service and Scottish Prison Service, local authorities and the NHS were identified as having a considerable role to play. A wide range of voluntary organisations, including Victim Support Scotland, Scottish Women’s Aid, the Scottish Rape Crisis Network, Petal and Families of Murdered Children, also were identified as playing a key role in providing free, independent and confidential services to victims and were acknowledged as instrumental in bringing about increased awareness of victims’ needs. The Strategy aimed for a clear understanding of the victims’ needs.

The Strategy identified a victim may be any person who has been the subject of any type of crime. In the event of the death of a victim of crime, or their incapacity in relation to criminal proceedings, the family or those sharing a family-like position may also be considered as victims.

It is the underlying premise of this Strategy that all victims should be treated fairly and that consideration is given to their interests irrespective of their race, ethnic origin, age, gender, religious beliefs, sexual orientation or any disability.

The broad principles which underpin *‘The Scottish Strategy for Victims’* are:

* A recognition of the importance of the victim and the need to provide practical and emotional support to assist the victim to recover and towards prevention of further crime or secondary victimisation;
* A commitment to provide explanations for victims about the criminal justice and other processes with which they are involved;
* A recognition that victims have a legitimate interest in the cases with which they are involved and so have a contribution to make;
* A commitment to offer victims information on the progress of their cases; and
* A recognition that victims should be enabled to have a voice throughout all stages of the criminal justice system.

Family victims may find themselves in a caring role following a traumatic violent attack on themselves or another family member and so will be offered this support. Family victims of violent crime who are already in a caring role before the violent act may not be made aware of the additional rights outlined in the Victim Strategy and are currently therefore potentially disadvantaged by not being given full information about their rights as ‘victims’. We know that informing carer victims of their rights as ‘carers’ is also not done as a matter of routine and so there is a danger that carer victims are not offered the same level of information and support as other victims. Carers of people within forensic mental health services also need specialist information and support that may not be available from existing victim support services and consideration should be given to support being provided by such specialist agencies such as Support in Mind Scotland.

Under provisions contained in the Criminal Justice (Scotland) Act 2003, victims were provided the right, in certain criminal cases, to receive information about the release of an offender (and some other relevant details) through the Victim Notification Scheme (VNS). The VNS came into force on 1 November 2004. The VNS has never been open to all victims of crime, only those where the offender has committed an offence set out in the Victim Notification (Prescribed Offences) (Scotland) Order 2004. VNS initially provided victims of offenders who had been sentenced to four years or more with the right to receive information about the offender’s progression within prison and eventual release. On 15 May 2008, the VNS was extended to include offenders who have been sentenced to 18 months or more. Victims can apply to join the scheme regardless of when the crime was committed.

In 2005 National Standards for the Victims of Crime was published establishing what level of service victims should expect from criminal justice agencies.

In late 2012, an EU Directive established minimum standards on the rights, support and protection of victims of crime. It aimed to strengthen the rights and protection of victims of crime. The objectives of the EU Directive were to ensure that all victims of crime receive appropriate protection and support, were able to participate in criminal proceedings and were recognised and treated respectfully, sensitively and professionally without discrimination in all contacts with any public authority.

The Directive is intended to ensure that, in all EU countries:

* victims are treated with respect and police, prosecutors and judges are trained to properly deal with them
* victims get information on their rights and their case in a way they understand
* victim support exists
* victims can participate in proceedings if they want and are helped to attend the trial
* vulnerable victims are identified – such as children, victims of rape, or those with disabilities – and are properly protected
* victims are protected during the police investigation and court proceedings

The EU Directive required victims to be able to access information about the release and escape of prisoners and while that is, essentially, the purpose of the VNS, the Scottish Government considered that VNS should be extended to better reflect the Directive. In response to the EU Directive, the Victims and Witnesses (Scotland) Act 2014 was enacted. The Directive does not specify any threshold on the length of sentence before victims should have the right to be informed although it does suggest that cases involving minor offences should be excluded. While Scotland already complied with much of the EU Directive, both legislative and non-legislative changes to the justice system were identified as necessary.

The Victims and Witnesses (Scotland) Act 2014 adopts the following statutory principles in its first section:

## General principles

*(1) Each person mentioned in subsection (2) must have regard to the principles mentioned in subsection (3) in carrying out functions conferred on the person by or under any enactment in so far as those functions relate to a person who is or appears to be a victim or witness in relation to a criminal investigation or criminal proceedings.*

*(2)The persons are—*

*(a)the Lord Advocate, (b)the Scottish Ministers, (c)the chief constable of the Police Service of Scotland, (d) the Scottish Court Service, (e)the Parole Board for Scotland.*

*(3) The principles are—*

*(a) that a victim or witness should be able to obtain information about what is happening in the investigation or proceedings,*

*(b) that the safety of a victim or witness should be ensured during and after the investigation and proceedings,*

*(c) that a victim or witness should have access to appropriate support during and after the investigation and proceedings,*

*(d) that, in so far as it would be appropriate to do so, a victim or witness should be able to participate effectively in the investigation and proceedings.*

*(4) The Scottish Ministers may by order modify subsection (2).’*

The Victims’ Rights (Scotland) Regulations 2015 amended the 2014 Act to provide for additional general principles:

*2. After section 1 of the Act, insert—*

*“Further general principles applicable to victims*

*1A.—(1) Each person mentioned in section 1(2) must have regard to the principles mentioned in subsection (2) in carrying out functions conferred on the person by or under any enactment in so far as those functions relate to a person who is or appears to be a victim in relation to a criminal investigation or criminal proceedings.*

*(2) The principles are—*

*(a) that victims should be treated in a respectful, sensitive, tailored, professional and non-discriminatory manner,*

*(b) that victims should, as far as is reasonably practicable, be able to understand*

*information they are given and be understood in any information they provide,*

*(c) that victims should have their needs taken into consideration,*

*(d) that, when dealing with victims who are children, the best interests of the child should be considered, taking into account the child’s age, maturity, views, needs and concerns, and*

*(e) that victims should be protected from—*

*(i) secondary and repeat victimisation,*

*(ii) intimidation, and*

*(iii) retaliation.*

*(3) In this section, “child” means a person under 18 years of age.*

The 2014 Act amends the 2003 Act to make changes to the VNS in relation to: (a) a victim’s ability to make representations when offenders are first eligible for temporary release; (b) the list of prescribed offences set out in the 2004 Order; and (c) the ability to make oral representations to the Parole Board for Scotland in the case of life sentence prisoners who are due to be considered for release.

In addition, the 2014 Act (as amended by the Victims’ Rights (Scotland) Regulations 2015) provided all victims with the right to be notified of the release of escape of a prisoner, regardless of sentence length; rather than an extension to the VNS, this right is accessed through the victim directly contacting the Scottish Prison Service to request this information.

Temporary release is part of the process of managing a prisoner’s progress through the prison and preparing them for release and reintegration into the community; it is similar to the use of Suspension of Detention in the forensic mental health system. Prior to the 2014 Act the VNS wrote to the victim and the letter invites the recipient to contact VNS if they wish to discuss the case prior to temporary release. While the victim was free to contact VNS with any concerns, they were not expressly invited to make representations in the same way that victims were in relation to the release of prisoners on licence.

The Scottish Government believed that the ability of victims to make representations about the release of prisoners should not be limited in this way. Under provisions in the 2014 Act, victims were given the right to make written representations when prisoners are first eligible for temporary release, and are able to raise any concerns they have about the conditions that are placed on offenders. There continues to be no direct contact with or identification of the Prison involved in any temporary release.

The 2014 Act also removed the list of prescribed offences set out in the 2004 Order so that victims of all offences are potentially eligible. In addition, the Victims’ Rights (Scotland) Regulations 2015 which came into force in December 2015 amended the 2014 Act to provide for information to be given to victims concerning the release or escape of offenders sentenced to less than 18 months in prison.

The VNS allows certain victims of crime to make written representations to the Parole Board for Scotland (the Board) when the offender is being considered for release and/or when licence conditions are being set. When coming to a decision on release or licence conditions, the Board considers representations along with other relevant information, and if a licence condition is imposed which relates to the victim’s representations, they will be informed of that decision.

While the Board does take these representations into account, it is primarily concerned with the assessment of risk to the public should a prisoner be released. The Scottish Government has stated that the intention behind the policy of allowing victims of crime to make oral representations is that they should feel more involved in the criminal justice process, with the option of making representations in person if they feel that this would enable them to better convey their feelings and views (Policy memorandum, para 112).

The 2003 Act seeks to allow certain victims who are registered on the VNS to make oral representations to a Board member, who is not dealing with the convicted person’s case as respects their release, if they so wish. It is intended that the Board member will convey any concerns the victim has to those members of the Board comprising the tribunal considering the case for release. For the time being, the Act provides that oral representations in this manner will only apply in the case of life prisoners although this may be extended by order by the Scottish Ministers to include other categories of prisoner.

In its response to recent consultation on VNS, Crown Office stated that the VNS is currently operated on an opt-in basis and the Government may wish to consider that if there is a high level of participation in the scheme, it may be more appropriate to operate it on an opt-out basis (Scottish Government 2012a).

The Parole Board for Scotland stated, in its response to recent consultation, that making provision for victims to meet a member of the Board will provide an opportunity to explain to victims what the basis of decision making is. The Board’s response pointed out that, at present, the majority of written representations made by victims oppose the release of prisoners on the basis that not enough time has been served in custody. Whilst the Board recognises that this is an understandable view from the perspective of victims, it is not the Board’s responsibility to consider whether the punishment period of an offender’s sentence has been sufficiently long. The Board’s remit is simply to consider whether the risk to the public will be manageable if the prisoner is released. The Board expressed concern that under current arrangements, victims may well feel that their views have not been taken into account and a personal meeting may prove to be of value in assisting the victim’s understanding of the Board’s remit and responsibilities (Scottish Government 2012a).

# The current Victim Notification Scheme in operation

Following initial police investigation the main point of contact between a victim and the Criminal Justice System is the Victim Information and Advice (VIA) officer, a member of staff in the Procurator Fiscal’s office.

After sentencing, the VIA provides eligible victims with a form which upon completion is sent to the VNS based within Scottish Prison Service (SPS) to register with the scheme.

The scheme has two parts and victims can opt to receive information under either or both parts. Under part 1 victims opt to only receive information. Under part 2 victims are invited to make representations at key stages of an offender’s rehabilitation.

Part 1 entitles victims to receive information about the offender’s:

* release
* date of death, if they die before being released
* date of transfer, if they are transferred to a place outwith Scotland
* eligibility for temporary release (for example, for training and rehabilitation programmes or home leave in preparation for release)
* escape or absconding from prison
* return to prison for any reason

Part 2 of the scheme entitles victims to make representations to the Parole Board or Prison when the offender is being considered for parole or temporary release. When the Parole Board for Scotland is due to consider the case affecting the victim, the victim is given the chance to send written comments to the Board. Victims can also send written comments to the Scottish Prison Service when it is considering a prisoner’s release on Home Detention Curfew. The victim is told whether the Board recommends or directs the release of the offender and if the prisoner is released on licence, of any conditions attached to that licence which relate to them or their family.

When the offender is due to be released, the VNS cannot give details about an offender’s whereabouts after their release. Victims can register for the VNS at any time until the offender reaches the sentence expiry date.

## Victims of Mentally Disordered Offenders

Victims of mentally disordered offenders (MDOs), who are made subject to mental health orders following a court case and not a prison sentence, were never part of the original VNS. Additionally the participation/notification of victims stopped if a sentenced prisoner was transferred to a psychiatric hospital for treatment.

Following conviction, or a finding that an individual is not responsible because of mental disorder for offending behaviour, or unable to take part in a trial because of mental disorder, a Sheriff or Judge may impose a Compulsion Order requiring an individual to be subject to the provisions of mental health legislation. The court can add a restriction order to a compulsion order. This is only done if the court thinks a person is a serious risk to the public. It will order detention in hospital with the powers of a compulsion order. In addition, Scottish Ministers need to give approval to:

* any move to a different hospital
* any periods spend out of hospital

Although excluded from VNS, forensic psychiatry best practice was to take account of the needs of victims. Many victims of MDOs are family members or acquaintances who were in a caring role. Despite having to come to terms with the trauma of a violent act many continue to be involved in the care and support of a MDO and some will remain the Named Person under the Mental Health Care and Treatment Scotland 2003.

MDOs who are parents may retain certain parental rights and continue to be actively involved in child welfare proceedings even following the homicide of another family member, when the child in question is a secondary victim.

Information sharing with victims has commonly taken place when they have continued to be in supporting contact with their MDO. Usually this will be with the consent of the MDO but may be information shared as part of the named person process.

It has been common practice to minimise the risk of chance meetings with victims who are not in contact with the patient – either because they were stranger victims or are now estranged. Suspension of Detention (SUS) is used extensively in forensic mental healthcare to test out patients and is an essential part of the risk management processes. Mental Health services have difficulty in identifying the needs of such victims and in response the Scottish Government has emphasized the role of police liaison as part of the Care Programme Approach (Scottish Government *Memorandum of Procedure for Restricted Patients* 2010). Geographical limits to Suspension of Detention to minimize the risk of chance meetings are common but until now there has been no mechanism for reliably identifying which areas should be avoided.

If a victim of a MDO who has received a Restriction Order contacts Scottish Government Restricted Patient team information about the forensic mental health process is shared, but there is no reliable mechanism to inform victims that they can contact the Restricted Patient team. Similarly a victim may be considered an interested party by a Mental Heath Tribunal and may be given the opportunity of written and oral submissions but there is no reliable mechanism to ensure victims know they can do this.

At present, there is no right for victims or family members of victims to make representations to be taken account of by:

* a patient’s RMO before making a decision about granting unescorted suspension of detention; or
* the Scottish Ministers before taking a decision about varying conditions of conditional discharge in a way which may have an effect on the victim or the victim’s family.

Good victim support may also be in the therapeutic interests of the patient. Everybody involved should also have the highest consideration for public safety. Good risk management primarily depends on excellent clinical management and part of that is victim empathy and victim sensitivity. Many MDOs have been victims themselves – histories of childhood sexual and emotional abuse are common. They are all victims of illness, which has led to the loss of freedom. To make therapeutic progress there needs to be both an appreciation of a MDO as victim as well as perpetrator. The establishment of a comprehensive scheme for the victims of MDOs can be used as part of wider therapeutic understanding of coming to terms with traumatic experience. A reliable scheme for MDO victims may also help the timely granting of permissions for Suspension of Detention if victim needs can be shown to be clearly understood and addressed.

## Existing involvement in MHT under the Mental Health Care and Treatment Act 2003 and the likely impact of the 2015 Act

At present, there is a mechanism under the 2003 Act whereby victims and family members of victims are entitled to make representations (whether orally or in writing) and to lead or produce evidence in proceedings before the Mental Health Tribunal for Scotland (the Tribunal). The Tribunal is obliged to allow the responsible medical officer (usually the consultant psychiatrists in charge of the case) , the mental health officer (a specially trained social worker) and the named person amongst others to make representations and lead evidence. That obligation is extended to ‘any other person appearing to the Tribunal to have an interest’ (sections 193(9)(j) and 215(7)(j) of the 2003 Act). Victims and close family members of a victim would appear to fall under this definition of a person having an interest. At present the Tribunal learns of a victim either because of direct contact or following communication from the restricted patient team. The Tribunal then takes steps to confirm the identity of the victim before entering their name on register. The people on the register then are invited to participate when a Tribunal occurs and are sent a letter from the president’s office; the process is outlined in appendix 1 and an example of a notification letter is given in Appendix 2.

The President’s Office advises the victim about the nature of the Tribunal, and asks if the victim would like to make representations (orally or in writing), or to lead or produce evidence. There have been no examples of individuals who have saught to lead evidence, but there are examples of people who have made oral and written representations.

In those cases where an individual has sought to submit written evidence the Tribunal has set a timeframe for submission. The submission is then redacted to remove contact information (address, phone number, email) before being circulated to all parties.

In all cases of oral evidence, the Tribunal has sat at its headquarters in Hamilton at a special hearing from which the patient and their named person are excluded (under rule 69(1)(b) of the Mental Health Tribunal’s for Scotland (Practice and Procedure) no. 2 Rules 2005), but present may be the patient’s solicitor and a representative for Scottish Ministers in Restricted cases. In practice once an oral submission is heard the panel has asked some questions but to date there have been no questions from the patient’s solicitor or Scottish Ministers.

After the Tribunal the decision of the Tribunal but not the Full Findings and Reasons is given to the participating victim.

There are potentially a large number of tribunals to which victims may be invited to attend. If a patient or named person were to utilise their rights under section 264 (of the 2003 Axt) that may trigger a 264, 265 and 266 hearing alongside a 192 appplicationand a 185 reference. A registered victim could theoretically be invited to participate in up to 7 Tribunals a year although the minimum would be one every two years.

In September 2015, there were **17** patients (15 restricted patients and 2 civil patients) in respect of whom the Tribunal has details of a total of **36** victims or family members of victims (31 re restricted patients, and 5 re civil patients). This compares to the number of restricted patients standing at 313 (September 2015).

Despite these small numbers, given the sensitivity of the issues being dealt with, the complexity of the provisions of the 2003 Act (which can require careful explanation), the requirement to scrutinise written representations so that personal details (such as contact email and postal addresses and telephone numbers) are redacted and the effort required in scheduling hearings for victims or family members of victims who wish to make oral representations to the Tribunal, dealing with these matters takes up a significant period of time in both the casework team and the President’s Office.

It is difficult to extrapolate from the current involvement of victims and family members of victims in proceedings before the Tribunal the numbers of victims and family members of victims who will wish to make representations under the provisions of the 2015 Act or who may in the future utilise 2003 Act rights once the general issue of victim rights of MDOs has been given a higher profile.

However, it is worth noting the following figures:

* **313** restricted patients currently in Scotland (30 of whom are on transfer for treatment directions (TTDs))
* **10** people are made subject to a CORO each year (average of figures from 2011 to 2014)
* **44** people are made subject to a TTD each year (average of figures from 2011 to 2014).

Given the nature of the scheme provided for by the 2015 Act and the increased awareness of the right to make representations which is likely to occur as a result of the scheme, it would seem reasonable to assume that most, if not all, new CORO patients will have victims or family members of victims who will wish to make representations under the scheme provided for by the 2015 Act. Further, with a new scheme and the increase in awareness that it is likely to cause, it may well be that there will be some uptake in respect of existing patients.

Working on the basis of 10 new patients per year attracting victims and family members of victims who wish to make representations under the new scheme, it appears that the workload will only increase over time.

It is worth noting that with new patients it will probably take some time for this to impact on the business of the Tribunal. That is because new patients are unlikely to be making applications to the Tribunal or to be subject to references triggered by RMO recommendations, and section 264 applications are excluded from the 2005 scheme. Accordingly, it appears likely that the first 2‑year review will be when the Tribunal has its first engagement with new patients and, accordingly, with the victims or family members of victims of new patients.

The main practical difference following the 2015 Act to the Mental Health Tribunal is the likely increase in the number of cases where victims wish to make representation under the 2003 Act as they will now be better identified and informed. The 2003 scheme will coexist alongside the 2015 scheme. It has a broader remit to the 2015 scheme in that it included non restricted patients subject to a compulsion order and excessive security tribunals. The right to make representations under the 2003 scheme may be considered preferable to the rights of participation under the 2015 Act scheme.

This is a potential major source of confusion and duplication. For victims who qualify for the 2003 Act the Tribunal will simply keep a list and inform individuals of forthcoming Tribunals and outcomes as they currently do, but with the possibility of many more people taking up those rights than present. For victims who qualify under both schemes to participate in tribunals there needs to be considered coordination between the MDOVS and the Mental Health Tribunal so to the individual it appears as much as possible as they are participating in one scheme with one point of contact albeit under two legislative provisions. It may be that certain communications about forthcoming Tribunals and later oytcomes should come jointly from the MDOVS and MHT. In most cases utilising the 2003 scheme will be superior than utilising the rights under the 2015 scheme with respect to Tribunals

## An outline of the current VNS in practice

The victim of a violent crime or the immediate family of a homicide victim will have no initial contact with the VNS. For the immediate family of victims of a homicide and certain other victims, there will be initial support from a Family Liaison Officer (FLO) from Police Scotland. The primary purpose of the FLO is to support the investigation but they are often valued for their secondary supportive role. The involvement of the FLO is strictly time limited and usually after a suspect has been indicted for the offence the victim liaison role is passed on to the Victim Information and Advice service.

Victim Information and Advice (VIA) provide a service to victims and witnesses of crimes reported to the Procurator Fiscal which involve:

* Domestic abuse
* Racial or religious aggravation
* Sexual offences
* Child victims and witnesses
* Crimes where any trial is likely to involve a jury.

They can also assist:

* The nearest relatives in cases of deaths which may involve criminal proceedings, or significant further inquiries

VIA has a major role in the identification and support of vulnerable witnesses or victims who may need additional support (because of, for example, language, circumstances or disabilities).

For most victims their first contact with Victim services will be from VIA who are based in every Procurator Fiscal’s office. The numbers of cases they deal with means that the frequency of communication is much less than with a FLO. They have a key role in informing the Victim about the course of criminal proceedings. At the conclusion of criminal proceedings if there has been a conviction and the victim falls under the provisions of the VNS, VIA will write to the victim with a form for completion inviting them to send the completed form to the VNS office. If the victim has not qualified for VIA support but nevertheless falls under the scheme the Procurator Fiscal will contact them with the form to complete.

VNS receives a letter from victims who have been informed they fall under the provisions of the scheme and who wish to participate. VNS have no way of knowing if the individual correctly falls under the scheme and rely on VIA/PF to correctly identify qualifying victims.

The VNS is based in the Prison Service Head Quarters Edinburgh. Letters are written to those who have opted into the scheme about key stages of an offenders pathway.

VNS will write to registered victims who opt in with the following information:

* the date an offender is released from prison;
* if the offender becomes eligible for temporary release;
* if the offender is transferred out of Scottish prison Service custody;
* the date an offender dies if still in custody;
* a return to prison for any reason;
* and if the offender escapes or absconds from temporary release.

VNS has a large number of pre-prepared letters for the various circumstances. They have been designed to avoid jargon and to be understandable to children. Currently a child victim under 12 will have letters sent to a parent or guardian. From 12 the letters are addressed directly to the child. This age limit has recently been lowered from 14.

VNS will not:

* release information about where an offender is held;
* give information about where the offender will go when released;
* or give details about each individual episode or specific details of temporary release.

Eligible Victims may also opt in to Part 2 of the scheme which enables them to make written submissions to the Parole Board, Scottish Prison Service and Scottish Ministers to inform:

* decisions about release;
* license conditions;
* consideration of Home Detention Curfew Release;
* consideration of Temporary Release.

In these circumstances the offender is made aware of the victims’ anonymous comment if it has a bearing on the decision.

In these circumstances victims are contacted directly by the Parole Board or Scottish Government to elicit views regarding the matters relating to them and by the staff of the VNS for matters decided by Prison Governors. There is no direct contact with the prison Governor or information about which prison the offender is detained.

The FLO, VIA and VNS all supply written information to victims and in particular information about how to contact charities who support victims in a variety of ways.

Not all victims of violent crime in Scotland qualify to receive information and participate in Parole Board hearings under the VNS. Victims qualify either because of the severity of sentence or if they are one of the bereaved family members of a homicide up to a maximum of 4.

An individual qualifies for inclusion under the scheme if the offender has been sentenced to imprisonment of 18 months or more for any crime.

The eligible victims are:

* direct victims aged 12 years and over;
* a parent or carer if the victim is a child under 12 years;
* a near relative if the victim is incapacitated.

If the victim has died, up to 4 near relatives can take part in the scheme.

* the 4 relatives listed highest can register to join the VNS and they are listed below.
* Where the victim is incapacitated, then only the highest person listed below may register to join.
* Where the victim is a child under 12, the parent or carer can register on the child's behalf.

If however, the victim is unable to communicate, but this can be overcome by a human or mechanical aid (e.g. where the victim is unable to write but can tell someone else what (s)he wants to say) the right to join the VNS stays with the victim.

The eligible nearest relatives are:

(a) spouse;

(b) cohabitee;

(c) son or daughter or any person that the victim had parental rights or responsibilities for;

(d) father or mother or any person who had parental rights or responsibilities towards the victim;

(e) brother or sister;

(f) grandparent;

(g) grandchild;

(h) uncle or aunt;

(i) nephew or niece,

and the elder of any two persons described in any one of paragraphs (a) to (i) is to be taken to be the higher listed person, regardless of sex.

For example, in a case where a victim has died leaving a wife, 2 (living) parents and 2 brothers, the wife, both parents and the elder of the brothers would be invited to join the VNS. If one parent decided not to join, no others would be invited to take their place from further down the list.

Victims are **not** eligible to receive information through the scheme if:

* the offender is released before reaching the age of 16, or where (s)he has not reached the age of 16 by the time the case is referred to the Parole Board;
* there are exceptional circumstances which make it inappropriate to give the information.

In addition to the VNS, which provides the opportunity for victims in cases where the offender has been sentenced to 18 months or more to be notified of the release of the offender (and other information), victims in which a custodial sentence of less than 18 months is passed have the right to be told of the release or escape of the prisoner. This right is accessed by writing to the Scottish Prison Service.

## The development of Victim Notification in The Mental Health Act 2015

The 2015 Act contains provisions allowing victims of crime committed by mentally disordered offenders to receive certain information and to make representations about the release of the patient. Improving the provision of information, including case specific information, for victims has long been a policy objective of the Scottish Government. In 2010 the Scottish Government publicly consulted on whether another scheme similar to that in place for other offenders in the criminal justice system should be introduced for victims of mentally disordered offenders. The Scottish Government’s analysis of responses report published in March 2011 (following a public consultation between August and November 2010) stated the Scottish Government‘s intention was to implement a statutory scheme but noted that primary legislation would be required to progress the matter.

The majority of the 34 responses received to the VNS consultation were in favour of procedures being introduced to enable information to be routinely given to victims of mentally disordered offenders in the same or similar way in which information is made available to victims of crime under the Criminal Justice Victim Notification Scheme.

The draft Bill consultation set out the Government‘s proposals in this regard and provision was made in the draft Bill (which was issued with the consultation document) to reflect the proposals.

The views of the respondents who offered comments on these provisions ranged from those who welcomed the proposals, to those who were in favour of the proposals but only in the case of patients subject to a compulsion order with a restriction order (i.e. not for patients subject to just a compulsion order), through to those who were opposed to the proposals. A number of respondents commented that individuals subject to a compulsion order have often committed only minor offences and that to allow the proposed notification in such cases may be an unnecessary and disproportionate limitation of their rights to private and family life. A number of respondents who are service users raised concerns that the implementation of such a scheme would result in people who suffer from a mental disorder facing even more discrimination. Family members of MDO also report that discrimination, exclusion and even bullying within local communities is a major barrier to seeking help – particularly to their long-term caring relationship as part of an offender’s recovery.

The recent EU Directive, does not differentiate between offenders who suffer from mental disorder and those who do not in respect of the information to be given to victims. As such, alternative approaches were considered limited by Scottish Government. Consideration had been given to a totally separate, standalone service for victims of mentally disordered offenders but it was considered for ease of use for both practitioners and victims, that incorporating the provisions for victims of mentally disordered offenders within the existing legislation was the most pragmatic and effective approach to take.

While the information which falls to be disclosed under the scheme does not, as such, amount to medical information it is nevertheless private information in which the patient has a reasonable expectation of privacy. On that basis, the statutory scheme set out in the 2015 Act engages Article 8(1) of ECHR (which protects the right to respect for private and family life) and falls to be justified under Article 8(2).

Disclosure of the information provided under the scheme must be justified under Article 8(2) on the basis that it is necessary for the protection of health (as victims suffer tremendous stress and anxiety wondering whether an offender has escaped from detention and if or when they might encounter the offender in public) and protection of the rights and freedom of others. The information which falls to be provided to victims is restricted to information which will provide support and protection to them in terms of knowing whether the offender is due to be released, if the offender is being transferred out of Scotland, if the offender has escaped/been returned to hospital, if the offender has died and so on. This type of information can help victims come to terms with the offence and deal with the stress and anxiety of wondering whether they are likely to encounter the offender in a public place, or indeed near their home.

In striking the right balance between the rights of victims to receive information under the proposed scheme and the rights of offenders in protecting their privacy, different considerations apply where the offender suffers from mental disorder and are themselves vulnerable. The provisions in the Act allow a higher level of protection to be afforded to vulnerable patients in individual cases as section 16A(3) (inserted by s.44 of the 2015 Act) will allow Ministers not to give information under the scheme if they consider there to be exceptional circumstances‘ which make it inappropriate. This provision can be relied upon in individual cases if it is considered that disclosure of the information under the scheme would cause harm to the patient, for example, in terms of having a negative impact on their mental health. Section 16(1) of the CJ Act 2003 already contains similar provision which, following amendment of the scheme, will apply in relation to patients who are subject to a transfer for treatment direction or a hospital direction.

Similarly, the provisions which allow victims to make representations in relation to certain decisions relating to the release of an offender must, by virtue of s.17B(2) (as inserted by s.45(2) of the 2015 Act) be about how the decision in question might affect the victim or the victim‘s family. In other words, the representations must be about the impact of the decision to release the patient on the victim, not whether the patient is released.

Whilst the 2015 Act provisions have an effect on the Article 8 rights of certain patients, any infringement of their rights under Article 8(1) can be justified under Article 8(2) on the basis that the provisions pursue legitimate aims and go no further than is necessary to achieve those aims.

The Policy objective of the 2015 Act was to implement a victim notification and representation scheme for victims of mentally disordered offenders subject to a hospital direction, transfer for treatment direction or a compulsion and restriction order. The intention was to place victims of mentally disordered offenders subject to these orders on the same footing as victims who are currently eligible to be part of the Criminal Justice Victim Notification Scheme. The 2015 Act is also intended to implement the recent EU Directive establishing minimum standards on the rights, support and protection of victims of crime.

As a matter of policy Scottish Government have decided the scheme is to be administered by officials within the Scottish Government Health and Social Care Integration Directorate. Also as a matter of policy it was considered that the scheme of victim notification for MDOs under the 2015 Act should not be greater than for non MDOs; although it was always acknowledged that practices and processes in forensic healthcare are different from the prison and that there would inevitably be some degree of approximation between the operation of the VNS scheme and its application to a healthcare setting.

## The Mental Health Act 2015

Sections 54 to 60 of the 2015 Act make provision for MDO victims‘ rights. These sections insert provisions into the existing victim notification scheme in Part 2 of the CJ Act 2003 so as to extend the scheme to the victims of mentally disordered offenders.

The 2015 Act allow qualifying victims to receive limited information about the status of the patient who perpetrated the crime against them, as well as the right to make representations to the Tribunal, the Scottish Ministers or the patient‘s responsible medical officer (indirectly), as the case may be, in connection with the conditions which might apply to the patient upon being released from detention. The intention behind the provisions is to provide victims with the opportunity to receive information and make representations regardless of whether the offender happens to be given a prison sentence or a mental health disposal (or else is subsequently transferred into the mental health system from prison) thereby producing a comprehensive and consistent scheme. However, in recognition of the fact that mentally disordered offenders are themselves vulnerable, the proposals do not require Scottish Ministers to disclose information to victims where there are exceptional circumstances which would make doing so inappropriate: this could, for example, apply if the mentally disordered offender has particular vulnerability and release of specific information would cause them harm.

Amendments are made to section 16 of the CJ Act 2003 by section 54 of the 2015 Act to deal with cases where an offender is subject either to a hospital direction (made by a court under section 59A of the 1995 Act) or a transfer for treatment direction (made by the Scottish Ministers under section 136 of the 2003 Act).

The nature of the information which is to be made available to victims of convicted persons is intended to—

* assist the victim and/or their close family members in coping with the longer term effects of the offence by giving them notice of the offender‘s release (rather than them learning this through media sources or by seeing them in the community);
* give victims and/or their close family members peace of mind by informing them of the patient‘s death or transfer out of Scotland;
* warn victims and/or their close family members of any periods during which the patient is unlawfully at large so they can take whatever precautions they consider necessary.

New sections 16A to 16C are added (by section 55 of the 2015 Act) to the CJ Act 2003 to deal with victims of mentally disordered offenders who are not sentenced to imprisonment but instead receive a mental health disposal. Section 16A provides that the Scottish Ministers must give certain information which relates to an offender who has perpetrated an offence against a person and who has been made subject to a compulsion order and a restriction order under the 1995 Act to persons who are, by virtue of section 16B, entitled to receive the information.

A person‘s entitlement to receive information under the scheme is determined by section 16B, which provides that the victim is to receive the information, unless certain specified circumstances persist. If a person would otherwise be entitled to receive the information but they are aged under 12, the person‘s carer is entitled to receive the information instead. The information which is to be provided to victims or such other persons is set out in section 16C and includes revocation of the compulsion order or restriction order to which the patient is subject, the offender‘s date of death, release of the patient on conditional discharge and any periods in which the offender is unlawfully at large.

Section 17 of the CJ Act 2003 currently provides a right to make representations to victims who are entitled to receive information under section 16 of that Act. The entitlement available to victims under section 17 is to make representations to Scottish Ministers as regards the release of the offender on licence and as to the conditions which might be specified in the release licence.

The amendments made to section 16 in the 2015 Act to extend that provision to victims of persons subject to a hospital direction or transfer for treatment direction also have the effect of extending the right to make representation in section 17 to such persons.

Section 17B (added by section 56 of the 2015 Act) gives victims of offenders subject to a hospital direction or transfer for treatment direction the right to make representations to the patient‘s responsible medical officer before the first time a decision is taken to suspend the offender‘s detention on an unescorted basis.

Section 17B also provides victims of offenders subject to a compulsion order and restriction order with the right to make representations prior to certain decisions being taken relating to the discharge of the patient or the first application for unescorted suspension of detention. It is made clear in section 17B that any representations made must be about how the decision in question might affect the victim or members of their family.

The new legislative provisions for victims recently enacted, aims at providing comprehensive and reliable information and the opportunity to make representations for victims of MDOs.

## The MDOVS in operation

The role of VIA is important in the general victim notification scheme providing initial victim information and sending opt in letters upon conviction. This role in relation to MDOVS will require to be replicated. If VIA was not to extend its current role then both of these functions would need to be carried out by the new MDOVS team based at Scottish Government. One difference for MDOs compared to other offenders is the length of time an MDO may be on an interim compulsion order prior to disposal. Victims need to be prepared for a gap of up to 12 months between conviction and final disposal.

Patients subject to a mental health order by the Courts are usually sentenced to orders which are either without limit of time or can be indefinitely renewed subject to the approval of a Tribunal. Sentence length cannot therefore be used a guide to the types of offending behaviour that should fall under the scheme. As a proxy therefore the presence of a Restriction Order will be the main qualifying condition for victims to be able register for the MDOVS. In addition some prisoners are transferred to psychiatric Hospital on a Transfer for Treatment Direction. Eligible victims will now have continuity of information via the MDOVS rather than the VNS for that period of time. Finally there are a small number of Hospital Directions were patients receive a tariff sentence but initially receive care in psychiatric hospital. Under the MDOVS they will receive information for the duration of the tariff sentence – via the MDOVS whilst the individual is in hospital and via the VNS if they progress to prison.

Good rehabilitation and risk management required a graduated approach to freedoms as part of a testing out process in both the mental health system and the prison but the names and mechanisms for those activates are different. In mental health such leave from the hospital is much more extensive than for prisoners. A restricted patient may expect years of testing out before becoming eligible for conditional discharge. Prisoners may have left the prison under escort for all manner of reasons prior to any home curfew or temporary release. Such episodes outside the prison are not notified to victims. The approximation to temporary release for MDOs is that point in rehabilitation where they have reached unescorted suspension of detention.

Usually when a patient have proven themselves safe on escorted periods of time for several months then the RMO submits a proposal and risk assessment to a Multi Agency Public Protection Arrangements (MAPPA) meeting. At the moment the police may contribute intelligence about victims but under the MDOVS notice to the MDOVS team will need to be given by the RMO. The MDVOS can then write out to the victim for their views but at no point is there proposed to be any direct communication with the RMO or identification of the detention location of the patient.

One issue which gave the group concern was the age limit of 12. There are a number of children who will fall under the scheme whose mentally disordered parent killed a sibling. In this and other circumstances it may be against the child’s best interests for there to be direct communication. Advise was given to the group that although a child’s name must occur on correspondence from the age of 12 it is acceptable for the letter to be addressed primarily for the attention of a parent or guardian who can then share the information in the most appropriate way they consider. Other special provisions may need to be developed for traumatised vulnerable adults.

## Information to be given to victims is described under section 16C of the 2015 Act

‘This section sets out the information that is to be given under section 16A about the person referred to in that section as O.

The following information is to be given in any case—

1. that the compulsion order to which O is subject and which is mentioned in section 16A(1)(b) has been revoked,
2. that the restriction order to which O is subject and which is mentioned in section 16A(1)(b) has been revoked,
3. the date of O’s death,
4. that the compulsion order has been varied by way of a modification of the measures specified in it,
5. that O has been transferred to a place outwith Scotland,
6. that the Mental Health Tribunal has made an order under section 193(7) of the Mental Health Act conditionally discharging O,
   1. the terms of any restrictions on things O may do which have been imposed on O as conditions on conditional discharge under section 193(7) or section 200(2) of the Mental Health Act (including under section 193(7) as applied by section 201(3) or 204(3) of that Act) in so far as those conditions are relevant to the victim (see section 58),
7. that the Scottish Ministers have recalled O to hospital under section 202 of the Mental Health Act.

In respect of the orders under a) and b) above, the duty to provide information arises when if the order is being appealed against, and then when the appeal is concluded and the decision is final.

The following information is to be given in a case where the compulsion order authorises O’s detention in hospital—

1. that O is unlawfully at large from hospital,
2. that O has returned to hospital having been unlawfully at large,

* that a certificate has been granted, for the first time, under the Mental Health Act which suspends O’s detention and does not impose a supervision requirement,
* that the certificate mentioned in paragraph (c) has been revoked.”.

MDOVS will not release information about:

* where a MDO is held;
* the identity of any member of the multidisciplinary team;
* information about where the MDO will go when released;
* or give details about each individual episode or specific details of unescorted Suspension of Detention.

The consequence of this is that the identification of the RMO and where the RMO works must be kept private. Communications to the RMO must be via the MDOVS office in the same way that written submissions to prison Governors is through the VNS.

# The MDO Victim scheme –recommendations

1. **The group recommends that the Scottish Government liaises closely with Mental Health Tribunal for Scotland to agree paperwork and protocols for contact with victims and family members of victims** by the Scottish Government and the Tribunal under the scheme provided by the Mental Health (Scotland) Act 2015 and the Mental Health (Care and Treatment) (Scotland) Act 2003 to ensure that there is as little duplication of contact as possible. They should work together to ensure that victims receive the best possible service to allow them to receive information that they wish to receive and to which they are entitled and to have their voices heard in matters in which they are entitled to have their representations taken account of by decision makers (whether RMOs, Ministers or the Tribunal) prior to the relevant decisions being taken.
2. **The working group to should be reconvened at some an appropriate point in the future to examine and comment upon the Scottish Government’s proposals for implementation of the victim notification and representation provisions of the 2015 Act *before* implementation occurs.** In addition to the relevant experience and knowledge required, the short life working group has a working knowledge of the statutory provisions, having considered these as they have developed through the Parliamentary process.
3. There must be recognition that the 2015 Act reflects the on-going development of public bodies in Scotland to be victim aware and victim sensitive. **The Group recommends that the Scottish Government commission** Greater Glasgow and Clyde Psychological Trauma Service in collaboration with **the third sector to develop victim awareness and victim sensitivity resources for the training of all staff involved in forensic mental health and also the School of Forensic Mental Health** in terms of resources to informing colleagues about the practical aspects of the new arrangements**.  Precise costings are not yet possible until greater detail emerges regarding implementation.**
4. The MDO victim scheme created by the 2015 Act (MDOVS) should mirror the operation of the VNS. As a guiding principle no more extensive information should be given under MDOVS than under VNS. There may be further developments of VNS, such as the switch from an opt in scheme to an opt out scheme, as these developments occur, MDOVS should be updated accordingly. **The Group recommends that the MDO victim scheme (MDOVS) should continue to mirror the operation of the general VNS and should be updated as the VNS is updated**.
5. MDOVS is separate to the existing provisions of the 2003 Act with regards to involvement of victims as Interested Parties at Mental Health Tribunals (which are likely to use much more frequently when victims are made aware this is open to them). This is a potential cause of confusion and duplication of information and as a general principle the Group recommends that as far as possible victims should relate to one victim scheme and duplication of information should be minimised. This will require partnership working between the MHT administration and the MDOVS team. If a victim wishes to make representations under the 2003 Act the MDOVS team should support their contact with the MHT**. The Group recommends that as far as possible victims should relate to one MDO victim scheme.**
6. Further to this recommendation a general information leaflet should be prepared which can be given to victims of MDOs in a variety of circumstances and at a variety of stages. It should be developed from the current information given by Scottish Government (Appendix 3) and explain the pathway for MDOs and in outline both the MDOVS and the provisions for victims under the 2003 Act. It should set out that decision making (by both MHTS and Scottish Ministers) regarding the progress and rehabilitation of MDOs under the 2003 Act is primarily based on clinical and risk assessment, highlighting the particular circumstances in which representations by or on behalf of victims are likely to be relevant. It should also signpost victims to the variety of Victim charities who can give support. The leaflet should be sufficiently broad in its remit that it is relevant to give a victim by a FLO, member of Crown Office, MDOVS team office, any member of the MHT or any member of the clinical team for a victim in ongoing contact with an MDO. **The Group recommends that a general information leaflet is developed for victims of MDOs in conjunction with victim and family support/carer organisations.**
7. **The group recommends that the final scheme is well publicised to potential beneficiaries** and that victims should be provided with the support and advocacy that they require to navigate, understand and participate effectively with the MDOVS. **Relevant agencies (including third sector organisations) should be identified and approached to establish referral mechanisms to ensure that victims are adequately supported and represented through the system.**
8. **The group recommends that all victims should have the opportunity to opt in to registration with the MHT and eligible victims the opportunity to also opt in to the 2015 MDOVS scheme. The merits of an opt-out scheme for both the generic VNS and MDOVS should be kept under review by Scottish Government.**
9. In the communication with victims there is a need for clear communication**, the group recommends that proforma letters are prepared by the MHT and MDOVS for the variety of circumstances that may occur. They should be joint letters where possible to avoid duplication and be written in clear English following consultation with Victims’ groups as to style.**
10. There are particular aspects of MDOVS which distinguish it from the general VNS. All activities carried out under the 2003 Act are subject to its section 1 principles. A balance needs to be struck in every case between the principles of the 2003 Act and those relating to Victims under the 2012 Act. The MDOVS scheme should aim at bringing together and balancing these imperatives rather than seeing them as opposed. **The group recommends that the MDOVS is guided both by the principles of the 2003 and 2012 Acts.**
11. Another difference is that whilst some MDOs will have been found not guilty by reason of their mental disorder, all are patients. There are various safeguards available to patients which are not available to prisoners – not least the overarching protective oversight of the Mental Welfare Commission – **but the group recommends the introduction of an additional safeguard to check victim notification eligibility in the case of the MDOVS.** It is suggested that when an opt-in letter arrives with the MDOVS team an additional check is made regarding victim eligibility.
12. The eligible age of victims receiving information is 12. The group felt that this may be too young and potentially harmful in many cases. **The group recommends that correspondence to children between the ages of 12 to 16 be marked for the primary attention of a parent or guardian.**

# Appendix 1 Flowchart of the 2003 Act scheme in operation

Tribunal provided with contact details of victim

(either by direct contact or via Scottish Ministers)

Casework Team creates entry on Register of Victims and Family Members of Victims

Casework Team checks each new case against Register

Where case has victim involvement, Casework Team advises President’s Office (PO)

PO issues letter to victim advising of right to make representations,  
whether in writing or orally

Victim advises whether s/he wishes to make representations

in writing or orally

Tribunal writes to victim re arrangements for oral hearing

PO writes to victim advising timetable for submission of written representations

Victim attends oral hearing

PO receives written representations and passes them to Casework Team to be scrutinised and redacted

Tribunal makes decision

Casework Team circulates written representations to panel and parties

Victim advised of outcome

Tribunal panel makes decision

Victim advised of outcome

# Appendix 2 – example of a letter currently sent to a victim registered under the 2003 Act scheme

Mrs Example

Cul de Sac Drive

Town

20 November 2014

Dear Mrs Example

**A PERSON – RESTRICTED PATIENT**

**SECTION 189 REFERENCE**

I refer to my letter to you of 22 April 2014, in which I undertook to advise you of any case before the Mental Health Tribunal for Scotland (“**the Tribunal**”) concerning Mr A Person (“**the patient**”).

The Tribunal is the independent judicial body responsible for making decisions, on the basis of evidence, about the orders to which the patient is subject. Decision are made by a three‑member Tribunal panel comprising a general and a medical member and convened by either the President of the Tribunal or a Sheriff. I explain the powers of the Tribunal in more detail below.

The Tribunal has received a reference from the Scottish Ministers under section 189 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (“**the 2003 Act**”). The Scottish Ministers are required to make such a reference if no reference or application has been made to the Tribunal during a two year period. The patient is subject to a compulsion order and a restriction order. On a reference under section 189, the Tribunal can–

(1) maintain *the status quo* by making no order (so the patient would remain in hospital subject to his compulsion order and restriction order);

(2) conditionally discharge the patient into the community (so the patient would remain subject to his compulsion order and restriction order but would live in the community subject to conditions imposed by the Tribunal which might, for example, require the patient to reside at a specified address, allow certain professionals access to his home, prohibit him from entering certain geographical areas, and so forth);

(3) revoke the patient’s restriction order (which would remove the oversight role of the Scottish Ministers in respect of the patient and leave the patient subject only to his compulsion order for 6 months, unless the compulsion order was subsequently extended by the Tribunal on the application of the patient’s treating psychiatrist); or

(4) revoke the patient’s compulsion order (effectively absolutely discharging the patient).

A date has not yet been scheduled for the Tribunal to hear the section 189 reference. However, it is likely to take place in mid-February 2015. You are – in the terminology of the 2003 Act – a “person appearing to the Tribunal to have an interest” and, as such, the Tribunal is required to afford you the opportunity to––

(i) make representations (either orally or in writing); and

(ii) lead or produce evidence.

I would be grateful if you would advise me if you wish to avail yourself of the opportunity to make representations (either orally or in writing) or to lead or produce evidence. Once I know your preference concerning this matter, I can arrange with you an appropriate timetable.

The Tribunal is required to circulate any document which it receives in respect of a reference such as this to the Tribunal members and to all parties (including any lawyers instructed by any of the parties). The parties in this case will be the Scottish Ministers, the patient and the patient’s “named person”, if the patient has one.

It might be helpful for me to explain that the standard procedure with regard to written representations received by the Tribunal is that these are scrutinised by the Tribunal’s Administration and any contact details - such as email and postal addresses and telephone numbers - are removed before the written representations are circulated to the Tribunal panel members and to the parties.

The terms of the 2003 Act are complex and you may wish to seek your own legal advice as to the terms of the 2003 Act and the Tribunal’s Rules of Procedure (the Mental Health Tribunal for Scotland (Practice and Procedure) (No. 2) Rules 2005, as amended).

I appreciate that this letter contains a lot of complex information. I have sought to set that information out as clearly as I can. Should you wish to discuss the contents of this letter with me or should you wish further clarification of the procedure, please do not hesitate to contact me.

Yours sincerely

**Russell Hunter**

**Solicitor**

**Legal Secretary to the Tribunal**

# Appendix 3 Example of information to form the basis of a General information leaflet

**BACKGROUND FOR VICTIMS OF MDOs**

Scottish Ministers take very seriously their responsibilities for restricted patients. Family and victim considerations are taken into account during multi-disciplinary assessment by the clinical team and by the Scottish Ministers when considering recommendations for transfer to another hospital, suspension of detention or discharge from hospital. When a patient is being considered for suspension of detention, transfer to a lesser secure hospital or discharge from hospital, it is of paramount importance that all risk factors, including victim sensitivities, are taken into account.

This paper provides background on the processes and procedures which are in place to strictly monitor and manage restricted patients; background on the policy relating to the provision of information to victims of mentally disordered offenders (MDOs); a short paragraph covering the constraints placed on Scottish Ministers in relation to patient confidentiality and finally the role of the Mental Health Tribunal for Scotland.

**Management of restricted patients**

In addressing the primary concern of the victim or the victim’s family regarding potential contact with the patient should they at some point return to the community we are able to reassure the victim or their family that exclusions zones can be applied to suspension of detention (leave from the hospital) or exclusion zones may be included as a condition of conditional discharge – once a restricted patient has been fully tested out in different levels of security and only when it is considered safe and appropriate they will continue their rehabilitation in the community subject to a number of conditions of discharge, including exclusion zones where appropriate, to ensure any risk they pose continues to be robustly managed. A patient who has been conditionally discharged may be recalled to hospital by Scottish Ministers.

In general, in rare cases ie where the offence is high profile and occurred in a small community, patients may instead be rehabilitated elsewhere. Every effort will be made to minimise the distress to the victim or their family by taking steps to ensure that they do not come across the offender in their local area.

The restricted patient team receive numerous reports from the multi-disciplinary team including risk assessment and management reports. In addition Dr Dewar, Consultant Forensic Psychiatrist, Principal Medical Officer at the Scottish Government personally assesses all restricted patients prior to major rehabilitation changes. This information will be summarised and put to Scottish Ministers when they are exercising their decision making powers.

In general, if a patient is detained under a compulsion order and restriction order (a restricted patient) the court hearing the case has decided on the basis of medical evidence presented that the offender requires to be dealt with through a programme of treatment and rehabilitation in hospital with additional safeguards to protect the public.

The aim is to prevent a recurrence of offending by dealing with the mental disorder which gave rise to it in the first place and the relationship between the disorder and the patient’s behaviour which resulted in the patient’s detention. By doing so the clinical team will be able to develop a care plan designed to treat the mental disorder and assess over time the extent to which treatment has reduced the risk of the patient behaving in a dangerous manner if returned to the community. Each patient’s progress is regularly reviewed in light of medical reports received from the Responsible Medical Officer (RMO) at the hospital in which the patient is detained.

More widely, public safety lies at the heart of decision making and restricted patients will not transfer to conditions of lesser security until the patient has undergone rigorous risk assessment and scrutiny. When clinical agreement is reached that the patient may be managed in conditions of lower security that decision usually marks the start of a process of visits to the new facility and ultimately inform whether transfer can proceed. Family, local community and victim considerations are taken into account during multi-disciplinary assessment and planning by the clinical team. Within any assessment potential risk to the public is fully evaluated and is always of paramount importance. Decisions on transfers between hospitals requires the consent of Scottish Ministers which involves an additional layer of scrutiny.

Indeed our Memorandum of Procedure on Restricted Patients, which provides guidance to all those involved with the management of restricted patients, makes specific reference to the importance of taking account of the views of victims and family members in future care planning for restricted patients. We respect the feelings and fears of victims and we have regard to a range of factors when proceeding with plans for patient’s rehabilitation.

All restricted patients are subject to the Care Programme Approach which ensures that the protection of the public is at the core of the decision making in respect of rehabilitation. CPA establishes joint arrangements for effective risk management requiring that all those engaged in a restricted patient’s care have an understanding of the risks presented by the patient and of the factors that might suggest a relapse in the patient’s conditions and be prepared to act where those factors appear to be manifest. In addition, all restricted patients are subject to Multi Agency Public Protection Arrangements (MAPPA) ensuring that there is separate scrutiny of risk assessment and management planning. A referral is required prior to first consideration of unescorted leave and when the multi-disciplinary team are considering conditional discharge. The police are part of both the CPA process and MAPPA.

**Victim Notification Scheme**

Improving the provision of information, including case specific information, for victims has been a policy objective of the Scottish Government since the Scottish Strategy for Victims was published.  The existing criminal justice Victim Notification Scheme (VNS) is a key part of the Scottish Government's implementation of the Scottish Strategy. The VNS is an opt-in scheme and allows the victims of offenders sentenced to a prison term of 18 months or more, including life for a violent crime; a sexual or indecent offence, a crime involving firearms, housebreaking, hate crime or fire-raising to receive information about the release of the offender. The scheme also gives the victim the right to make written representations to the SPS if the offender is to be considered for release on Home Detention Curfew (HDC) or to the Parole Board in advance of the offender being considered for release on parole. The eligible victims are direct victims aged 12 years and over; a parent or carer of the victim is a child under 12 years; a near relative if the victim is incapacitated. If the victim has died, up to 4 near relatives can take part in the scheme. At the moment disclosure of information to victims of a mentally disordered offender (MDO) does not come within the scheme.

We recognise that the victim of a MDO will have as much of a need for information as any other victim.  However, we also recognise that when the courts make a mental health disposal under the Criminal Procedure legislation then the MDO enters the health system, as opposed to penal system.  As such, once in the health system then, as is the case with any other patient, their personal and medical information is covered by common law duties on patient confidentiality and the Data Protection Act 1998.

Setting up a statutory scheme to allow the sharing information with victims of certain MDOs is therefore a delicate balance, and for this reason we went out to consultation on both whether to introduce such a scheme, and the framework of any such scheme.

The Mental Health (Scotland) Act 2015 is available on the Scottish Parliament website and it provides the detail of the framework of this new scheme.

Any enquiries relating to the victim notification scheme they should contact Nicola Paterson, Head of Protection of Rights Unit, Mental Health & Protection of Rights Division, e-mail [nicola.paterson@scotland.gsi.gov.uk](mailto:nicola.paterson@scotland.gsi.gov.uk)

**Patient Confidentiality**

Mentally disordered offenders detained in hospital are patients and, as such, are entitled to the same rights of patient confidentiality as other patients. Any processing of personal health information including disclosure, must also be carried out in terms of the Data Protection Act 1998 and be compatible with the European Convention on Human Rights. The effect of the 1998 Act is that it generally prohibits the release of any information about a mentally disordered offender’s detention or discharge from hospital without their consent. Patient confidentiality also precludes discussing individual cases of restricted patients.

**Mental Health Tribunal for Scotland**

Finally following the implementation of the Mental Health (Care and Treatment) (Scotland) Act 2003, the Mental Health Tribunal for Scotland make the decisions in relation to whether the patient is detained in conditions of excessive secure and on discharge, whether conditionally or absolutely. The Tribunal is an independent body and Dr Joe Morrow, is currently the President of the Mental Health Tribunal for Scotland - Bothwell House, First Floor, Hamilton Business Park, Caird Park, Hamilton ML3 0QA.

It is possible for a victim or their family to be afforded an opportunity to be an “interested person” and have a say in any future Mental Health Tribunal. Every person in Scotland who is detained under a compulsion order and restriction order must by law have his/her orders reviewed by the Mental Health Tribunal for Scotland on a biennial basis and the Scottish Ministers have a duty to refer a patient’s case to the Tribunal for review. Should you want to be afforded this opportunity or want to contact the restricted patient team you should write to Rosemary Toal, Team Leader Restricted Patient Casework, Scottish Government, Rm 2N.02, Mental Health & Protection of Rights Division, St Andrew’s House, Edinburgh EH1 3DG. Whether or not you are invited to be an “interested person” is a matter for the Mental Health Tribunal.

**Victim Support Scotland**

Victim Support Scotland (VSS) provide free and confidential advice, assistance and support to victims, witnesses and those affected by crime in Scotland through providing practical help, emotional support and essential information and guidance. The service is provided by volunteers in local offices based throughout Scotland, via their telephone helpline, as well as through Witness Services in court buildings. Local services can be found via their website at <http://www.victimsupportsco.org.uk/page/directory/index.cfm> or by contacting the Scottish helpline on 0845 6039 213.

# GLOSSARY

**C**Compulsion Order – a final disposal made under section 57A of the 1995 Act by a criminal court which authorises detention and treatment in a hospital or community setting for six months, then reviewed annually. Requires two medical reports and an MHO report. Applications for variation and revocation are made to the Tribunal.

Compulsion Order with Restriction Order – same as Compulsion Order but without limit of time. Reserved for the most serious and high risk offenders.

**H**Hospital Direction – an order granted under section 59A the 1995 Act which authorises detention of a patient in hospital until they are well enough to be transferred to prison to complete their sentence.

**M**MDOVS – Mentally Disordered Offender Victim Scheme

Mental Health Officer – a social worker with specialist training and skills in relation to mental health.

Mental Health Tribunal – an independent judicial body which deals with applications for review, variation and recall for civil orders and compulsion orders, including those with restriction.

Mental Welfare Commission – an independent regulatory body which provides on-going monitoring of the 2003 Act to Scottish Ministers. Provides advice to professionals and service users, and also has powers to investigate cases where there are concerns of care standards.

**N**Named Person – someone appointed by the patient to look after their interests. They are entitled to receive information about the patient and in certain circumstances can make applications on their behalf.

**R**Responsible Medical Officer – the lead medical practitioner who has overall responsibility for a patient‘s care and treatment.

**S**

Suspension of Detention – a period(s) of authorised absence from hospital to help prepare a patient for a managed return into the community. Also used to facilitate attendance at court, routine medical appointments, or compassionate leave.

**T**Transfer for Treatment Direction – issued by Scottish Ministers under section 136 of the 2003 Act where a serving prisoner requires hospital treatment for mental disorder.