

MENTAL HEALTH (CARE AND TREATMENT) (SCOTLAND) ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 21 – Offences

Section 311: non-consensual sexual acts

617. **Section 311** creates an offence of engaging in a sexual act, as defined in subsection (2), with a patient who does not consent or is incapable of consenting to that act by reason of his or her mental disorder. It applies to any patient of either gender, whatever his or her type of mental disorder (unlike section 106 of the 1984 Act, which was restricted to sexual intercourse and could only be committed by a man on a mentally impaired woman).
618. A patient will be regarded as not having consented to a sexual act where the purported consent has been given as a result of the patient being frightened, threatened, intimidated or tricked.
619. Subsection (5) provides a defence to an accused who can prove that they did not know and could not reasonably be expected to know both that the patient had a mental disorder and was incapable of consenting.
620. Subsection (7) also makes it an offence for another person to assist or encourage a person to carry out such a sexual offence.
621. The section provides the levels of penalties applicable to these offences.

Section 312: offences under section 311: extended sentences

622. **Section 312** amends section 210A of the 1995 Act, which allows a court to give an offender convicted of a sexual offence an extended sentence where an offence has been committed under section 311 of the 2003 Act.

Section 313: persons providing care services: sexual offences

623. **Section 313** creates an offence where a carer or a member of staff, or someone working in or managing a hospital (other than the Scottish Ministers) engages in a sexual act, as specified in subsection (1), with a patient for whom he or she cares. Again, there is a defence available to an accused who did not know or could not reasonably be expected to know that the patient was mentally disordered. The offence does not apply where the person concerned is married to the patient, or there was an ongoing sexual relationship between them. The offence attracts a maximum sentence of 2 years' imprisonment.

Section 314: notification requirements for offenders under sections 311 and 313

624. The Sex Offenders Act 1997 provides that persons convicted of one of a list of offences are liable to be placed on the Sex Offenders Register. The effect is that the person must register certain personal details with the police. Section 314 provides that the offences created by sections 311 and 313 are added to the list. The 1997 Act has now been repealed and the notification provisions re-enacted in the [Sexual Offences Act 2003](#) (c 42).

Section 315: ill treatment and wilful neglect of a mentally disordered person

625. [Section 315](#) makes it an offence for a carer or a member of staff, or someone working in or managing a hospital (other than the Scottish Ministers) to ill-treat or wilfully neglect a patient to whom they are providing care or treatment. The maximum penalty on indictment is 2 years' imprisonment.

Section 316: inducing and assisting absconding etc

626. Subsection (1) makes it an offence to knowingly induce or assist a patient to abscond or to fail to act, in such a way as to make the patient liable to be taken into custody and subject to the provisions of section 303, or to harbour a patient who has absconded or so failed.
627. Subsection (2) provides that it is a defence for an accused to prove that what he or she did, did not interfere with other persons carrying out functions under the 2003 Act and it was calculated to protect the interests of the patient.

Section 317: obstruction

628. [Section 317](#) makes it an offence to behave in a way which obstructs a person authorised to carry out functions under the 2003 Act and in particular to do so in any of the ways listed in subsection (1). The maximum penalty is 3 months' imprisonment or a fine not exceeding level 3 on the standard scale.
629. A patient who is the subject of any intervention under the 2003 Act cannot be guilty of the offence in relation to that intervention.

Section 318: false statements

630. [Section 318](#) makes it an offence for a person to knowingly make a false statement in a written document which is an application under the 2003 Act, one accompanying such an application or any other document which must be made, prepared or sent or given for a purpose of the Act.
631. Documents that are exempt from this provision are documents produced by the patient nominating a named person or declaring that someone is not to be a named person, and also an advance statement.

Section 319: time limit for summary proceedings for offences under sections 311 and 313

632. [Section 310](#) applies the time limits for summary proceedings in subsections (2) to (4) of section 4 of the Criminal Law (Consolidation) (Scotland) Act 1995 to proceedings brought under section 311 or 313. Summary proceedings may be commenced at any time within the period of 6 months from the date on which evidence that the Lord Advocate considers sufficient to justify the proceedings comes to his knowledge.