



Mental Health (Care and Treatment) (Scotland) Act 2003

2003 asp 13

PART 21

OFFENCES

311 Non-consensual sexual acts

- (1) Subject to subsection (5) below, a person who engages in an act mentioned in subsection (2) below with, or towards, a mentally disordered person shall be guilty of an offence if, at the time of the act, the mentally disordered person—
 - (a) does not consent to the act; or
 - (b) by reason of mental disorder, is incapable of consenting to the act.
- (2) The acts referred to in subsection (1) above are—
 - (a) sexual intercourse (whether vaginal or anal); and
 - (b) any other sexual act.
- (3) For the purposes of subsection (1)(a) above, a person shall be regarded as not consenting if the person purports to consent as a result of—
 - (a) being placed in such a state of fear; or
 - (b) being subjected to any such—
 - (i) threat;
 - (ii) intimidation;
 - (iii) deceit; or
 - (iv) persuasion,as vitiates that person's consent.
- (4) For the purposes of subsection (1)(b) above, a person is incapable of consenting to an act if the person is unable to—
 - (a) understand what the act is;
 - (b) form a decision as to whether to engage in the act (or as to whether the act should take place); or
 - (c) communicate any such decision.

- (5) Where a person is charged with an offence under subsection (1)(b) above it shall be a defence for such person to prove that, at the time of the sexual intercourse or other sexual act, such person did not know, and could not reasonably have been expected to know, that the other person—
- (a) had a mental disorder; and
 - (b) was incapable of consenting to the intercourse or other act.
- (6) A person guilty of an offence under subsection (1) above shall be liable—
- (a) on summary conviction to imprisonment for a term not exceeding 3 months or to a fine not exceeding the statutory maximum or to both;
 - (b) on conviction on indictment to imprisonment for life.
- (7) A person guilty of aiding, abetting, counselling, procuring or inciting any other person to commit an offence under subsection (1) above shall be liable—
- (a) on summary conviction to imprisonment for a term not exceeding 3 months or to a fine not exceeding the statutory maximum or to both;
 - (b) on conviction on indictment to imprisonment for a term not exceeding 2 years or to a fine or to both.
- (8) In this section “sexual act” means any activity which a reasonable person would, in all the circumstances, regard as sexual.

312 Offences under section 311: extended sentences

In section 210A(10) of the 1995 Act (extended sentences for sex and violent offenders: meaning of certain expressions), in the definition of “sexual offence”—

- (a) the word “and” which occurs immediately after paragraph (xix) shall be omitted; and
- (b) after paragraph (xx) there shall be added “and
 - (xxi) an offence under section 311(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13) (non-consensual sexual acts).”.

313 Persons providing care services: sexual offences

- (1) Subject to subsection (3) below, a person who engages in—
- (a) sexual intercourse (whether vaginal or anal); or
 - (b) any other sexual act,
- with, or towards, a mentally disordered person shall be guilty of an offence if, at the time of the intercourse or other act, the person is one of those specified in subsection (2) below.
- (2) Those persons are—
- (a) a person providing care services to the mentally disordered person;
 - (b) a person who—
 - (i) is an individual employed in, or contracted to provide services in or to; or
 - (ii) not being the Scottish Ministers, is a manager of, a hospital in which the mentally disordered person is being given medical treatment.

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- (3) Where a person is charged with an offence under subsection (1) above, it shall be a defence for such person to prove that—
- (a) at the time of the intercourse or other act—
 - (i) such person did not know, and could not reasonably have been expected to know, that the other person was mentally disordered; or
 - (ii) the mentally disordered person was the spouse of such person; or
 - (b) in the case of—
 - (i) a person specified in subsection (2)(a) above, immediately before that person began to provide care services to the mentally disordered person; or
 - (ii) a person specified in subsection (2)(b) above, immediately before the mentally disordered person was admitted to the hospital referred to in that provision or (where the mentally disordered person has been admitted to that hospital more than once) was last admitted to it,a sexual relationship existed between them.
- (4) A person guilty of an offence under subsection (1) above shall be liable—
- (a) on summary conviction to imprisonment for a term not exceeding 3 months or to a fine not exceeding the statutory maximum or to both;
 - (b) on conviction on indictment to imprisonment for a term not exceeding 2 years or to a fine or to both.
- (5) References in this section to the provision of care services are references to anything done by way of such services—
- (a) by;
 - (b) by an employee of; or
 - (c) in the course of a service provided or supplied by,
- a care service, whether by virtue of a contract of employment or any other contract or in such other circumstances as may be prescribed by regulations.
- (6) In this section—
- “care service” has the meaning given by subsection (1)(a), (b), (e), (g), (h), (k) and (n) as read with subsections (2), (3), (6), (9), (10), (16) and (27) of section 2 of the Regulation of Care (Scotland) Act 2001 (asp 8); and
 - “sexual act” has the meaning given by section 311(8) of this Act.

314 Notification requirements for offenders under sections 311 and 313

In Schedule 1 to the Sex Offenders Act 1997 (c. 51) (sexual offences to which Part I applies), in paragraph 2(1), after paragraph (e) there shall be added—

“(f) offences under—

- (i) section 311(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13) (non-consensual sexual acts); and
- (ii) section 313(1) of that Act (persons providing care services: sexual offences).”.

315 Ill-treatment and wilful neglect of mentally disordered person

- (1) This section applies to a person (a “relevant person”) who—

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- (a) is an individual employed in, or contracted to provide services in or to, a hospital;
 - (b) not being the Scottish Ministers, is a manager of a hospital;
 - (c) provides care services; or
 - (d) is an individual who, otherwise than—
 - (i) by virtue of a contract of employment or other contract with any person; or
 - (ii) as a volunteer for a voluntary organisation, provides care or treatment.
- (2) A relevant person who—
- (a) whether under this Act or otherwise—
 - (i) is providing care or treatment; or
 - (ii) purports to provide care or treatment, to a patient; and
 - (b) ill-treats, or wilfully neglects, that patient, shall be guilty of an offence.
- (3) A person guilty of an offence under subsection (2) above shall be liable—
- (a) on summary conviction to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum or to both;
 - (b) on conviction on indictment to imprisonment for a term not exceeding 2 years or to a fine or to both.
- (4) In subsection (1)(c) above, the reference to the provision of care services shall be construed in accordance with section 313(5) of this Act.

316 Inducing and assisting absconding etc.

- (1) A person who knowingly—
- (a) induces or assists a patient to do or fail to do anything which results in the patient's being liable under section 301 or 302 of this Act to be taken into custody and dealt with under section 303 of this Act; or
 - (b) harbours a patient who has, with that result, done or failed to do anything, shall be guilty of an offence.
- (2) Where a person is charged with an offence under subsection (1)(b) above, it shall be a defence for such person to prove that the doing of that with which the person is charged—
- (a) did not obstruct the discharge by any person of a function conferred or imposed on that person by virtue of this Act; and
 - (b) was intended to protect the interests of the patient.
- (3) A person guilty of an offence under this section shall be liable—
- (a) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum or both;
 - (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years or to a fine or both.
- (4) The reference in subsection (1) above to sections 301 to 303 of this Act includes a reference to those sections as applied or as applied and modified under section 309

of this Act and to any regulations made under section 310 of this Act which make provision corresponding to sections 301 to 303 of this Act.

317 Obstruction

- (1) A person who—
- (a) refuses to allow a person authorised by virtue of this Act access to any premises;
 - (b) refuses to allow access to a mentally disordered person by a person authorised by virtue of this Act to have such access;
 - (c) refuses to allow the interview or examination of a mentally disordered person by a person authorised by virtue of this Act to interview or examine such person;
 - (d) persists in being present when requested to withdraw by a person authorised by virtue of this Act to interview or examine, in private, a mentally disordered person;
 - (e) refuses to produce any document or record to a person authorised by virtue of this Act to require the production of such document or record; or
 - (f) otherwise obstructs a person in the exercise of any functions conferred on such person by virtue of this Act,
- shall be guilty of an offence.
- (2) A mentally disordered person shall not be guilty of an offence under subsection (1) above if the person mentioned in that subsection—
- (a) who is authorised by virtue of this Act, is so authorised; or
 - (b) who is exercising functions conferred on that person by virtue of this Act, is exercising those functions,
- in relation to that mentally disordered person.
- (3) In any proceedings against a person for an offence under subsection (1) above it shall be a defence for the accused to show that the accused had a reasonable excuse for doing that with which the accused is charged.
- (4) A person guilty of an offence under subsection (1) above shall be liable on summary conviction to imprisonment for a term not exceeding 3 months or to a fine not exceeding level 3 on the standard scale or to both.

318 False statements

- (1) A person who—
- (a) knowingly makes, in a relevant document, an entry or statement which is false in a material particular; or
 - (b) with intent to deceive, makes use of any such entry or statement knowing it to be false,
- shall be guilty of an offence.
- (2) For the purposes of subsection (1) above, a “relevant document”—
- (a) is—
 - (i) an application under this Act;
 - (ii) a document accompanying any such application; or

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- (iii) any other document required or authorised to be granted, prepared, sent or given for any of the purposes of this Act; but
 - (b) does not include—
 - (i) a nomination of a named person in accordance with section 250(2) of this Act;
 - (ii) a declaration made in accordance with section 253(2) of this Act; and
 - (iii) an advance statement.
- (3) A person guilty of an offence under this section shall be liable—
 - (a) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum or to both;
 - (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years or to a fine or to both.

319 Time limit for summary proceedings for offences under sections 311 and 313

Subsections (2) to (4) of section 4 of the Criminal Law (Consolidation) (Scotland) Act 1995 (c. 39) (time limits for certain summary proceedings) shall apply to summary proceedings in respect of an offence under section 311 or 313 of this Act as they apply to the summary proceedings to which those subsections relate.