

PE1786/E

Scottish Government submission of 6 May 2020

Thank you for your request dated 25 March 2020. Please find below my response to PE1786 on behalf of the Scottish Government. As Policy Manager in Mental Health Law I have consulted with the Mental Welfare Commission and Crown Office Procurator Fiscal Service (COPFS) in order to provide a complete response to the petition.

The petition is calling on the Scottish Parliament to urge the Scottish Government to investigate why there have been no prosecution under either section 315 or section 318 of the Mental Health (Care and Treatment) (Scotland) Act 2003 ('the Act').

Enquiries have been conducted and I can confirm that the information is held in relation to your request.

During the period 2008 to 2020 Police Scotland reported one case to COPFS where the charge is contrary to s318 of the Act. This was a 2018 case and the prosecutorial decision taken in the case was 'no action' and this was due to insufficient admissible evidence. There were no prosecutions under s318 of the Act.

Detentions under s318 are supposed to take place with the consent of a specialist social worker, called a Mental Health Officer (MHO). In practice, there may be a variety of reasons behind the lack of consent obtained from an MHO. It is useful to be aware that issuing an Emergency Detention Certificate without the consent of an MHO is legally acceptable where it is not practicable to obtain the consent of an MHO, and the relevant form requests that the detaining doctor explains why that has been the case. The fact that this happens does not give rise to an inference that doctors are being dishonest. Nor does the fact that the figures vary from place to place, which could be caused by many factors, including variations in the availability of MHO services round the clock.

Prosecutions and convictions data under s315 of the Act is provided in the attached table in **Annex A** from 2007-08 to 2018-19, by local authority area. Please note that we cannot obtain data in this respect prior to 2006-07. The Mental Health (Care and Treatment) (Scotland) Act 2003 came into force on 5 October 2005. Accordingly, the information provided is from 2006/2007 onwards.

You will note that court proceedings under s315 were taken in respect of 69 charges which were reported to Crown Office Procurator Fiscal Service (COPFS) from 2007/2008 until 2018/19. Out of these, 36 charges led to a conviction. Charges that do not lead to a conviction can be largely down to there being insufficient admissible evidence to proceed with a criminal prosecution. Other considerations that are taken into account when deciding whether to proceed with a criminal prosecution include the public interest in raising criminal proceedings in the first instance.

It might be helpful if I provide some general information about the role of the Procurator Fiscal in raising criminal prosecutions.

In Scotland the police report incidents of alleged criminality to the Procurator Fiscal. The Procurator Fiscal, as the independent prosecution authority, then decides whether

action can be taken in respect of a criminal allegation based on whether there is sufficient admissible, credible, corroborated evidence, in law, of a criminal offence having been committed. In order for there to be sufficient evidence to decide to prosecute an individual, there must be corroborated evidence. This means that there is evidence from two separate sources that an offence has been committed and that the accused person was the person responsible.

If the Procurator Fiscal concludes that there is sufficient evidence, they will then consider what action, if any, should be taken in the public interest. The COPFS Prosecution Code at pages 6 – 8 outlines the various factors that are to be considered by the Crown in determining whether it is in the public interest to prosecute an accused person.

I attach a link to the COPFS Prosecution Code:

https://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Prosecution20Code20_Final20180412_1.pdf

As you will note, in considering the public interest, Prosecutors take a number of factors into account, including the background and personal circumstances of the accused; the motive for the alleged crime; any mitigating circumstances and the risk of further offending. This can involve competing interests and will vary with every case. As a result, assessment of the public interest involves careful consideration of all factors.

As there is a duty on the Procurator Fiscal to prosecute cases in the public interest, a careful assessment of these factors is carried out when considering the question of raising criminal prosecutions under the Mental Health (Care and Treatment) (Scotland) Act 2003. COPFS is committed to ensuring that all such cases are investigated thoroughly and sensitively and prosecuted appropriately, where there is sufficient credible and reliable evidence and it is in the public interest.

Ministers consider that a fairer Scotland can only be realised when we secure equal rights for everyone, including all those coming into contact with the justice system.

We will continue to work with justice partners and other public services to ensure that, in every case, people are treated as equal citizens within all parts of Scotland's justice system. This should include full access to the physical environment, advocacy and support, information and advice, and additional communication support where this is required.

I hope this information is helpful

ANNEX A

Number of prosecutions and convictions for all offences under Mental Health (Care & Treatment)(Scotland)Act 2003, section 315, by local authority area

Local authority	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
Total prosecutions	1	1	4	1	3	12	4	4	13	7	6	13
Argyll & Bute	-	1	-	-	-	-	-	-	-	-	-	-
Dumfries & Galloway	-	-	-	-	-	-	1	-	3	-	-	-
Dundee City	-	-	-	-	1	3	-	1	-	-	-	-
East Ayrshire	1	-	-	-	-	1	-	-	1	-	1	-
Edinburgh, City of	-	-	-	1	1	-	2	-	1	-	-	-
Falkirk	-	-	-	-	-	-	-	1	-	-	-	2
Fife	-	-	-	-	-	-	-	-	4	-	-	4
Glasgow City	-	-	-	-	1	-	-	-	-	3	-	-
Highland	-	-	-	-	-	-	-	-	-	3	-	2
Scottish Borders	-	-	-	-	-	1	-	1	-	-	-	-
South Ayrshire	-	-	1	-	-	6	-	-	2	1	3	-

South Lanarkshire	-	-	-	-	-	1	1	-	-	-	-	-
Stirling	-	-	-	-	-	-	-	1	1	-	-	-
West Dunbartonshire	-	-	-	-	-	-	-	-	-	-	2	-
West Lothian	-	-	3	-	-	-	-	-	1	-	-	5
Total convictions	1	-	2	1	2	6	1	3	5	4	5	6
Dundee City	-	-	-	-	1	-	-	-	-	-	-	-
East Ayrshire	1	-	-	-	-	1	-	-	-	-	1	-
Edinburgh, City of	-	-	-	1	-	-	-	-	1	-	-	-
Falkirk	-	-	-	-	-	-	-	1	-	-	-	2
Fife	-	-	-	-	-	-	-	-	2	-	-	-
Glasgow City	-	-	-	-	1	-	-	-	-	-	-	-
Highland	-	-	-	-	-	-	-	-	-	3	-	-
Scottish Borders	-	-	-	-	-	1	-	1	-	-	-	-
South Ayrshire	-	-	1	-	-	3	-	-	2	1	2	-
South Lanarkshire	-	-	-	-	-	1	1	-	-	-	-	-
Stirling	-	-	-	-	-	-	-	1	-	-	-	-

West Dunbartonshire	-	-	-	-	-	-	-	-	-	-	2	-
West Lothian	-	-	1	-	-	-	-	-	-	-	-	4