

Citizen Participation and Public Petitions Committee

4th Meeting, 2021 (Session 6), Wednesday
22 September 2021

PE1878: Investigate prosecutions under the
Mental Health (Care and Treatment)
(Scotland) Act 2003

Note by the Clerk

Petitioner Andrew Muir

**Petition
summary** Calling on the Scottish Parliament to urge the Scottish Government to investigate why there have been so few prosecutions under sections 315 and 318 of the Mental Health (Care and Treatment) (Scotland) Act 2003.

Webpage <https://petitions.parliament.scot/petitions/PE1878>

Introduction

1. This is a new petition that was lodged on 10 June 2021.
2. A SPICe briefing has been prepared to inform the Committee's consideration of the petition and can be found at **Annexe A**.
3. While not a formal requirement, petitioners have the option to collect signatures on their petition. On this occasion, the petitioner elected to collect this information. 32 signatures have been received.
4. The Committee seeks views from the Scottish Government on all new petitions before they are formally considered. A response has been received from the Scottish Government and is included at **Annexe B** of this paper.

SPICe briefing

5. The petitions asks about the low prosecution rate under sections 315 and 318 of the [Mental Health \(Care and Treatment\) Scotland\) Act 2003](#). The two offences deal with:
 - section 315 – the ill-treatment or wilful neglect of a mentally disordered patient by a person involved in providing care or treatment
 - section 318 – making false statements in relation to applications under the 2003 Act.
6. The petitioner raised this issue in his petition [PE1786](#), in February 2020 and states that consideration of his earlier petition failed to address his concern that there are too many barriers to prosecutions. The petitioner outlined what he believes to be the barriers to prosecution in his [submission of October 2020](#):
 - “The legislation is very complicated;
 - There are not enough police resources or expertise;
 - The NHS have all the documentation and the release of this is time consuming;
 - If someone is alleged to have broken the law, the NHS will move this person to another area to hamper the investigation;
 - If the police charge a person with an offence the details will be forwarded to the Procurator Fiscal who will then ask expert advice. The people chosen as experts tend to be people who will defend the accused person;
 - Making a complaint may put the whistle-blower at risk due to the inherent power imbalance in the system; and
 - Several other complaints bodies have time-bar rules which mean the police have to start from scratch when investigating since no other body has examined the issues properly”
7. The PPC wrote to and subsequently received submissions from the [Mental Welfare Commission](#) and [Cabinet Secretary for Justice](#) before closing the petition in October 2020 on the basis that the Committee was satisfied with the reasoning provided by the Scottish Government and the Mental Welfare Commission as to why prosecutions under section 315 and 318 of the Mental Health (Care and Treatment) (Scotland) Act 2003 are low or zero.
8. The briefing for this new petition highlights an independent review of mental health legislation: the [Scottish Mental Health Law Review](#) chaired by John Scott QC. The review included “Reviewing the developments in mental health law and practice on compulsory detention and care and treatment since the Mental Health (Care and Treatment) (Scotland) Act 2003 came into force.”

9. An [interim report](#) was published in December 2020 (along with an [executive summary](#)). The project timeline indicates that a final report with recommendations is planned for 2022.

Scottish Government submission

10. In its submission, the Scottish Government notes that Court proceedings under s315 were taken in respect of 71 charges which were reported to Crown Office Procurator Fiscal Service (COPFS) from 2007-08 to 2019-20. Out of these, 38 charges led to a conviction.
11. In relation to s318 of the Act the submission notes that one case was reported to the COPFS in 2018 which resulted in 'no action' due to insufficient admissible evidence.
12. The petition highlights a s318 case and states that Police Scotland found "sufficient evidence", however that the Mental Welfare Commission advised the COPFS to drop the case. The petitioner believes this issue should be investigated.
13. When considering raising criminal prosecutions under the Act, the Scottish Government highlights that a 'careful assessment' of factors such as the background, personal circumstances and the risk of further offending. It goes on to state that in order to prosecute, there must be corroborated evidence.
14. The submission concludes by stating that Scottish Ministers 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.

Action

15. The Committee is invited to consider what action it wishes to take on this petition.

Clerk to the Committee

PE1878: INVESTIGATE PROSECUTIONS UNDER THE MENTAL HEALTH (CARE AND TREATMENT) (SCOTLAND) ACT 2003

Petitioner

Andrew Muir

Date Lodged

8 July 2021

Petition summary

Calling on the Scottish Parliament to urge the Scottish Government to investigate why there have been so few prosecutions under sections 315 and 318 of the Mental Health (Care and Treatment) (Scotland) Act 2003.

Previous action

I have contacted my MSP Jackie Baillie.

Background information

I am aware of a section 318 case where the police investigated the complaint against the psychiatrist and found sufficient evidence to charge them with having committed an offence. However the Mental Welfare Commission advised the Procurator Fiscal to drop the case. I believe this issue should be investigated. Wellside Research published a consultation about the Commission recently which showed they heavily favoured professionals. My previous petition on this topic (PE1786) was closed last year. It was believed that the issue was that there were not enough Mental Health Officers to consent to emergency detentions. However this was not the point of my previous petition. My point was that there are too many barriers to prosecutions. I have submitted several petitions in the past that have been closed without any outcomes and without being allowed to appear personally in front of the Committee.

Briefing for the Citizen Participation and Public Petitions Committee

Petition [PE1878](#): Investigate prosecutions under the Mental Health (Care and Treatment) (Scotland) Act 2003, lodged by Andrew Muir

Background

The petition questions “why there have been so few prosecutions” under sections 315 and 318 of the [Mental Health \(Care and Treatment\) \(Scotland\) Act 2003](#) (the ‘2003 Act’). The two offences deal with:

- [section 315](#) – the ill-treatment or wilful neglect of a mentally disordered patient by a person involved in providing care or treatment
- [section 318](#) – making false statements in relation to applications under the 2003 Act.

The petitioner also raised the issue of prosecutions under these two sections in petition [PE1786](#), lodged February 2020. The Public Petitions Committee agreed to close that petition in October 2020. More information on the earlier petition is set out below.

In the current petition, the petitioner states that consideration of his earlier petition failed to address his concern that there are too many barriers to prosecutions under the 2003 Act. The current petition highlights the role of the Mental Welfare Commission. The petitioner outlined what he saw as other potential barriers during scrutiny of his earlier petition (see below).

Mental Welfare Commission

With reference to the role of the [Mental Welfare Commission](#) (‘the Commission’), the current petition states that recent research “showed they heavily favoured professionals”.

The role of the Commission includes:

- monitoring how the provisions of the 2003 Act are applied
- investigating cases where someone with a mental illness or learning disability may not be getting the right care and treatment.

The research referred to by the petitioner would seem to be the [results of stakeholder research on the Commission](#) (Wellside Research 2020). It noted that:

“Whilst overall the survey results are encouraging, it would appear that service users with lived experience, families and carers, however, are both less aware and less satisfied with the Commission, its work, role and responsibilities compared to professionals working in the area. Across almost all questions they provided less satisfied and more negative results than professionals.” (p iv)

On publishing the results of the research, the [Commission’s Chief Executive commented](#) (13 August 2020):

“One priority is for us to raise awareness of our role amongst people who have lived experience, and their families or carers. We are a small organisation, but we recognise we need to find new ways of continually ensuring that people who might benefit from contacting us are aware of who we are and what we do.”

Scottish Parliament consideration of petition PE1786

Information obtained during consideration of petition [PE1786](#) (lodged February 2020) indicated that there had been a number of prosecutions under section 315 of the 2003 Act, but did not show any under section 318.

Figures for prosecutions under section 315 are provided in a [Scottish Government freedom of information release](#) (2 September 2020).

In a [written submission to the Public Petitions Committee](#) (19 October 2020), the petitioner outlined what he saw as barriers to prosecutions under the 2003 Act:

“The legislation is very complicated.

There are not enough police resources.

There is not enough police expertise.

The NHS have all the documentation and the release of this is time consuming.

If someone is alleged to have broken the law, the NHS will move this person to another area to hamper the investigation.

If the police charge a person with an offence the details will be forwarded to the Procurator Fiscal who will then ask expert advice. The people chosen as experts tend to be people who will defend the accused person.

Making a complaint may put the whistle-blower at risk due to the inherent power imbalance in the system.

Several other complaints bodies have time-bar rules which mean the police have to start from scratch when investigating since no other body has examined the issues properly.”

In deciding to close the petition at its [meeting on 29 October 2020](#), the Public Petitions Committee indicated that it was satisfied with the reasoning provided by the Scottish Government and Commission as to why there are few prosecutions under sections 315 and 318 of the 2003 Act. However, the Convener noted that:

“We agree to close the position. If we were in a different part of the parliamentary cycle, we might have referred it to the Justice Committee. We agree to flag up to the Cabinet Secretary for Justice the issues that we have identified. We reassure the petitioner that if they do not consider that there has been sufficient progress, they can, of course, bring back the matter to the Public Petitions Committee in a year’s time.” (cols 23-24)

Independent review of mental health legislation

In 2019, the Scottish Government announced that there would be an independent review of mental health legislation: the [Scottish Mental Health Law Review](#) chaired by John Scott QC.

Information about the review is set out on its website. It notes that:

“The principal aim of the review is to improve the rights and protections of persons with a mental disorder and remove barriers to those caring for their health and welfare.”

And that this will involve:

“Reviewing the developments in mental health law and practice on compulsory detention and care and treatment since the Mental Health (Care and Treatment) (Scotland) Act 2003 came into force.”

An [interim report](#) was published in December 2020 (along with an [executive summary](#)).

A [project timeline provides](#) an indication of how the work of the Review may proceed during 2021 and 2022. It notes that a final report with recommendations is planned for 2022.

A SPICe blog provides more information on developments in relation to mental health law – [Mental health and adults with incapacity law in Scotland – what next?](#) (June 2021).

Key organisations

- [Equality and Human Rights Commission](#)
- [Crown Office and Procurator Fiscal Service](#)
- [Mental Welfare Commission](#)
- [Police Scotland](#)
- [Scottish Government](#)
- [Scottish Mental Health Law Review](#) (John Scott QC)

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29/06/2021

SPICe research specialists are not able to discuss the content of petition briefings with petitioners or other members of the public. However, if you have any comments on any petition briefing you can email us at spice@parliament.scot.

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Published by the Scottish Parliament Information Centre (SPICe), an office of the Scottish Parliamentary Corporate Body, The Scottish Parliament, Edinburgh, EH99 1SP.

Scottish Government submission of 30 June 2021

PE1878/A

This new petition is a direct follow on from PE1786 which was closed on 29 October 2020.

- In our response to PE1786 we outlined the role of the Procurator Fiscal in raising criminal prosecutions and advised that there have been both prosecutions and convictions under s315 of the Act.
- Court proceedings under s315 were taken in respect of 71 charges which were reported to COPFS from 2007-08 to 2019-20. Out of these, 38 charges led to a conviction.
- During the period 2008 to 2020 Police Scotland reported one case to Crown Office Procurator Fiscal Service (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.
- As there is a duty on the Procurator Fiscal to prosecute cases in the public interest, prosecutors take a number of factors into account, including the background and personal circumstances and the risk of further offending.
- 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.
- 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.
- Charges that do not lead to a conviction can be largely down to there being insufficient admissible evidence to proceed with a criminal prosecution.
- 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.

Scottish Ministers 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.