



Law Society
of Scotland

Call for Evidence

Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill

31 January 2020



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Law Committee welcomes the opportunity to consider and respond to the Scottish Parliament's Health & Sport Committee's Call for Evidence in relation to the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill (the Bill). The committee has the following comments to put forward for consideration.

General Comments

The Bill contributes to the aims of the Scottish Government's Equally Safe strategy and follows the 2019 consultation to which we responded.¹

It is essential that those accused of rape or sexual assaults should find themselves facing the consequences of the criminal law. For such prosecutions to be successful, sufficient admissible evidence in accordance with the requirements of Scottish criminal law needs to exist and where appropriate, to be gathered in. Corroboration of the victim's account will frequently be found in the analysis of the forensic samples that were obtained and have subsequently been analysed.

Obtaining these types of samples may well be upsetting for the victims, coming usually close to the time that they have experienced the incident and when they may still be shocked and traumatised. That is not the only consideration as there will be a need too for assessment as to their healthcare needs. Listening to the victim is essential by supporting them while informing them and providing relevant information. They need to be understood and in effect in control of the process while respecting their rights and their dignity. The Bill's Policy Memorandum recognises the trauma that victims of sexual offending may experience in

¹ <https://www.lawscot.org.uk/media/363186/19-05-08-crim-consultation-equally-safe-converted.pdf>

requiring to provide samples where it describes those victims as “[having] suffered a grave violation of their human rights.”²

We welcome and support the commitment of the Scottish Government to minimise unnecessary trauma to these victims in these circumstances. By seeking to address these concerns, we would hope that this will assist in supporting the victims’ recovery and if engagement follows thereafter with the criminal justice system, that engagement.

The policy objective of the Bill is to improve the experience of those people affected by sexual offending where there is a need to use forensic medical services which the Bill defines at section 2(4) of the Bill. That involves placing a clear statutory duty on the health boards to provide forensic medical examinations to victims to address their healthcare needs in a holistic way (which will include both referrals from the police and self-refers where the victim does not elect to report any incident to the police.)

Question 1: What are the key advantages and disadvantages of placing the examination of victims of sexual offences (and harmful sexual behaviour by children under the age of 12) by health boards on a statutory basis?

Standard of service

By placing the examination of victims of sexual offences by health boards on a statutory basis, this has the advantage of setting out clear responsibility for such services. This will include the provision of the examination services along with the retention services relating to samples.

We understand that these services are to be delivered by health boards as set out in the Healthcare Improvement Scotland Standards.³ These standards “outline a national minimum level of service so that local organisations can deliver person-centred, safe and effective health and social care.” A consultation following a pilot on these standards closed in December 2019. There is a need to ensure that the required standards of such services are maintained by the individual health boards which need to be transparent, available for all to refer and subject to robust monitoring and evaluation.

As well as maintaining the delivery of standards within the provision of these services, absent from the Bill seems to be any provision as to ongoing monitoring and reporting of how well the delivery of these statutory functions are being achieved. Consideration as to reporting on progress could include a statutory need to report to the Scottish Parliament within a set period.

Quality of service and practice

² Paragraph 5 of the Bill’s Policy Memorandum

³ http://www.healthcareimprovementscotland.org/our_work/standards_and_guidelines.aspx

The statutory framework should mean that it should be easier to achieve consistency of quality and practice in delivery. What is important for the desired outcomes is that victims should be treated the same no matter where in Scotland they are located. It should not be a postcode lottery.

Co-operation of health boards

Section 11 of the Bill sets out the requirements of co-operation among the health boards regarding the planning and provision of the services for the purpose of securing adequate provision and continuous improvement in delivery. While each statutory body is autonomous, the provision lacks any mandatory aspects. It would be useful to know what the intentions are for reporting on progress and sharing best practice so that as full and as effective cooperation takes place as possible among all health boards.

We understand that the Chief Medical Officer for Scotland has met with all health boards' Chief Executives to commit to the provision of the services specified in the Bill. Accountably for the health boards in delivery of these services must be robust.

Resourcing

It is essential to ensure that the health boards have the means to deliver this service to the required consistent high standard. There would be concerns, for instance, that prioritisation of other services by any health board could delay or hinder the delivery of these important services.

We are also aware that there may be implications regarding timeous access to services in more rural or remote areas. Though there needs to be different approaches taken to local needs and circumstances as highlighted above, each victim should expect to be provided with the same quality of care, irrespective of location.

We note that:

“Each island health board has already demonstrated a strong commitment to the establishment and continuous improvement of their local service. This will provide a solid foundation on which to build a local self-referral service when the provisions of the Bill are implemented.⁴”

Resourcing these areas adequately should remain a priority as indicated.

Victims

The Bill in making these changes to the statutory framework shows that it is the victim who comes first by considering their needs to be followed by the practical considerations of the criminal justice system.

Police stations are far from comfortable environments; they are busy and impersonal no matter how caring and well intentioned the staff involved may be. Her Majesty's Inspectorate of Constabulary in Scotland

⁴ Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill: ICIA <https://www.gov.scot/publications/forensic-medical-services-victims-sexual-offences-scotland-bill-icia/>

Report⁵ was designed to “provide a strategic overview of the forensic medical services provided to adult and child victims of sexual crime, and to give a high-level assessment of these services in terms of their current delivery against national policies and standards.” Recommendation 5 of that Report seems important to us in that it states:

“Police Scotland should work with NHS Boards to urgently identify appropriate healthcare facilities for the forensic medical examination of victims of sexual crime. The use of police premises for the examination of victims should be phased out in favour of healthcare facilities as soon as is practicable.”

Delivery of forensic medical services is a matter for the health boards concerned. Seeking to provide these facilities within the NHS, while not necessarily pleasant, would be an environment with which most will be familiar in accessing other medical services for themselves. Providing that as the standard and acceptable practice across Scotland would help ensure that there is true change focusing on health first and then on any criminal evidential considerations.

Question 2: What are the key benefits of providing forensic examination on a self-referral basis (whereby victims can undergo a forensic medical examination without first having reported the incident to the police)? What problems may arise from this process?

This is important as it recognises that the victims’ health needs should outweigh criminal considerations. Criminal cases can proceed without the complainer though in most cases of rape or sexual offences, it would be hard to envisage cases where this might happen. That means for criminal prosecutions to follow, it will fundamentally need the victim to make a complaint.

There is a small window of opportunity which the Bill recognises where forensic samples can be obtained; thereafter they will be of no evidential use. By allowing a victim to self-refer this allows that opportunity of making a complaint later not to be lost. That seems to be a big step forward in the interests of justice.

Victims react differently to sexual offences. There is not a “type.”

It is the provision of that information and what is contained within it which is so important. It is also how these victims where they chose to self-refer can obtain support to allow them to make informed choices about the best way forward.

Question 3: Are there any issues with the proposal to restrict self-referral to people over 16 years old?

⁵ <https://www.hmics.scot/publications/strategic-overview-provision-forensic-medical-services-victims-sexual-crime>

We understand the reasons why the Bill sets out that only people over 16 years can self-refer. There is a need to ensure that children under 16 are supported where paragraph 29 of the Bill's Policy Memorandum sets out the ongoing work in this direction.

Clarification would be welcome as to the practical significance of paragraph 30 of the Bill's Policy Memorandum. Those under 16 are excluded from the Bill's self-referral provisions so that a child is unable to access self-referral on account of being under 16. If it is considered by the police that a forensic examination should be done, such a child may be able to consent to such examinations themselves if they are judged to be sufficiently mature in terms of the Age of Legal Capacity (Scotland) Act 1991. That allows medical consent decisions to be made if they are considered appropriately mature in the opinion of a medical practitioner.

Question 4: Are there any issues with the health board storing and retaining evidence gathered during self-referred forensic examinations?

There needs to be a distinction made between the samples and the data obtained from them.

Regarding the physical retention of such evidence under section 8 of the Bill, consideration is still ongoing regarding the length of the period before the evidence collected during a forensic medical examination would be destroyed. It should be as soon as reasonably practicable after the making of a request by the person who underwent the examination that the evidence should be destroyed. Alternatively, this would apply where no such request is made after the period specific in Regulations to be laid. Such Regulations are subject to affirmative procedure which is appropriate.

Certain samples may have a shelf life and there is a need to ensure that they can be interrogated when required. Given the ongoing developments in forensic science, a sample in the future may be able to offer information which cannot be obtained at present. Retained samples could then be used to support a future criminal prosecution. These interests need to be balanced between the rights of the State to retain and those of the victim and their privacy in cases where the sample were to reveal personal information which was not relevant to the case in question.

Time scales for retention for such samples are tricky to decide. Cognisance should be taken of experience gained from the recent increase in reporting of such offences and especially in relation to historic sexual offence cases just how long these samples should be retained.

That refers to evidence but not the data. Clarification as to the position regarding the data obtained would be welcomed. Section 9 of the Bill refers to transfer of evidence but the definition of evidence under section 13 of the Bill does not include data. The Data Impact Assessment does not differentiate between the samples and data to be obtained.⁶

⁶ <https://www.gov.scot/publications/forensic-medical-services-victims-sexual-offences-scotland-bill-dpia/>

What is essential is for a robust audit trail to ensure that such evidence as is gathered and kept complies with the rules of criminal evidence. Transfer of samples or analysis of those samples and other personal data is carried out securely and expeditiously, between the health boards and Police Scotland. Continuity of evidence of such personal data or samples must be capable of being relied upon in any criminal trial. Corroboration of each step of the process is essential.

Question 5: Do you have any other comments to make on the Bill?

We have a few further comments:

Training

The Bill introduces changes so that involves learning different ways of working and systems. That requires all involved in these processes to be trained, especially those involved in provision of information at the outset. By providing effective communication and support at the right time, this should change the outcome for the victim in minimising trauma and having a positive as opposed to a negative effect on their recovery.

Paragraph 67 of the Bill's Policy Memorandum indicates that NHS Education Scotland is revising the training of their staff. That is welcome but training needs to include those to whom a sexual offence may be reported at the outset such as the police to ensure that the victims are signposted to the correct resources.

These training needs should include our legal members, whether acting for the Crown or the defence who both may encounter victims at the early stage of disclosure of a sexual offence.

Equality

Equality considerations are paramount. There is clear case law from the European Court on Human Rights that failure to give full protection to people with mental and intellectual disabilities is a breach of their human rights. That position is reinforced with the obligations undertaken by the UK under the UN Convention on the Rights of the Person with Disabilities. There is a need to consider the issue of consent and legal capacity. We had suggested previously that consideration may require to be given when it is necessary to decide on someone's behalf. If so, is that decision being made in that person's best interests?

There is also a need to acknowledge the role too of the Appropriate Adults whose responsibility it is to support vulnerable persons in the police station who may well be involved in having forensic medical examinations carried out.

There is also a need in providing information and support that account is taken of any specific considerations as to the "protected characteristics" under the Equality Act 2010. The neutral drafting of the Bill is supported in recognising that victims may be male or female.



For further information, please contact:

Gillian Mawdsley
Policy Executive
Law Society of Scotland
DD: 0131476 8206
gillianmawdsley@lawscot.org.uk