



Law Society  
of Scotland

# Stage 1 Briefing

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

29 September 2020



## Introduction

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The Law Society of Scotland is the professional body for over 12,000 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 previously responded to the Scottish Parliament's Health and Sport Committee's Call for Evidence on the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill (the Bill).<sup>1</sup> The Committee has also published its Stage 1 Report on the Bill on 7 September 2020.<sup>2</sup>

We have the following comments to put forward for consideration at the Stage 1 debate which is scheduled to take place on Thursday 1 October 2020 that address:

- Evidence in the criminal justice system
- Data Collection
- Consistency of Service Provision
- Self-referral
- Adverse Childhood Experience (ACE) and the vulnerable accused

## General

The Bill's main policy objective<sup>3</sup> is to improve the experience of people who have been affected by sexual crime. The work of the Scottish Government's Victim Taskforce supports this<sup>4</sup> where it was established to improve and ensure the provision of that vital and necessary support, advice and information for victims of crime. Its workstreams include gender-based violence, jointly chaired by Rape Crisis Scotland and Scottish Women's Aid that aims to improve advocacy services for victims of domestic abuse and sexual violence

<sup>1</sup>

[https://yourviews.parliament.scot/health/fmsbill/consultation/view\\_respondent?show\\_all\\_questions=0&sort=submitted&order=ascending&\\_q\\_\\_text=law+society&uuld=623852504](https://yourviews.parliament.scot/health/fmsbill/consultation/view_respondent?show_all_questions=0&sort=submitted&order=ascending&_q__text=law+society&uuld=623852504)

<sup>2</sup> <https://sp-bpr-en-prod-cdnep.azureedge.net/published/HS/2020/9/7/Stage-1-Report-on-the-Forensic-Medical-Services--Victims-of-Sexual-Offences---Scotland--Bill/HSS052020R9.pdf>

<sup>3</sup> Paragraph 6 of the Bill's Policy Memorandum

<sup>4</sup> <https://www.gov.scot/groups/victims-taskforce/>

within the criminal justice system.<sup>5</sup> They are best placed to advise on how that service should be organised and we would stress the importance and timing of that advocacy work in underpinning and helping to achieve the Bill's healthcare objectives.

In order to achieve the Bill's policy objectives, a balance must be achieved of the interacting interests of:

- public law in facilitating and ensuring criminal prosecutions for sexual offences can take place,
- private law in respecting the individual's privacy and autonomy and
- healthcare in ensuring the individual's wellbeing is observed.

Provision of effective information about the system of sample-taking<sup>6</sup> is vital. That must cover its purpose where respect for the autonomy of the individual as the victim is paramount. Clear guidance must be available about "what, why and how" as background regarding their choices about providing any samples.<sup>7</sup> Affording victims the time to reflect and to support their ultimate decision-making, whatever it is, is vital as is promoting their confidence and ability to make these important and the correct decisions for them. Only in that way can the benefits of the system of self-referral proposed under the Bill be fully achieved.

Section 1 of the Bill<sup>8</sup> requires health boards to provide forensic medical examinations to victims. Section 5 (1) of the Bill requires health boards to ensure that an individual's healthcare needs are identified and addressed.

We welcome the approaches as being holistic and wonder if this might be specifically set out on the face of the Bill so that it mentions the need for the treatment of the whole person, taking into account mental and social factors, and not just the forensic examination itself.

## Evidence in the criminal justice system

Section 6 of the Bill sets out the retention process.

We agree with the Stage 1 Report<sup>9</sup> which calls on the Scottish Government to set out what is to be stored by the health boards. It is suggested that this should be specifically covered by regulations, in due course. Certainly, the time for retention should be set out by regulations and advise as that period given by the relevant experts, bearing in mind advances in forensic science and its potential in due course.

<sup>5</sup> <https://protect-eu.mimecast.com/s/912iCk5Mghw6Vns8O0S8?domain=parliament.scot>

<sup>6</sup> Section 4(2) of the Bill

<sup>7</sup> Paragraph 51 of the Stage 1 Report <https://sp-bpr-en-prod-cdnep.azureedge.net/published/HS/2020/9/7/Stage-1-Report-on-the-Forensic-Medical-Services--Victims-of-Sexual-Offences---Scotland--Bill/HSS052020R9.pdf>

<sup>8</sup> <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/forensic-medical-services-victims-of-sexual-offences-scotland-bill/introduced/forensic-medical-services-victims-of-sexual-assault-bill-as-introduced.pdf>

<sup>9</sup> Paragraph 111 of the Bill <https://sp-bpr-en-prod-cdnep.azureedge.net/published/HS/2020/9/7/Stage-1-Report-on-the-Forensic-Medical-Services--Victims-of-Sexual-Offences---Scotland--Bill/HSS052020R9.pdf>

However, in consideration of what is seized by way of evidential samples, we suggest that there must be a necessary degree of latitude. What may be appropriate and relevant in one case may not be the same for all cases as each case/individual is different.

It may be a better approach for that sort of clarity to be included within the protocol to be issued to all health boards and to form part of the necessary training processes for all organisations. All who are empowered to seize evidence including any relevant articles for evidential purposes such as clothing should be aware of section 6(2) of the Bill that outlines the purpose of retention of any samples and/or physical items. That is “the preservation of the evidence for use in connection with (a) any investigation of the incident which gave rise to the need for the examination, and (b) any proceedings in relation to the incident.”

Certainty a broad-brush approach is to be avoided where every possible item is seized; even alone from a logistical perspective of storage which subject to an actual timeframe being set out may be for some time. Effective scrutiny is needed to ensure that there is an evidential purpose and reason for each item to be seized. Where required advice can be sought from the prosecution service, namely the Crown Office and Procurator Fiscal Service who are best placed to advise. They are ultimately responsible for any case proceeding in the criminal forum and where cases cannot proceed through any lack of admissible evidence.

We have highlighted the importance of a robust audit trail to ensure the collection and storage of evidence complies with the ‘best evidence’ rules in criminal law. That is required to maintain the continuity of evidence from its collection through to the retention process.

We welcome that reference to a national protocol being drawn up that is “to provide clarity to health boards about what evidence should be taken.” It may be useful for the legal profession to have sight of that draft in due course.<sup>10</sup>

## Data Collection

We continue to have concerns over the ambiguity in the Bill as to how data is processed, stored and transferred. There needs to be clarity on what data and evidence is taken by health boards, alongside a robust audit trail to ensure evidence gathered and kept complies with the rules of criminal evidence.

The Bill needs to differentiate between personal data, samples taken, and the data obtained from those samples. Account too should be taken of paragraph 144 of the Stage 1 Report<sup>11</sup> outlines the need to address children's rights in relation to the ownership of data to ensure a child's best interests are at the heart of sharing personal, private and sensitive information with alleged perpetrators.

<sup>10</sup> [https://www.parliament.scot/S5\\_HealthandSportCommittee/Reports/20200925\\_Ltr\\_IN\\_from\\_CabSecHS\\_response\\_to\\_FMS\\_Stage\\_1\\_Report.pdf](https://www.parliament.scot/S5_HealthandSportCommittee/Reports/20200925_Ltr_IN_from_CabSecHS_response_to_FMS_Stage_1_Report.pdf)

<sup>11</sup> <https://sp-bpr-en-prod-cdnep.azureedge.net/published/HS/2020/9/7/Stage-1-Report-on-the-Forensic-Medical-Services--Victims-of-Sexual-Offences---Scotland--Bill/HSS052020R9.pdf>

We welcome the Cabinet Secretary's acceptance that a revised Data Protection Impact Assessment (DIPA)<sup>12</sup> addressing each of the issues needs to be undertaken.<sup>13</sup> Timing for scrutiny of the revised DPIA will be important in assessing of Stage 2 amendments may be required.

## Consistency of service provision

To support the Bill, a 24-hour, 7-day, forensic medical examination service must be available to support, and provide individuals with choices when sexual offences have allegedly been committed. Any variation from urban to rural communities to the forensic examination service must be avoided; it should not be postcode driven, respecting that travel, timescales for reporting and numbers of population will affect the processes outside the main cities. But these factors are known now, and planning can take place to avoid inconsistencies.

To assist that role, effective monitoring and evaluation must put in place along with the issue of guidance and training to ensure that any variation in the interpretation of the legislation is minimised.<sup>14</sup> This goes beyond the health boards and includes those involved in any potential prosecution processes to be followed.<sup>15</sup>

We are pleased to note that the Cabinet Secretary has accepted that amendments will be brought forward at Stage 2 which we suggested should include an annual report to be produced by NHS Scotland. This would set out what actions are in place to ensure the forensic medical examinations processes are being monitored and evaluated, what systems are in place to drive forward identified improvements, and how the service will ensure the provisions of the Bill are consistently applied across the country. Sharing of experiences, practices and learning from across NHS Boards must be put in place to benefit from best practice.

We also welcome the response to paragraph 61 of the Stage 1 Report<sup>16</sup> regarding work in progress through the CMO Taskforce Access to Services Task and Finish Group. It recognises the need for "consistent, accessible information on the internet, printed literature and a national awareness raising campaign." It seems important for the legal profession who are responsible for supporting victims too to be aware of the development and sight of the information materials/content, including web content in due course.

<sup>12</sup> Paragraph 131 of the Stage 1 report <https://sp-bpr-en-prod-cdnep.azureedge.net/published/HS/2020/9/7/Stage-1-Report-on-the-Forensic-Medical-Services--Victims-of-Sexual-Offences---Scotland--Bill/HSS052020R9.pdf>

<sup>13</sup> [https://www.parliament.scot/S5\\_HealthandSportCommittee/Reports/20200925\\_Ltr\\_IN\\_from\\_CabSecHS\\_response\\_to\\_FMS\\_Stage\\_1\\_Report.pdf](https://www.parliament.scot/S5_HealthandSportCommittee/Reports/20200925_Ltr_IN_from_CabSecHS_response_to_FMS_Stage_1_Report.pdf)

<sup>14</sup> Dr Anne McLellan Consultant in Sexual and Reproductive Health at NHS Lanarkshire,

<sup>15</sup> Paragraph 61 of the Stage 1 Report.

<sup>16</sup> [https://www.parliament.scot/S5\\_HealthandSportCommittee/Reports/20200925\\_Ltr\\_IN\\_from\\_CabSecHS\\_response\\_to\\_FMS\\_Stage\\_1\\_Report.pdf](https://www.parliament.scot/S5_HealthandSportCommittee/Reports/20200925_Ltr_IN_from_CabSecHS_response_to_FMS_Stage_1_Report.pdf)

## Self-referral

We support that the views that the age limit of self-referral needs to be kept under review.<sup>17</sup> Affording the ability to change this by way of regulatory making procedure seems a sensible approach. We suggest that the indication of timescale as to when and how this would be assessed should be indicated. The standard affirmative regulation making procedure will allow the Committee to consider appropriately before making any changes.

## The role of Adverse Childhood Experiences (ACE) and the vulnerable accused person

The incidence of ACE<sup>18</sup> where children grow “up with [ACE] such as abuse, neglect, community violence, homelessness or growing up in a household where adults are experiencing mental health issues or harmful alcohol or drug use, can have a long-lasting effect on people's lives.”<sup>19</sup> It is becoming increasingly more recognised with regard to perpetrators within the Scottish criminal justice system.

We support the work of Scottish Government's response regarding the increasing need to take account of the fact that perpetrators of abuse may be former victims of abuse. Equality means that they should be subject to the same ethical and professional standards of examinations as their victims.

We highlight that many of the perpetrators may well fall into the category of the “vulnerable” where it is important to ensure that they understand, can obtain advice with appropriate representation and participate effectively within the criminal justice system at all stages of the processes including at the police station. In our Report published in April 2019, we highlighted the need for greater protections to be developed for vulnerable people accused of criminal offences where “everyone accused of a crime is entitled to respect for their human rights but if vulnerabilities are not identified early on there is a risk people will not be treated consistently and fairly and can cause delay in the justice system.”<sup>20</sup>

That seems very important in ensuring fairness for all and we would suggest that regard is had to that category of perpetrator and the need for guidance and training to safeguard their interests.

<sup>17</sup> Paragraph 4 of the Stage 1 Report

<sup>18</sup> <https://www.cdc.gov/vitalsigns/aces/index.html>

<sup>19</sup> <https://www.gov.scot/publications/adverse-childhood-experiences-aces/>

<sup>20</sup> <https://www.lawscot.org.uk/news-and-events/law-society-news/greater-consistency-needed-for-vulnerable-accused-people/>



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