



Law Society
of Scotland

Scottish Parliament Stage 3 Briefing

8 December 2020



Introduction

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 has 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 Bill¹).

Now the Bill has reached Stage 3, there are a few areas on which we seek to comment ahead of the Stage 3 debate on the Bill² which is scheduled to take place on Thursday 10 December 2020. These include:

- The principles of the Bill
- Lowering the age for self-referral
- Role of Adverse Childhood Effect³ /Vulnerable Accused Person
- Collection of Evidence
- Victims

General

We support the main policy objective of the Bill⁴ to improve the experience of people who have been affected by sexual crime. The work of the Scottish Government's Victim Taskforce supports this important objective, established to improve and ensure the provision of vital and necessary support, advice and information for victims of crime. Its workstreams include gender-based

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https://yourviews.parliament.scot/health/fmsbill/consultation/view_respondent?show_all_questions=0&sort=submitted&order=ascending&_q__text=law+society&uuld=623852504

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https://yourviews.parliament.scot/health/fmsbill/consultation/view_respondent?show_all_questions=0&sort=submitted&order=ascending&_q__text=law+society&uuld=623852504

3 <http://www.healthscotland.scot/population-groups/children/adverse-childhood-experiences-aces/overview-of-aces>

4 Paragraph 6 of the Bill's Policy Memorandum

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.⁵

As the Bill's reaches the final stage of its parliamentary process, it is important that in achieving its policy objectives, a balance must be maintained of the interaction of the various interests which include:

- 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.

What the Bill does highlight is importance of the process once it comes into force for training which includes the legal sector for ensuring that all are aware of its provisions and the importance in supporting them.

Lowering the age of self-referral to 13

The question of the age at which self-referral should take place has been the subject of much debate, especially during the Stage 2 debate on 10 November 2020.⁶ The Bill now provides for affirmative regulations to be made under section 2 of the Bill in due course if it is decided that the age for self-referral should be lowered. The Cabinet Secretary for Health and Sport in seeking that amendment at Stage 2 advised that:

"The function of the proposed new delegated power is to allow a change, in the future, of the minimum age for access to self-referral from any age below the age of 16—from 13 to 15 years old—and any age above the age of 16 up to 80."

She committed to appropriate consultation and a further children's rights and wellbeing impact assessment to be undertaken at that time.

We support the position to assess and consider any further change in due course given the bigger policy interests in children which are underway at present that include:

- the clinical pathway for children and young people with the provision of on-going care and support for children and families to aid recovery
- the current Consultation on the revised National Guidance for Child Protection in Scotland⁷
- the proposed UNCRC (Incorporation) (Scotland) Bill.

⁵ <https://www.gov.scot/groups/victims-taskforce/>

⁶ <https://www.parliament.scot/parliamentarybusiness/report.aspx?r=12930&mode=pdf>

⁷ <https://consult.gov.scot/child-protection/consultation-on-the-revised-national-guidance/>

Though not necessarily to be included in any actual legislation, we wonder whether it may be appropriate to obtain a commitment from Scottish Government to report on progress following the Bill's implementation regarding the review of age of self-referral and that report to follow within a set period.

That fully endorses the considered assessment that now is not the time to change the age of self-referral. However, it would support not only having the door open. It would strengthen the issue of “perhaps it will happen in the very near future—but it is certainly a matter for the future.”

This ties in with the wider assertion that there was an ongoing timescale to frame consideration of the continuing support of young victims in supporting the NHS in this important work.

Role of Adverse Childhood Effect⁸ /Vulnerable Accused Person

We note the Scottish Government's amendment at section 9a of the Bill at Stage 3 that The Patient Rights (Scotland) Act 2011 should be amended.

This ensures regard is had to the importance of providing health care in a way that seeks to avoid re-traumatisation and is otherwise trauma informed. This is a central blank of the Victims Taskforce's work above which is focused on trauma and its effects and the effect on the victim.

We welcome the approaches as being holistic and is now set out specifically on the face of the Bill respecting the need for the treatment of the whole person, considering mental and social factors, and not just the forensic examination itself.

We are now all increasingly aware of the impact of Adverse Childhood Experience (ACE)⁹ and the vulnerable accused person in relation to stressful events in early life such as being the victim of abuse (physical, sexual and/or emotional). That has lifelong impacts on health and behaviour which are all relevant to us in society. The incidence of ACE 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.”¹⁰

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 the former victims of abuse.

We have stressed before the need for continuing need for equality so that all are subject to the same ethical and professional standards of examinations as their victims. Many 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

8 <http://www.healthscotland.scot/population-groups/children/adverse-childhood-experiences-aces/overview-of-aces>

9 <http://www.healthscotland.scot/population-groups/children/adverse-childhood-experiences-aces/overview-of-aces>

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

processes including at the police station. The Society's Report published in April 2019¹¹ 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."

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

That need for training applies across the Bill and all its sections not only the medical profession but also all section of the legal community too.

Evidence

There has been much debate over evidence gathering with amendments made at Stage 2 of the Bill. Section 12 A gives a non-exhaustive list of the types of aspects to comprise evidence. In particular, the description of "notes or other records" makes it clear that such notes can record matters that concern matters beyond the victim's physical condition, such as their psychological state.

Evidence that is collected may transfer to the police only when needed for the purposes of investigation or prosecution of the incident. That means records containing notes of wholly unconnected health information will not be considered as evidence. They are not to be subject to transfer or destruction.

Evidence is to be stored even where a victim decides not to proceed with a full physical examination, allowing the health board to store initial non-intimate samples to be taken before a full physical examination is performed.

With these changes, we continue to stress 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 maintains the continuity of evidence from its collection through to the retention process.

With the reference to a national protocol being drawn up that is "to provide clarity to health boards about what evidence should be taken" we repeat that it would be useful for the legal profession to have sight of that draft in due course.¹²

Victims

¹¹ <https://www.gov.scot/publications/adverse-childhood-experiences-aces/20><https://www.lawscot.org.uk/news-and-events/law-society-news/greater-consistency-needed-for-vulnerable-accused-people/>

¹² https://www.parliament.scot/S5_HealthandSportCommittee/Reports/20200925_Ltr_IN_from_CabSecHS_response_to_FMS_Stage_1_Report.

Where the person is underage: We note that amendments have been included at section 9A of the Bill to include where a forensic medical examination has been carried out on an under-age person.

While we understand the insertion of these provision, how often are these circumstances expected to arise. Surely there is a need for the health boards to be concerned to carry out robust and appropriate scrutiny to ascertain the relevant age of any person undergoing forensic medical examination?

Victims Code: We understand and welcome the reference to the codification of the rights of the victim regarding sight of the Victims' Code for Scotland and information relating to their rights of victims plus contact to refer them to the providers of victim support services.

We have a few observations:

- Where the person requests a referral, the health board must, subject to the views of the person (a) disclose the person's details to such providers of victim support services as the authority considers appropriate to the person's needs or (b) provide the person with the name, address and telephone number of such providers of victim support services. How is this to work in practice and the views of the person to be considered.
- Where a person requests a copy of the Victims' Code for Scotland and the person does not understand or speak English, the person may request that the copy provided be a translation in a language that the person understands. This is about equalities – how long would it in effect take to obtain a translation? Furthermore, it is not just the English language as how is consideration to be given to those with additional support needs or other requiring other forms of information dissemination?

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