Consultation Response

Self– referral forensic medical services- retention period for evidence: consultation

28 April 2021
Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

The Forensic Medical Services (Victims of Sexual Offences) (Scotland) Act 2021 (FMS)\(^1\) passed the Scottish Parliament on 10 December 2020 and received Royal Assent on 20 January 2021.

Our Criminal Law Committee welcomes the opportunity to consider and respond to the Scottish Government consultation: Self-referral forensic medical services\(^2\) (the consultation). This seeks views on the appropriate retention period for evidence collected during self-referral forensic medical services in connection with implementation of the FMS.

The committee has the following comments to put forward for consideration.

General

The objectives of the FMS Act were well understood during the passage of the FMS in that it places a duty on health boards to give victims of all ages access to trauma-informed, person-centred forensic medical services. For adults aged 16 or over, it will enable a health board to retain certain evidence where the victim is undecided about reporting to the police.

The consultation focuses on a relatively narrow but important issue which relates to the time-period for the retention period of evidence collected under the self-referral forensic medical services. The time-period is to be outlined in secondary legislation. We consider that this approach is appropriate as reflected in the questions below as this provides:

- Certainty, removing dubiety. It should be cross-referenced in the information produced by the various justice and health sectors organisations who interact with prospective complainers in their respective roles.
- Future proofing allowing for change if the evidence supports a longer or shorter period. That also bears in mind possible advances in forensic science and that potential in due course as “developing science.”

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We are interested in how the success or otherwise as to the retention period being fixed as decided following the consultation will be monitored and evaluated. We suggest that should be specifically detailed as part of the response to the consultation.

We respond to the consultation questions as follows:

**Consultation Questions**

**Question 1: Do you agree with the proposal that the retention period for evidence collected in the course of self-referral forensic medical services be 26 months (2 years, 2 months)?**

Before turning to the specific question over the selection of the time period, we have certain observations to put forward.

Longitude: Affording a degree of latitude is essential in allowing a complaint to be made. As we reflected previously, “what may be appropriate and relevant in one case may not be the same for all cases as each case/individual is different.”

Clarity: We recognised that clarity had to be included within the protocol to be developed to apply to all health boards.

Training/Communication: That needs to form part of the necessary training processes for all organisations. Training has not been highlighted in the consultation but is essential, irrespective of what retention period is selected.

Communicating that clearly to victims too at the time of their self-referral will need careful handling as it may not necessarily be understood at that time. It is vital when reflecting later about possibly making any complaint. Just how that is handled seems to us to be important as it needs to be balanced in its approach. It should not seek to actively encourage but ensure rights are understood and know as well as the method of taking this action. Similarly, those empowered to seize evidence including any relevant articles for evidential purposes such as clothing should be aware of FMS and its provisions understanding the purpose of retention of any samples and/or physical items.

Compliance with evidential standards: What is also important too is that “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.

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We note that there is reference to the development of a national protocol being drawn up and to a Self-Referral Subgroup of the CMO Taskforce developing the necessary resources to implement the provisions of the FMS Act as they relate to self-referral. The legal profession has an important role in reviewing the draft protocol and would query if and how that membership and feedback is to be secured.\(^5\)

Time period: We have no specific observation to make on the selection of 26 months for retention. We note that information was obtained from outside Scotland which is relevant where the view was that there was no consistency of approach. We rely on the experts and evidence base outlined in the consultation. If that is the recommended period, and as long as it can be changed if necessary then that period seems acceptable.

We agree with the observation in Paragraph 15 of the consultation which states that the retention period should be proportionate.

Proportionate in this context seems to reflect the needs of those who should be given a reasonable amount of time to decide if they want to make a police report and practical in that health boards require to continue holding evidence which comes with a cost and the need for space.

We suggest what is equally important is the role of emerging science. Though we note the scientific perspective presumably relating to the viability of any samples retained has been offered by the Faculty of Forensic and Legal Medicine in indicating 2 years, what might have helped would be when and how this specific aspect would be reviewed and monitored to ensure that this period of 26 months remains appropriate.

We consider that there needs to be regular reporting and review of that period and this should be set out specifically and add detail to “the Scottish Government will keep the retention period under close review.”

Question 2: If you indicated in your response to question 1 that the retention period should be shorter than 26 months, what should it be?

We have no comment.

Question 3: If you indicated in your response to question 1 that the retention period should be longer than 26 months, what should it be?

We have no comment but would refer to our response to Question 1.

\(^5\) Paragraph 19 of the consultation
Question 4: Do you have any views on potential impacts of the proposals in this paper, not sufficiently covered the existing impact assessments, on child rights and wellbeing, data protection, equality, socio-economic equality (the Fairer Scotland Duty), people in rural or island communities, or human rights?

We do consider how information about the self-referral process is disseminated to those representatives of the "protected characteristics" is going to be very important.
For further information, please contact:

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