

This document relates to the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 November 2019

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

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## Policy Memorandum

### Introduction

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill, introduced in the Scottish Parliament on 26 November 2019.
2. The following other accompanying documents are published separately:
  - Explanatory Notes (SP Bill 60–EN);
  - a Financial Memorandum (SP Bill 60–FM);
  - statements on legislative competence by the Presiding Officer and the Scottish Government (SP Bill 60–LC).
3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government's policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

### Terminology

4. A glossary of terms used in this Memorandum (including “forensic medical examination” and “victim”) is provided at the end of the document.

This document relates to the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 November 2019

## Policy Objectives: Overview

5. Rape, sexual assault or child sexual abuse are very traumatic experiences for the person affected (and also for those around them) and victims of these sexual offences have suffered a grave violation of their human rights. The Scottish Government is committed to doing all that it can to help improve the experiences of victims of sexual crime. The Scottish Government considers that this can help to minimise unnecessary trauma and can have a positive effect on victims' recovery and on their engagement with any subsequent justice process.

6. The main policy objective of the Bill is to improve the experience, in relation to forensic medical services, of people who have been affected by sexual crime. It does this by providing a clear statutory duty for health boards to provide forensic medical examinations to victims and to ensure that an individual's healthcare needs are addressed in a holistic way in the context of any such examination (or where such an examination is not proceeded with). As well as placing a duty on health boards to provide forensic medical examinations when a victim is referred for such an examination by the police, the Bill allows victims to "self-refer". Self-referral means that a victim can request a forensic medical examination without having reported an incident to the police. The Bill provides a statutory framework for the retention by health boards of samples obtained during a forensic medical examination, which may support any future criminal investigation or prosecution. In self-referral cases, this allows the victim time to decide whether to make a police report.

7. The statutory duties imposed by the Bill also put beyond any doubt that the responsibility for the delivery and continuous improvement of these services rests with health boards rather than the police.

8. The Bill therefore empowers victims, giving them greater choice which may positively influence their decision to report the crime to police and encouraging those who may be reluctant to make a police report to access appropriate NHS services (for example, sexual health testing and emergency contraception). The Bill contributes to the national outcome that human rights are respected, protected and fulfilled<sup>1</sup>. The Bill also contributes to the aims of the Scottish Government's Equally Safe strategy,

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<sup>1</sup> <https://nationalperformance.gov.scot/>

This document relates to the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 November 2019

which provides a framework to eradicate all forms of violence against women and girls in Scotland, and which includes a commitment to improve services for victims of sexual assault where a forensic medical examination is required<sup>2</sup>.

## Background

### Reporting of sexual crime

9. In 2018-19 there were 13,547 sexual crimes recorded by the police in Scotland<sup>3</sup>, including 2,426 for rape and attempted rape and 5,123 related to sexual assault. The Scottish Crime and Justice Survey 2017/18<sup>4</sup> found that sexual offences are widely under reported, with only 23% of those who had experienced forced sexual intercourse<sup>5</sup> since the age of 16 saying the police came to know about it. Of those respondents who had experienced forced sexual intercourse since the age of 16, 56% said their partner had assaulted them and 14% said the offender(s) was someone they had never seen before. Evidence also confirms that the most common reason for not telling the police was fear of making matters worse (38%).

### Forensic medical services

10. In the context of sexual offences, the primary aim of a forensic medical examination is to assess the healthcare needs of the victim and to capture any forensic evidence of the alleged assault (such as DNA), which may evidence that intimate contact has taken place and be used to support

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<sup>2</sup> <https://www.gov.scot/publications/equally-safe-delivery-plan-scotlands-strategy-prevent-violence-against-women/>

<sup>3</sup> <https://www.gov.scot/publications/recorded-crime-scotland-2018-19/>

<sup>4</sup> <https://www.gov.scot/binaries/content/documents/govscot/publications/statistics/2019/03/scottish-crime-justice-survey-2017-18-main-findings/documents/scottish-crime-justice-survey-2017-18-main-findings/scottish-crime-justice-survey-2017-18-main-findings/govscot%3Adocument/scottish-crime-justice-survey-2017-18-main-findings.pdf>

<sup>5</sup> The term “forced sexual intercourse” is used in the SCJS rather than “rape” to provide more consistent and accurate figures on respondents’ experiences. Descriptive behaviours are used in the survey to improve cognitive consistency and clarity and thereby reduce the potential for bias emerging where respondents interpret questions differently.

This document relates to the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 November 2019

any subsequent criminal investigation. A forensic medical examination is currently carried out by a doctor who has had specific training in sexual offence examinations<sup>6</sup>. Additional evidence can include, for example, the presence of injuries such as bruises or markings which may be visible on the body and be consistent with the use of force by the alleged assailant or physical resistance by the victim. It is important to emphasise however, that rape and sexual assault, and child sexual abuse, are crimes in Scots law even where no force is used or where there is no evidence of a physical struggle.

11. Due to the nature of the evidence which is often recovered in these types of cases, forensic medical examinations may be particularly uncomfortable and upsetting for the victim and the proximity of the examination to the offence may amplify this<sup>7</sup>. It is therefore imperative that these services take a trauma-informed approach and always put an individual's needs first, supporting victims' decision making wherever appropriate. Respecting someone's dignity and building trust are essential to empowering them to have control over the decisions which affect them. This can help to minimise unnecessary trauma and can have a positive effect on an individual's health, wellbeing and recovery. It can also help to support positive engagement with any subsequent criminal justice process.

## **Delivery of forensic medical services**

12. Prior to the creation of the Police Service of Scotland, forensic medical services for victims of sexual offences were seen as a distinct policing and criminal justice function, delivered by police surgeons contracted by each of the eight former police forces. Following the creation of a single police service in 2013, the vast majority of healthcare and forensic medical services for people in police care transferred to the NHS under a non-binding Memorandum of Understanding (MoU)<sup>8</sup>.

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<sup>6</sup> Paragraph 70 describes a new nurse Sexual Offence Examiner Test of Change.

<sup>7</sup> There is a seven day forensic capture window as further explained in the terminology guide at the end of this Policy Memorandum.

<sup>8</sup> <https://www.policecare.scot.nhs.uk/wp-content/uploads/2015/03/Police-Healthcare-Forensic-Medical-Services-MoU-Final-v1.pdf>

This document relates to the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 November 2019

13. However, care for victims often continued to be viewed through a justice lens based on the requirement to gather evidence for any future police investigation or prosecution and because until recently, in some areas, these examinations took place in a police rather than a healthcare setting. The Scottish Government considers that a victim's healthcare needs should come first and that to enable this to happen, responsibility for service delivery must clearly rest with health boards. How these services should be delivered by health boards is set out in the December 2017 Healthcare Improvement Scotland (HIS) Standards,<sup>9</sup> which have been developed to ensure a consistent approach and to reinforce the high-quality care anyone should expect.

## **Her Majesty's Inspectorate of Constabulary in Scotland Report**

14. Following feedback from service providers and people with lived experience of sexual crime about the quality and consistency of forensic medical and healthcare services, Her Majesty's Inspectorate of Constabulary in Scotland (HMICS) undertook to carry out a strategic review to help inform future scrutiny of this area. In March 2017, HMICS published its report<sup>10</sup> which contained 10 recommendations for improvement. These included:

- Recommendation 1: that the Scottish Government should review the legal basis for the current agreement between Police Scotland, the Scottish Police Authority and NHS Scotland to deliver healthcare and forensic medical services. This review should inform the nature and need for any refreshed national MoU between the parties; and
- Recommendation 7: that the Scottish Government should work with relevant stakeholders and professional bodies, including NHS Scotland, Police Scotland and the Crown Office and Procurator Fiscal Service to develop self-referral services for the victims of

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<sup>9</sup>[http://www.healthcareimprovementscotland.org/our\\_work/standards\\_and\\_guidelines/stnds/sexual\\_assault\\_services.aspx](http://www.healthcareimprovementscotland.org/our_work/standards_and_guidelines/stnds/sexual_assault_services.aspx)

<sup>10</sup><https://www.hmics.scot/publications/strategic-overview-provision-forensic-medical-services-victims-sexual-crime>. See also the subsequent progress review: <https://www.hmics.scot/publications/hmics-progress-review-provision-forensic-medical-services-victims-sexual-crime>

This document relates to the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 November 2019

sexual crime. This should clarify the legal position for obtaining and retaining forensic samples in the absence of a report to the police and support formal guidance for NHS Boards and Police Scotland.

## **Scottish Government response to the HMICS report**

15. In March 2017, the Chief Medical Officer for Scotland, Dr Catherine Calderwood, was asked by the Scottish Ministers to chair a Taskforce to provide national leadership for the improvement of healthcare and forensic medical examination and healthcare services for adults, children and young people who have experienced rape, sexual assault or child sexual abuse<sup>11</sup> (CMO Taskforce).

16. In order to deliver against the HMICS recommendations under its remit, in October 2017, the Chief Medical Officer published a five-year high level work plan which set out a clear vision and improvement plan across a range of issues including workforce, premises, data, IT, national guidance and legislation<sup>12</sup>. Each of these strands of work is led by a sub-group and expert groups feed in to those on specific areas of work as required. The work of the CMO Taskforce and its sub-groups is coordinated and managed by a team of dedicated Scottish Government staff.

17. To support this programme of work, the Scottish Government has committed £8.5 million over the period 2018 to 2021. This funding is being used to: develop the workforce both in terms of increased capacity and improved skills and competency; to improve the physical environment; to purchase equipment and to support health boards to implement the HIS Standards.

18. As set out in the 2017 to 2018 Programme for Government (PfG)<sup>13</sup>, making improvements in this area is a key Ministerial priority. The 2018 to

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<sup>11</sup> <https://www.gov.scot/groups/taskforce-to-improve-services-for-rape-and-sexual-assault-victims/>

<sup>12</sup> <https://www.gov.scot/publications/rape-and-sexual-assault-victims-taskforce-high-level-work-plan/>

<sup>13</sup>

<https://www.gov.scot/binaries/content/documents/govscot/publications/corporate-report/2017/09/nation-ambition-governments-programme-scotland->

This document relates to the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 November 2019

2019 PFG<sup>14</sup> made a specific commitment to consult on proposals for legislation and the 2019 to 2020 PFG<sup>15</sup> confirmed the Scottish Government's intention to introduce a Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill. Broadly, the provisions of the Bill align to and underpin the work of the CMO Taskforce, focussing on the victims of sexual offences specifically. In particular, the Bill will wholly deliver recommendation 1 from the HMICS report in respect of victims of sexual offences by clarifying the legal basis for health boards to deliver police referral services<sup>16</sup> and wholly deliver recommendation 7 by creating a new duty in relation to services for people who chose not to report to the police or are undecided.

19. Further information about the wider work of the Taskforce is provided below (including a list of the remaining recommendations from the HMICS report and a brief summary of CMO Taskforce action in relation to those recommendations).

## Police Objectives In More Detail

### **Robust legal basis for service delivery**

20. The Scottish Government believes that important public services, such as forensic medical services for victims of sexual offences, should be underpinned by a clear legal footing. This is important so that service providers know what is expected of them and service users know what they are entitled to. The Scottish Government expects that the Bill will support improvements in service delivery by putting the responsibilities of health boards beyond doubt. The drafting approach adopted is to create a “freestanding” Bill written in as modern and plain language as possible, rather than insert provisions into the National Health Service (Scotland) Act

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2017-18/documents/00524214-pdf/00524214-pdf/govscot%3Adocument/00524214.pdf

<sup>14</sup> <https://www.gov.scot/publications/delivering-today-investing-tomorrow-governments-programme-scotland-2018-19/>

<sup>15</sup> <https://www.gov.scot/publications/protecting-scotlands-future-governments-programme-scotland-2019-20/>

<sup>16</sup> The Bill does not cover all services provided under the MoU (see paragraphs 57 to 58 below with regard to suspects) and therefore the MoU will continue to apply for wider forensic medical services.

This document relates to the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 November 2019

1978<sup>17</sup>. The Bill will sit alongside existing legislation applicable to the police and local authorities and, by making health boards' legal position clearer, should further support multi-agency working.

### **Extension of access to self-referral**

21. A forensic medical examination might be important in providing information to help the police investigate a crime when a complaint of a sexual offence is made. Evidence gathered as part of this process can be significant in any future criminal proceedings. However, in addition to the requirements to gather evidence, the utmost priority is to ensure that anyone who has been the victim of rape or sexual assault can access timely healthcare support in a person centred environment and be supported by an appropriately trained and trauma-informed workforce. Depending on what has happened to an individual and when, if it is appropriate, they should be offered a forensic medical examination as part of that healthcare response. The Scottish Government is clear that access to a forensic medical examination, wider healthcare interventions and support should be available whether or not the victim has reported, or is unsure about reporting the crime to the police. The Bill confers new statutory duties on health boards to provide this service.

22. In the days immediately following a rape or sexual assault, a victim may be undecided about making a police report. Some victims may fear making a police report and this may deter them from accessing forensic medical services and any healthcare they may need. Generally, forensic medical examinations must take place within seven days of the offence.

23. A key aspect of the Bill is to make “self-referral” arrangements available across Scotland so that a victim can access healthcare and request a forensic medical examination without first making a report to the police. At present, to access a forensic medical examination in most health board areas in Scotland, a victim must first report the offence to the police.

24. Access to self-referral gives victims more choice and control which is very important in the aftermath of a rape or sexual assault which will have

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<sup>17</sup> Appropriate consequential modifications are made to the “1978 Act”, and the Scottish Government will consider if further technical amendments might be required at Stage 2.



This document relates to the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 November 2019

deprived them of their human rights. Evidence from established self-referral services across the UK is that some victims may feel ready to make a police report in the days, weeks or months following the assault, once they have had time to talk to someone they trust such as family, friends or advocacy and support services. Consistent access to self-referral services should therefore help to encourage people to access healthcare and will enable health boards to retain potentially crucial evidence to support any future police investigation if the victim decides to report.

25. The Bill requires all victims who are considering having a forensic medical examination to be provided with and have information explained to them about the process, including, where a victim self-refers, the purposes for which samples have been retained by health boards, and for how long. The Bill gives victims who self-refer an appropriate degree of control over their samples and any other property held by health boards. That includes the ability of a victim who has self-referred and had evidence stored by the health board to make a request that such evidence is destroyed, as well as the opportunity to request return of stored items belonging to them. The duty placed on health boards to offer a self-referral service will become enshrined in legislation for the first time, offering clarity to both victims and to the health boards that support them. This will be a new service for most health boards, although forms of it are currently delivered by NHS Greater Glasgow and Clyde<sup>18</sup> and NHS Tayside<sup>19</sup>. The Bill supports and underpins the Scottish Government's vision of consistent, person-centred, trauma-informed healthcare and forensic medical services and access to recovery for anyone who has experienced rape or sexual assault, or child sexual abuse, in Scotland. The Bill's objectives are secured if a victim accesses healthcare, even if for one reason or another they do not undergo forensic medical examination. It is important that victims feel able to access healthcare, and to report sexual offending to police where that is their wish, even where it has not been possible to capture forensic evidence.

## **Persons able to access self-referral**

26. Further to the policy objectives outlined above, the Bill gives due regard to what extent children and young people and vulnerable adults should be able to access self-referral. Often the abuse of vulnerable

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<sup>18</sup> <http://archway.sandyford.org/>

<sup>19</sup> <https://www.wrasac.org.uk/>

This document relates to the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 November 2019

people (whether children or adults) will not come to the authorities' attention until sometime after the seven day forensic capture window has closed. Historic abuse cases, for example, suggest that it may be years into adulthood before a victim of child sexual abuse feels able to disclose the offences against them. In these cases, forensic evidence such as DNA is unlikely to be present and a forensic medical examination is unlikely to take place.

27. The Scottish Government wants every child and young person in Scotland to develop mutually respectful, responsible and confident relationships with other children, young people and adults. This is part of the Scottish Government's wider ambition in making Scotland the best place for children in which to live and grow up. All children and young people have the right to be cared for and protected from harm and abuse and to grow up in a safe environment in which their rights are respected and their needs met. Children and young people should get the help they need, when they need it and their safety is always paramount.

28. If a child under 16 tells a professional that they have experienced sexual abuse, that professional is duty bound to report what has happened to the relevant authorities in accordance with existing national child protection guidance and clinical practice. Children or young people under the age of 16 will not therefore be able to access self-referral, including referring themselves for a forensic medical examination. This would not of course preclude a young person seeking access to healthcare ahead of the police report.

29. It is the Scottish Government's view that the healthcare response must be sensitive to the specific needs and circumstance of children and young people. It is imperative that there is a holistic and trauma-informed approach to healthcare and recovery from the outset, and that they have appropriate access to ongoing therapeutic support. The CMO Taskforce has set up a Children and Young Person's Expert Group to consider how to support health boards to improve these services for children and young people.

30. The self-referral cut off age of 16 aligns with practice at existing self-referral services provided by NHS Greater Glasgow and Clyde and NHS Tayside. Age 16 also aligns with the "age of consent" in the Sexual

This document relates to the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 November 2019

Offences (Scotland) Act 2009 and the age of legal capacity in the Age of Legal Capacity (Scotland) Act 1991. The 1991 Act includes a provision that allows medical consent decisions to be made by younger children should they be considered to be appropriately mature in the opinion of a qualified medical professional – for example a decision to obtain contraception or in appropriate cases abortion without parental consent. In the forensic medical examination context, where a child is unable to access self-referral on account of being under 16 and it is considered by the police that a forensic medical examination should be done, younger people will be able to make a medical consent decision themselves if they are judged to be sufficiently mature in line with the current position under the 1991 Act.

31. National guidance for child protection in Scotland also provides a framework for agencies and practitioners at local level to agree processes for working together to safeguard and promote child wellbeing. This is currently being reviewed to support clinical decision making and an update will be published in early 2020<sup>20</sup>.

32. The Bill does not make provision with regard to the specific situations in which it may not be appropriate for a victim aged over 16 to access self-referral due to questions of capacity. Rather, mental health and incapacity legislation, as it applies now and as it may be revised in future, will sit to the side of the Bill. The Scottish Government also recognises that there is existing guidance in this matter<sup>21</sup> and that health professionals routinely exercise sound clinical judgement in complex cases of vulnerability. The Scottish Government does not wish to pre-empt the outcome of the review of mental health and incapacity legislation which is underway<sup>22</sup>.

33. It is a fundamental legal and ethical requirement that an adult with capacity consents to a forensic medical examination. The Scottish Government's policy on adults with support needs is that such persons should always have their decisions respected, as far as they have capacity

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<sup>20</sup> <https://www.gov.scot/publications/national-guidance-child-protection-scotland/>

<sup>21</sup> <https://www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/consent>

<sup>22</sup> <https://www.gov.scot/publications/mental-health-legislation-review-terms-of-reference/>

This document relates to the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 November 2019

to make them and be assisted in decision making as far as possible. Further, a person ought not be considered incapable of making decisions merely because of a communication difficulty, which might be attributable to a disability or to not fully being able to speak or understand the English language<sup>23</sup>. The Bill therefore does not seek to legislate for matter of capacity to consent since the ordinary law and practice will apply. There will be rare cases in which healthcare or other professionals may require to make a police report when a victim over 16 seeks self-referral, even though the victim does not have a specific vulnerability or support needs. For example, professional guidance requires doctors to report knife wounds to the police<sup>24</sup>. The Bill has been framed in the context that people over 16 may generally access self-referral, although there may be case by case circumstances in which a police report has to be made on account of professional judgment and guidance.

### **Child-centred approach to delivering justice, care and recovery for children who have experienced trauma**

34. The Scottish Government is committed to exploring how the Barnahus<sup>25</sup> concept could operate in Scotland, which includes consideration of cases where the child may have suffered other forms of abuse than, for example, child sexual abuse. Barnahus provides Scotland with an opportunity to design a genuinely child-centred approach to delivering justice, care and recovery for children who have experienced trauma.

35. HIS, in partnership with the Care Inspectorate, has been commissioned by the Scottish Government to develop Scotland-specific standards for Barnahus based on the European PROMISE Quality Standards which have been developed using best practice from the Nordic

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<sup>23</sup> There is discussion of the principle of supported decision making at paragraph 91.

<sup>24</sup> <https://www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/confidentiality---reporting-gunshot-and-knife-wounds>

<sup>25</sup> The Barnahus concept was established in Iceland in 1998. It seeks to provide an immediate trauma-informed response to child victims and witnesses of serious and traumatic crimes in a familiar and non-threatening setting. For more information visit: <https://www.childrenatrisk.eu/promise/>

This document relates to the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 November 2019

countries<sup>26</sup>. This work is at the development stage. It is anticipated that final standards will be published by summer 2020. The development of Barnahus standards will sit alongside this Bill and align with the statutory responsibility for health boards to deliver forensic medical examinations and associated healthcare needs for victims of sexual offences.

36. A Children's Rights and Wellbeing Impact Assessment has been published on the Scottish Government website to coincide with the introduction of the Bill<sup>27</sup>.

## Principles

37. The Mental Welfare Commission for Scotland (MWCS)<sup>28</sup> and other respondents to the consultation invited the Scottish Government to consider including appropriate principles in the Bill. The Bill applies the existing principles of the Patient Rights (Scotland) Act 2011 to victims accessing services under the Bill – these include that patients must be treated with dignity and respect and that health care is provided in a caring and compassionate manner.

38. For the purposes of the Bill, the principle of trauma-informed care is added to the statutory list of health care principles in the Patient Rights (Scotland) Act 2011. Trauma-informed care has particular importance to victims of sexual offences. Further, the Bill includes a health care needs section so that in carrying out forensic evidence capture duties health boards and their staff bear in mind that the healthcare and recovery of a victim is the paramount consideration.

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<sup>26</sup> <https://www.childrenatrisk.eu/promise/standards/>

<sup>27</sup> <http://www.gov.scot/ISBN/9781839603556>

<sup>28</sup> [https://consult.gov.scot/equally-safe/equally-safe-improve-forensic-medical-services/consultation/view\\_respondent?uuld=854224295](https://consult.gov.scot/equally-safe/equally-safe-improve-forensic-medical-services/consultation/view_respondent?uuld=854224295)

This document relates to the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 November 2019

## Consultation

39. The Scottish Government consultation<sup>29</sup> on proposals to improve forensic medical services for victims of sexual offences, as set out in the PfG 2018 to 2019, ran for 12 weeks between 15 February and 8 May 2019.

40. The paper specifically sought views on introducing direct statutory duties on health boards to provide forensic medical services and healthcare support to all victims, including those who have chosen not to report the crime to police, or are undecided, but wish to undergo a forensic medical examination and access support on a self-referral basis. Further views were sought on:

- the taking and retention of samples;
- the potential impacts of proposals, including on island communities, equalities and socio-economically disadvantaged groups;
- provision for children and young people; and
- potential financial implications for health boards, national NHS Scotland bodies and other bodies.

41. The consultation generated 53 responses from 18 individuals and 35 organisations. These included 17 third sector organisations with 10 representing specific groups and seven focused on victim support. The responses also included nine from health organisations (including seven health boards), five from organisations providing a justice perspective and two from local authorities.

42. Respondents were broadly supportive of the key proposals. Notably, 91% were in agreement that there should be a specific statutory duty for health boards to provide forensic medical services to victims of sexual offences. Responses also highlighted specific issues faced by vulnerable adults. Almost two-thirds of respondents raised potential impacts, both positive and negative, in relation to people in rural or island communities.

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<sup>29</sup> <https://www.gov.scot/publications/equally-safe-consultation-legislation-improve-forensic-medical-services-victims-rape-sexual-assault/>

This document relates to the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 November 2019

43. Key themes included the value of a statutory duty, the importance of self-referral routes and the positive impact of embedding trauma-informed care and adopting a health-focused approach to forensic medical services for victims of sexual offences, or child sexual abuse.

44. The Scottish Government also hosted a consultation workshop on 26 March 2019. The Scottish Government invited representatives from Police Scotland, the Scottish Police Authority (which hosts Scotland's national centre of forensics expertise), the Crown Office and Procurator Fiscal Service (COPFS), NHS Scotland and Rape Crisis Scotland to explore the development of a consistent national model for self-referral. While there was broad support for proposals to place statutory responsibility on health boards to store samples, there were differing views about the proportionate retention period. In light of this, the Scottish Government proposes that the sample retention period is not provided for in the Bill and instead is to be set out in regulations. A new self-referral sub-group under the CMO Taskforce is being established to take this forward and to develop the necessary guidance for health boards. This will include a recommendation to the Scottish Government as to the appropriate retention period.

45. An analysis of written responses from the consultation was published on 29 August 2019<sup>30</sup>. The Scottish Government response to the consultation was published on 5 September 2019<sup>31</sup>. Further, the Bill team carried out over 15 engagements, from site visits to workshops to targeted meetings with key groups. An equalities round table, for example, gathered useful input from Interfaith Scotland on possible issues for different faith communities. This wider consultation work engaged important organisations, some of whom had not contributed to the written consultation exercise.

46. The Bill provisions have been informed and shaped by consultation findings and subsequent engagement with stakeholders. For example,

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<sup>30</sup><https://www.gov.scot/publications/analysis-responses-equally-safe-consultation-legislation-improve-forensic-medical-services-victims-rape-sexual-assault/>

<sup>31</sup> <https://consult.gov.scot/equally-safe/equally-safe-improve-forensic-medical-services/>

This document relates to the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 November 2019

Children 1st<sup>32</sup> supported the proposal that there should be statutory duties on health boards but cautioned that focus should not be lost on wider types of medical examination that may be carried out on victims of non-sexual child abuse (physical abuse or neglect). In the Scottish Government's view the Bill does not require to legislate any wider than is proposed because wider medical examinations can be (and are) carried out under the National Health Service (Scotland) Act 1978 and the MoU referred to above.

47. Another important consultee was the UK Information Commissioner's Office<sup>33</sup> which has been engaging with Scottish Government officials as part of the statutory consultation requirement in Article 36(4) of the General Data Protection Regulation (GDPR). A Data Protection Impact Assessment has been published on the Scottish Government's website to coincide with the introduction of the Bill<sup>34</sup>. The Scottish Government's data protection work has been coordinated with the CMO Taskforce's Information Governance Delivery Group<sup>35</sup>. The Delivery Group aims to ensure clarity and consistency in how information on victims of rape and sexual assault is shared between health boards and Police Scotland.

48. Recognising the importance of developing policy which takes account of the views of people with lived experience, the Scottish Government met the Rape Crisis Scotland Forensics Focus Group to discuss the Scottish Government's policy focus on healthcare and access to recovery. Victims welcomed this approach, having had experience of what felt like a policing-focussed process (in which the needs of the justice system often took precedence over the health and wellbeing needs of the victim).

## Alternative Approaches

49. As part of the Bill development process, alternative approaches were considered in the context of the policy objectives outlined above. These

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<sup>32</sup> [https://consult.gov.scot/equally-safe/equally-safe-improve-forensic-medical-services/consultation/view\\_respondent?uuld=613412060](https://consult.gov.scot/equally-safe/equally-safe-improve-forensic-medical-services/consultation/view_respondent?uuld=613412060)

<sup>33</sup> [https://consult.gov.scot/equally-safe/equally-safe-improve-forensic-medical-services/consultation/view\\_respondent?uuld=901675809](https://consult.gov.scot/equally-safe/equally-safe-improve-forensic-medical-services/consultation/view_respondent?uuld=901675809)

<sup>34</sup> <http://www.gov.scot/ISBN/9781839603600>

<sup>35</sup> See for example the consultation on information sharing between health boards and Police Scotland which closed on 30 October 2019 <https://consult.gov.scot/cmo/information-governance/>.



This document relates to the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 November 2019

included: maintaining the status quo (with current services continuing to be delivered under the existing MoU); legislating to create a statutory duty upon health boards to deliver existing police referral services only (do minimum); and to legislate to clarify health board responsibility for the provision of existing police referral services (as provided for under the existing MoU) as well as to provide a self-referral service.

## **Status quo**

50. The challenges of the model of delivery under the existing MoU are documented in the HMICS' strategic overview and progress report and this is echoed in the feedback received from people with lived experience of these services. For example, prior to the creation of the CMO Taskforce, the lack of clarity about responsibilities between the NHS and the police, meant that there was not always the level of leadership and investment in the continuous improvement of these services that was needed. This led to inconsistency in the quality and accessibility of services across the country.

51. The CMO Taskforce has provided the national leadership to encourage a shift in operational delivery from a police to a health led model and the prospect of future legislation (the Bill) has supported this. A clear statutory basis is vital to both underpin and sustain these positive changes in the long term.

52. No consultation respondents advocated for the continuation of existing arrangements, which do not meet the policy objectives outlined above. For these reasons, the Scottish Government's view is that the status quo is not an option.

## **Do minimum**

53. Whilst the CMO Taskforce and health boards are already making good progress towards the delivery of healthcare led forensic medical services for people who report to the police, it would be an anomaly for this to remain the legal responsibility of the police in the long term. 91% of consultation responses agreed that the Scottish Government should legislate to make these services an NHS responsibility.

54. However, merely replacing the existing MoU with a statutory duty in this regard, would not be consistent with, or meet the requirements of, the

This document relates to the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 November 2019

CMO Taskforce vision, HIS Standards or relevant HMICS recommendations as it would not provide victims with equitable access to a self-referral and retention service, irrespective of whether they wish to make a police report, or are undecided. As such, it is the Scottish Government's view that the do minimum option is also undesirable.

## **Legislation to encompass self-referral**

55. It is the Scottish Government's view that primary legislation is required to provide a clear and robust statutory basis for forensic medical service provision to victims of sexual offences who do not wish to report to the police at the time of the incident (self-referral), as well as for those who do (the "do minimum" option). Clear consensus was reached with organisations consulted that health boards should have statutory responsibility for the taking and retention of samples in self-referral cases.

56. Overall, the Bill will also support the effective governance, performance management, quality assurance, strategic planning and continuous improvement of a high quality, co-ordinated and consistent response to those who need these services.

57. The Bill does not legislate more widely to encapsulate all forensic medical services required for the robust investigation and prosecution of crime, such as responsibility for examinations by a qualified healthcare professional of a suspect under police investigation.

58. The consultation leading to this Bill did not identify a wider scope as a priority. The Scottish Government has agreed to collaborate with the COPFS to explore the scope of any required improvements to wider forensic services, separately from the Bill process. One area where specific activity is already in train, unrelated to the Bill despite the similarity in terminology, is the independent review into forensic mental health services<sup>36</sup>.

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<sup>36</sup> <https://www.gov.scot/groups/forensic-mental-health-services-independent-review/>

This document relates to the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 November 2019

## Wider Work

### CMO Taskforce

59. As outlined above, the CMO Taskforce is making good progress with the delivery of the HMICS recommendations not delivered by the Bill (in so far as these fall within its remit). To summarise:

- Recommendation 2 was that Police Scotland should work with the partners responsible for delivering the Archway service in Glasgow and the West of Scotland and strengthen its current governance arrangements to ensure the service is adequately resourced and meets the needs of the communities it serves.

Action: the clinical governance arrangements of the Archway service in Glasgow have been strengthened by NHS Greater Glasgow and Clyde and the CMO Taskforce Unit within the Scottish Government are working closely with the new West of Scotland Programme Board to ensure the delivery of high quality, sustainable services across the region. CMO Taskforce revenue funding has been provided to maintain continuity of the service provided by Archway and capital investment has been provided to support the development of a new regional Centre of Expertise due to open late 2020, which will replace the existing Archway site.

- Recommendation 3 was that the Scottish Government should engage with relevant agencies and stakeholders and bring forward proposals for establishing dedicated healthcare facilities across Scotland to meet both the healthcare needs of victims of sexual crime and the necessary forensic requirements. This should be informed by research and current best practice.

Action: CMO Taskforce funding is being invested in all of the 14 territorial health boards to enhance existing or to create new healthcare facilities across Scotland, so that services can be provided as close as possible to the point of need. Work is also well underway on new centres of expertise in both Edinburgh and Glasgow. A national service specification document has been developed in close consultation with health boards and other key stakeholders which sets out best practice guidance on the

This document relates to the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 November 2019

development of trauma-informed services. This will be published in December 2019.

- Recommendation 4 was that the Scottish Government should consider formally issuing the newly proposed national standards for the delivery of forensic medical examination for victims of sexual violence to all health boards. These standards should be supported by a framework of publicly reported quality indicators and monitored through an effective audit and inspection regime.

Action: National Standards were published by Healthcare Improvement Scotland in December 2017<sup>37</sup>. Interim Quality Indicators to underpin the HIS Standards were published in December 2018<sup>38</sup>. Updated Indicators went out to consultation on 8 November 2019<sup>39</sup> and finalised Indicators are due to be published in February 2020. This will enable health board performance against the standards to be monitored as part of an ongoing quality assurance process.

- Recommendation 5 was that Police Scotland should work with health 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.

Action: prior to the HMICS report, some health boards were already delivering forensic medical examination services in a healthcare setting, but where this was not the case, CMO Taskforce funding has been invested to ensure that all examinations of victims of sexual crime which previously took place in a police station, now happen in to an appropriate healthcare setting (NHS Dumfries and Galloway, NHS Fife, NHS

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<sup>37</sup>[http://www.healthcareimprovementscotland.org/our\\_work/standards\\_and\\_guidelines/stnds/sexual\\_assault\\_services.aspx](http://www.healthcareimprovementscotland.org/our_work/standards_and_guidelines/stnds/sexual_assault_services.aspx)

<sup>38</sup>[http://www.healthcareimprovementscotland.org/our\\_work/standards\\_and\\_guidelines/stnds/sexual\\_assault\\_indicators.aspx](http://www.healthcareimprovementscotland.org/our_work/standards_and_guidelines/stnds/sexual_assault_indicators.aspx)

<sup>39</sup>[http://www.healthcareimprovementscotland.org/our\\_work/standards\\_and\\_guidelines/stnds/sexual\\_assault\\_indicators.aspx](http://www.healthcareimprovementscotland.org/our_work/standards_and_guidelines/stnds/sexual_assault_indicators.aspx)

This document relates to the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 November 2019

Forth Valley and NHS Tayside). Two new healthcare facilities are planned in NHS Highland in place of the police-owned premises currently used for examinations in Wick and Inverness. Taskforce funding is also being used to create an additional NHS facility in Golspie (also NHS Highland).

- Recommendation 6 was that the Scottish Government should work with relevant stakeholders and professional bodies including NHS Scotland, Police Scotland and the Crown Office and Procurator Fiscal Service to develop the role of forensic nurses in Scotland.

Action: an expert group was set up under the remit of the CMO Taskforce to progress this recommendation and work is now underway to take the first steps towards this multi-disciplinary approach in Scotland. Further detail on this is provided below.

- Recommendation 8 was that the Scottish Government should work with NHS Scotland to ensure that the existing healthcare ICT system (ADASTRA) is being used consistently for collating information on the volume and nature of forensic medical examinations across Scotland. This will inform future policy and decision making, including resourcing.

Action: CMO Taskforce funding has been invested in specialist expertise to prepare a full business case for a national clinical IT system. An outline business case setting out options for this is currently under development and is expected to be brought to the CMO Taskforce before the end of the financial year.

- Recommendation 9 was that Police Scotland should work with the Scottish Police Authority and NHS Scotland to introduce standard operating procedures for the forensic cleaning of police premises which continue to be used for medical examinations. These should comply with current guidance.

Action: a national decontamination protocol was published in October 2019<sup>40</sup> and is being implemented by health boards. An

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<sup>40</sup> <https://www.gov.scot/publications/forensic-medical-examinations-dna-decontamination-guidelines/>

This document relates to the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 November 2019

environmental monitoring regime is being developed to monitor compliance with the protocol.

- Recommendation 10 was that Police Scotland should work with NHS Scotland to ensure suspected perpetrators of sexual abuse who are under 16 years old are not forensically examined within police custody facilities. The Criminal Justice (Scotland) Act 2016 defines a child as being a person under the age of 18 and consideration should be given to how this affects the treatment of child suspects in the context of forensic medical examinations.

Action: this recommendation is out with the scope of the CMO Taskforce. A short life working group under the remit of the Police Care Network (hosted by NHS National Services Scotland<sup>41</sup>) is progressing this recommendation. As is explained in the “alternative approaches” section above, the Bill does not legislate for the examination of alleged perpetrators or otherwise about forensic medical services in general.

60. Improvement is also being made across a number of other key areas within the Taskforce five-year high level work plan.

61. In June 2018, the Scottish Government hosted an options appraisal event which took key organisations through a rigorous decision making process to determine the optimal model and configuration of services for Scotland. In line with best practice guidance, the non-financial and financial benefits of each option were considered against agreed benefits criteria and then weighted and scored. The outcome was a clear preference for coordinated, multi-agency services delivered as close as possible to the point of need, supported by regional centres of expertise<sup>42</sup>.

62. The Bill is intended to act as a platform for this multi-agency working, although there are many examples of it already happening across the country, particularly where health boards have, or are in the process of

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<sup>41</sup> The formal legal name of “NSS” is the Common Services Agency for the Scottish Health Service and therefore it is referred to as “the Agency” in the Bill.

<sup>42</sup> Honouring the Lived Experience - Options Appraisal Report - October 2018

This document relates to the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 November 2019

developing, new facilities in close collaboration with their statutory and third sector partners. For example, new NHS facilities have been designed in partnership with Police Scotland, so that they can interview a victim without them needing to go to a police station. Work is also underway on new multi-agency centres of expertise in Edinburgh and Glasgow.

63. To ensure that this work has the appropriate level of leadership across Scotland, the Chief Medical Officer for Scotland regularly meets with health board Chief Executives to update them on the work of the CMO Taskforce and to make specific “asks” of them (requests for delivery of specific actions set by the Chief Medical Officer to help embed the HIS Standards). These are summarised below. All Chief Executives have committed to the timely delivery of these asks and the CMO Taskforce Unit within the Scottish Government work very closely with all health boards and regional planners to maintain the expected level of progress.

### **“Five Asks” May 2018 – April 2019**

1. Nominate a senior manager (Nominated Lead) for your health board (who is accountable through the corporate management team for these services) to take responsibility for working with multi-agency partners to develop and implement costed local improvement plans to deliver person centred, trauma-informed services in line with the CMO Taskforce vision, HIS standards and agreed service model. (Done).
2. Move FME out of police stations and into appropriate health and social care settings before the end of the financial year. (Done).
3. Ensure that all doctors undertaking this work are trained in trauma-informed care for victims of sexual crime before the end of the calendar year. (Done).
4. Consider options for attracting and retaining the workforce you need to meet the HIS standards (gender balance). (Ongoing).
5. Work towards having an appropriately trained nurse present during all FME. (Ongoing).

This document relates to the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 November 2019

### **“Five Asks”: May 2019 – April 2020 (all ongoing)**

1. Ensure timely delivery of the multi-agency objectives set out in the costed local improvement plans, including board approved capital projects.
2. Develop the local (and where appropriate, regional) workforce model to ensure:
  - A female doctor and nurse chaperone are available 24/7, so that where a victim requests a choice of the sex of staff involved in their care, this can be met.
  - A nurse coordinator(s) is in post to ensure a smooth pathway of onward care and referral to other services.
  - Timely access to therapeutic and through care services.
3. Prepare for forthcoming legislation; the introduction of a national model for self-referrals and the potential for an increase in demand for these services.
4. Ensure there is readiness within local and regional delivery teams for compliance with agreed national documentation and data collection requirements.
5. Plan for service sustainability beyond the life of Scottish Government ring-fenced funding (end of 2020-21).

64. With regard to facilities and equipment, in addition to the CMO Taskforce investment in new premises outlined above, a new national colposcope contract is in place (medical equipment which provides superior magnification and lighting for intimate examinations) and funding has been provided to purchase these for health boards where required.

65. In order to ensure consistency in practice across Scotland, the CMO Taskforce and its sub-groups have developed a new clinical pathway for adults which has been consulted on<sup>43</sup> and is being finalised for publication in early 2020, together with supporting guidance for professionals and victims. A clinical pathway for children and young people has been consulted on<sup>44</sup> and will be finalised and published by the summer. These

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<sup>43</sup> <https://consult.gov.scot/cmo/guidance-for-healthcare-professionals/>

<sup>44</sup> <https://consult.gov.scot/cmo/clinical-pathway/>



This document relates to the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 November 2019

pathways describe the care and treatment that a victim should receive, building on the provisions of the Bill.

66. National data sets for adults, children and young people have been tested which will enable a national standardised form and requirements for a national clinical IT system to be finalised. The Interim HIS Quality Indicators referred to above have been tested and revised to reflect the agreed national data sets and the intention is to publish a final version in February 2020. The intention is for health boards to commence national data collection, to measure performance against the HIS Standards and Indicators, from April 2020 with the first publication around autumn 2021. A robust quality assurance process is being developed to support this and to help ensure the continuous improvement of these services.

67. To help ensure an appropriately trained and competent workforce across Scotland, the CMO Taskforce has funded NHS Education Scotland (NES) to revise the training for staff to make it more portable, including for remote locations. Completion of this specific training, which was designed to incorporate the principle of trauma-informed care, is a requirement for all doctors who are involved in the delivery of forensic medical examinations. In addition to face-to-face training, new training materials have been developed and made available online, so that staff can access them at any time.

68. Since 2017, NES have trained 118 doctors in sexual offences examinations, 70% of whom are female. The training has also been adapted to provide joint inputs for nurses involved in providing healthcare to victims of sexual crime. So far, 68 nurses have been trained, 97% of whom are female. The CMO Taskforce has provided funding to NES to employ an Associate Post Graduate Dean (job-share), whose role is to develop and provide training to those involved in providing examination and healthcare services to victims of sexual offences and to support the development of regional peer support networks.

69. CMO Taskforce funding has also been provided to health boards to recruit more forensically trained nurses and to help ensure an individual receives appropriate follow-up healthcare and support.

This document relates to the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 November 2019

70. An expert group under the remit of the workforce sub-group was established to take forward recommendation 6 of the HMICS report, to develop the role of nurse sexual offence examiners in Scotland. This would mean that appropriately qualified nurses would be able to undertake forensic medical examinations of victims of sexual crime and give evidence in court as doctors currently do. A robust proposal for a nurse Sexual Offence Examiner Test of Change has recently been endorsed by the Cabinet Secretary for Health and Sport, the Cabinet Secretary for Justice and the Lord Advocate. Progressing this is a key priority for the CMO Taskforce. Developing this multi-disciplinary workforce is vital to supporting the sustainability of services in rural and island locations as well as to improving victim choice about the sex of examiner involved in their care.

71. In 2017, the Scottish Government and NES published “Transforming Psychological Trauma: A Knowledge and Skills Framework for the Scottish Workforce” and £1.35 million over three years (2018 to 2021) has been committed to design and deliver a National Trauma Training Programme, consistent with the Framework. The National Steering Group on Trauma Training is chaired by the Deputy First Minister and includes representatives from across health, police, social work, prisons, housing, education as well as people with lived experience of trauma.

72. The work of the CMO Taskforce is one of several initiatives aimed at improving outcomes for people accessing services in the space where traditional justice and health and social care services intersect. The Health and Justice Collaboration Improvement Board was created as an authorising environment for this collaborative work and brings together senior leaders from justice, health and social care and local government.

### **Experience of sexual offence victims in the justice system**

73. The Scottish Government continues to work closely with Rape Crisis Scotland and others to improve the experience of victims of sexual crime in the criminal justice system. Between financial years 2015-16 to 2017-18, £1.85 million in funding was provided to establish an advocacy support worker in every rape crisis centre in Scotland. Scottish Government funding to the Rape Crisis Scotland National Advocacy Project has been maintained and an additional £1.7 million was announced in March 2018

This document relates to the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 November 2019

over two years to continue this service and provide additional support workers in areas where they are needed most.

74. The Victims Taskforce, established on 12 December 2018 by the Cabinet Secretary for Justice and co-chaired by the Lord Advocate, brings together statutory and third sector partners to co-ordinate action to improve the experiences of victims and witnesses within the criminal justice system, whilst ensuring a fair justice system for those accused of crime. Although this is a separate Taskforce from the CMO Taskforce, the aims and work plans of both Taskforces are complementary, and coordinated by Government officials.

75. The work of the Victims Taskforce includes specific work to support improvements for victims of gender based violence. It has been recognised that whilst all victims of crime may share similar expectations in respect of the court process, rape and sexual assault cases merit distinct consideration around issues such as privacy, reporting and the role that health services or third party referral mechanisms can play in supporting victims to come forward and report sexual crime.

76. To build the evidence base on the perspective of victims and witnesses of sexual crime and to ensure that victims' voices are heard, the Rape Crisis Scotland Survivor Reference Group published a report in July 2020<sup>45</sup> which made recommendations such as: guaranteed availability of forensic and other time limited necessities; joined up trauma information communication providing consistent, reliable and appropriate information and pre-recorded evidence being taken as close to the incident as possible.

77. The Scottish Government supports a pilot being taken forward by the COPFS, Police Scotland and Rape Crisis Scotland to visually record rape complainers' initial statements to the police, and consider the potential for this to be used in appropriate cases as evidence in chief. Applications to use these visually recorded interviews as evidence in chief could be combined with applications to take the witness evidence by commissioner (a special measure allowing the pre-recording of evidence from child and vulnerable witnesses in serious cases). If granted, this would avoid the

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<sup>45</sup> <https://www.rapecrisisscotland.org.uk/resources/SRG---First-Meeting-recommends-booklet-pages.pdf>

This document relates to the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 November 2019

need for the complainer to give evidence in person during any subsequent trial. The pilot will be trialled in three areas of Scotland which have rural and city locations including one health care setting to embed a holistic response for the victim.

78. The number and complexity of sexual offence cases which come to court has significantly increased in recent years and this growth is expected to continue. The vast majority of High Court trials now relate to sexual offences and a significant volume of sexual assault cases are tried under solemn procedure in the sheriff courts. The Lord President, Lord Carloway, commissioned a judicially-led review to develop proposals for an improved system to ensure sexual offence cases are managed under a modern process with an improved experience for complainers.

79. The Review group, chaired by Lady Dorrian, the Lord Justice Clerk, comprises members of the judiciary and representatives of the Scottish Courts and Tribunals Service, Scottish Government, Police Scotland, COPFS, justice agencies and third sector organisations including Rape Crisis Scotland, Scottish Women's Aid and Victims Support Scotland. It is taking a fresh look at how sexual offences cases are conducted by courts and asks the question "is there a better way these cases can be dealt with to improve the experiences of all the participants in the interest of justice?".

80. The Review Group is considering what distinguishes sexual assault cases from other criminal cases and how court process and the experiences of complainers and witnesses can be improved without compromising the rights of an accused. This includes potential changes to court and judicial structures, skills development and procedure and practice and is expected to report in early 2020.

81. Due regard is given to ongoing work in relation to the evidence of children and vulnerable witnesses; the increased use of the taking of evidence by commissioner, jury research; and the work of the Scottish Government's Victims Taskforce and CMO Taskforce.

This document relates to the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 November 2019

## Effects On Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development Etc.

### **Equal opportunities**

82. The public sector equality duty requires public bodies to have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations between different people when carrying out their activities.

83. An Equality Impact Assessment<sup>46</sup> and Fairer Scotland Duty Impact Assessment<sup>47</sup> have been published on the Scottish Government website to coincide with the introduction of the Bill.

84. As mentioned, the Scottish Government is committed to preventing and eradicating violence against women and girls, whilst providing equal access to services and support for victims who are men and boys. All victims have the same rights to access healthcare and recovery and therefore the Bill has been drafted in gender neutral language. This approach ensures that victims who identify as trans or non-binary are fully included.

### **Human rights**

85. The Scottish Government has adopted a human rights-based approach to the development of the Bill<sup>48</sup>. In terms of the “participation” principle, the Scottish Government’s citizen space consultation platform allowed people with lived experience to input to the consultation anonymously and with the option of withholding their response from publication. The Scottish Government used twitter hashtag #EquallySafeFMS (Equally Safe Forensic Medical Services) to publicise the consultation process, allowing victims and the organisations who

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<sup>46</sup> <http://www.gov.scot/ISBN/9781839603549>

<sup>47</sup> <http://www.gov.scot/ISBN/9781839603563>

<sup>48</sup> The following paragraphs briefly reference the Scottish Human Rights Commission’s “PANEL” principles:

<http://www.scottishhumanrights.com/rights-in-practice/human-rights-based-approach/>

This document relates to the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 November 2019

support and represent them to follow and republish developments. Some organisational responses to the consultation, for example that from People First (Scotland)<sup>49</sup>, were directly informed by the experiences of people with lived experiences. As mentioned, Rape Crisis Scotland convened a Forensics Focus Group so that the Government could hear directly from victims about their experiences of forensic medical examination.

86. In terms of the “accountability” principle, as noted above, the first publication of health board performance data against the HIS Standards and Quality Indicators is expected around autumn 2021. This information will also help to inform annual health board reviews. An external quality assurance process is being developed to ensure the continuous improvement of these services. This is being developed in partnership with HIS which, where appropriate, would enable it to bring any issues to the Sharing Intelligence for Health & Care Group – which is a mechanism that enables seven national agencies to share, consider, and respond to intelligence about care systems across Scotland (in particular health boards) and to ensure that this intelligence is shared and acted upon appropriately. The CMO Taskforce has convened a short life working group to implement this system of external assurance, which will ensure that there is a more robust and consistent availability of performance information than has ever been available in the past.

87. In addition, health boards will be expected to collate qualitative data from the people who use their services, working in close partnership with their local Rape Crisis Centre or other third sector providers. The voice of people with lived experience is crucial to informing the continuous improvement of person centred, trauma-informed services. The Scottish Government receives anonymous monthly feedback from Rape Crisis Scotland, which has informed the development of the Bill and which will be a valuable measure of whether the objectives of the Bill are being realised in future.

88. In terms of the “empowerment” principle, the Bill’s provisions require that victims understand what is to happen with samples taken from them before they undergo forensic medical examination. The CMO Taskforce

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<sup>49</sup> [https://consult.gov.scot/equally-safe/equally-safe-improve-forensic-medical-services/consultation/view\\_respondent?uuld=82199920](https://consult.gov.scot/equally-safe/equally-safe-improve-forensic-medical-services/consultation/view_respondent?uuld=82199920)

This document relates to the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 November 2019

will work with health, justice and third sector partners to develop appropriate and accessible explanatory materials so that victims understand their rights under the Bill, including rights to self-refer<sup>50</sup>.

89. In terms of the “legality” principle, the Bill reflects the Scottish Government’s commitment to uphold human rights, democracy and the rule of law, in line with international obligations and the National Performance Framework in that the justice systems are proportionate, fair and effective. The Bill will contribute to the progressive realisation of economic, social and cultural rights. Paragraph 46 of the consultation paper on the Bill referenced a number of international obligations directly relevant to the right to the highest attainable standard of physical and mental health and to the right of access to recovery. Respondents to the consultation usefully highlighted additional international obligations of relevance (for example the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse 2007 (Lanzarote Convention) and also helpfully identified monitoring committee general comments or recommendations with relevance to the Bill.

90. The Bill’s provisions will secure rights under article 8 of the European Convention on Human Rights 1950 (ECHR; the right to respect for private life) with respect to the handling of samples taken from victims. The Bill will put in place a robust new statutory regime that will meet ECHR requirements.

91. A stakeholder workshop on 17 July 2019 saw discussion of adults with support needs including the principle of supported decision making, enshrined in article 12 of the UN Convention on the Rights of Persons with Disabilities 2006 (CRDP). Under the Bill supported decision will be available in appropriate cases (for example support to make a consent to examination decision, or support to make a self-referral decision), recognising that under current law and practice there may be exceptional cases where traditional “substitute” decision making by a proxy is justified.

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<sup>50</sup> See for example Rape Crisis Scotland’s video guides to the criminal justice system as it stands, including forensic medical examination <https://www.rapecrisisscotland.org.uk/news/news/guide-to-the-criminal-justice-system-for-survivors-of-sexual-violence-updated/>

This document relates to the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 November 2019

As mentioned above, a comprehensive review of mental health and incapacity legislation is underway.

## **Island and rural communities**

92. The Bill applies equally to all communities across Scotland. An Islands Communities Impact Assessment has been published on the Scottish Government website to coincide with the introduction of the Bill<sup>51</sup>. CMO Taskforce support and investment is being provided to the island health boards to develop sustainable on-island services by building the capacity and capability of their workforce. The £1.85 million Scottish Government funding relating to rape crisis centres mentioned above enabled the creation of specialist centres in Orkney and Shetland which has enhanced direct engagement with island communities on the unique challenges they face and helped to overcome perceived barriers to reporting sexual assault.

## **Local government**

93. The Bill does not impose any statutory duties on local government, although they will be impacted indirectly. As mentioned, the Bill is intended to facilitate multi-agency working across public and third sector bodies. Self-referral will require modest adjustments to working practices when local authorities support vulnerable people (children or adults). Social work and local government are key partners on the CMO Taskforce and work will continue to ensure that respective roles and responsibilities are clearly understood.

## **Sustainable development**

94. The Bill supports a range of United Nations Sustainable Development Goals (SDG)<sup>52</sup> including:

- SDG 3: Good health and well-being – the Bill clearly positions forensic medical services as part of the Scottish healthcare system, and includes a health care needs section;

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<sup>51</sup> <http://www.gov.scot/ISBN/9781839603570>

<sup>52</sup> <https://www.un.org/sustainabledevelopment/sustainable-development-goals/>



This document relates to the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 November 2019

- SDG 5: Gender equality – the Bill is an important part of Scotland’s Equally Safe strategy;
- SDG 10: Reduced inequalities – the consultation on and development of the Bill was informed by equalities considerations, including socio-economic inequalities; and
- SDG 16: Peace, justice and strong institutions – an important aspects of the Bill is to ensure reliable forensic evidence gathering techniques to support the Scottish criminal justice system.

## **Strategic Environmental Assessment**

95. It is unlikely that the provisions in the Bill will have an effect on the environment. A pre-screening report was undertaken and submitted to the Strategic Environmental Assessment (SEA) Gateway in September 2019 seeking views on whether the duties in the Bill would have a significant environmental effect and whether a SEA is required. It was determined that a SEA was not necessary and that the proposals are therefore deemed to be exempt from strategic environmental assessment under section 7(1) of the Environmental Assessment (Scotland) Act 2005.

## **Business and regulatory impact assessment**

96. The Bill does not impose any new costs on businesses or otherwise have any regulatory impact in the private sector. The Scottish Government considers therefore that a business and regulatory impact assessment is unnecessary for the Bill.

## **Terminology**

Forensic medical services – forensic services, in the widest sense, are the collection and analysis of scientific evidence and the presentation of evidence at court, for the purposes of a criminal investigation or prosecution. This Bill concerns forensic medical services for victims of sexual offences specifically. In this context, forensic medical services is an umbrella term to encompass forensic medical examinations and associated healthcare interventions such as the provision of emergency contraception where relevant and assessment of wider health and wellbeing needs

Forensic medical examination – for the purposes of the Bill, there are three associated types of forensic medical examination that are relevant. A

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qualified sexual offence examiner carries out the examination and at present all such examiners are doctors, accompanied by a forensically trained nurse. The most common type of forensic medical examination, commonly known as a “FME”, is the acute forensic medical examination of a victim of a sexual offence within the seven day forensic capture window where intimate swabs may be taken together with an assessment of any injuries as well as the persons other healthcare and wellbeing needs. The other two types of forensic medical examination are “early evidence” taking such as the taking of non-intimate mouth swabs and urine samples for toxicology purposes; and “non-acute” forensic medical examination which may be particularly relevant to children and young people or otherwise where bruising or injuries can be identified outside of the seven day forensic capture window.

Sexual offences – for the purposes of the Bill and this Policy Memorandum the relevant sexual offences are “contact” sexual offences namely rape and sexual assault and, in the case of children, child sexual abuse. Forensic medical examination is not relevant to “non-contact” sexual offences such as unauthorised disclosure of an intimate photograph or film (“revenge porn”). The Bill has been drafted in readiness for the implementation of the Age of Criminal Responsibility (Scotland) Act 2019 which raises the age of criminal responsibility from eight to 12 years. Harmful sexual behaviour carried out by a child between those ages will not be criminal but a victim of harmful behaviour will have the same access to services under the Bill as they would if the alleged perpetrator was an older child, or adult.

Police referral – a model for the provision of forensic medical services where the sexual offence is reported to the police before an examination takes place.

Self-referral – a model for the provision of forensic medical services where the sexual offence is not reported to the police at the time of an examination, but where evidence is retained and there is the possibility of the offence(s) being reported at a later date.

Victim – the term “victim” is used, rather than “complainant” which is the traditional description in Scots Law for the person against whom it is alleged a crime has been committed. The term victim recognises that a person may be a victim regardless of whether an offender has been

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identified, apprehended, prosecuted or convicted. The Scottish Government recognises that some victims of serious offences prefer to be referred to as survivors and for the purposes of this document, reference to victims includes reference to survivors and complainers.

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

## Policy Memorandum

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