FORENSIC MEDICAL SERVICES (VICTIMS OF SEXUAL OFFENCES) (SCOTLAND) BILL

EXPLANATORY NOTES

INTRODUCTION

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are 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:

- a Financial Memorandum (SP Bill 60–FM);
- a Policy Memorandum (SP Bill 60–PM);
- statements on legislative competence by the Presiding Officer and the Scottish Government (SP Bill 60–LC).

3. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

4. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL: AN OVERVIEW

5. The Bill imposes duties on health boards to provide certain forensic medical services to victims of sexual offences (and harmful sexual behaviour by children under the age of criminal responsibility).

6. Forensic medical examinations of such victims are currently carried out by health boards under a memorandum of understanding agreed between the Police Scotland and health boards.[1] This allows Police Scotland to refer victims to health boards for forensic medical examination.

[1] https://www.policecare.scot.nhs.uk/wp-content/uploads/2015/03/Police-Healthcare-Forensic-Medical-Services-MoU-Final-v1.pdf. The memorandum of understanding covers services other than those dealt with in the Bill (for example, it covers health care services required by persons in the care of the Police Service of Scotland and medical examination and collection of samples from alleged perpetrators in police custody). Services not covered by the Bill will continue to be dealt with under the memorandum of understanding.

The carrying out of such examinations by health board staff facilitates the simultaneous addressing of any health care needs of the victim arising from the incident in connection with which the examination is required. The Bill places the current arrangements on a statutory footing.

7. As well as providing examinations in these "police-referral" cases, some health boards[2] provide forensic medical examinations on a "self-referral" basis. This means that victims can undergo a forensic medical examination without first having reported the incident to police. Any evidence collected is stored. This allows victims to make a decision about whether to report the incident to police in their own time. The Bill requires all health boards to make forensic medical examination in sexual cases available on a self-referral basis.

8. What makes a medical examination a *forensic* medical examination is the fact that evidence is being collected for use in any subsequent investigation or court proceedings in relation to the incident. This aspect of forensic medical examination distinguishes the functions conferred by the Bill from health boards' other functions. The Bill sets out this part of the purpose of forensic medical examinations clearly, ensuring that health boards have a clear legal basis for their actions in this area (for example, in collecting, retaining and transferring information[3]).

9. The Bill also deals with various other matters to do with health boards' provision of forensic medical examinations and the storing and transfer of evidence collected during such examinations. In addition, it includes provisions allowing related functions to be conferred on, for example, special health boards and ensuring co-operation between health boards in this area, and makes various consequential modifications of other enactments.

THE BILL: SECTION BY SECTION

Section 1: Provision of certain forensic medical services

10. Section 1 places formal legal responsibility for the delivery of certain forensic medical services on health boards. Health boards will, in future, be required to provide an "examination service" and a "retention service": the "examination service" relates to the carrying out of forensic medical examinations (on both a "police-referral basis" and a "self-referral" basis – see section 2(2)), while the "retention service" deals with the storage of evidence gathered during examinations (principally those carried out on a self-referral basis). Further details of the two services are provided below.

11. The retention service must be provided directly by health boards (although co-operation with other health boards is possible under section 11). Health boards have the option of making arrangements for the provision of the examination service with others where the Scottish Ministers permit this. Co-operating with other health boards under section 11 to deliver the examination service is also a possibility (and does not require the permission of Ministers).

[2] NHS Greater Glasgow and Clyde and NHS Tayside.
[3] Which may be "personal data" for the purposes of data protection legislation.

Section 2: The examination service

12. The examination service that each health board must provide (or secure the provision of) consists of providing forensic medical examinations in relation to two types of incident. The first is where certain types of sexual offences are alleged to have been committed. The relevant type of offence is defined in broad terms in subsection (4), but includes rape and sexual assault as defined in the Sexual Offences (Scotland) Act 2009. A forensic medical examination is not necessary in relation to "non-contact" sexual offending, as an examination would not result in any additional evidence being obtained in such cases. The Bill does not therefore cover such cases.

13. The Bill does not refer to attempts to commit offences of the kind described in subsection (4). This is unnecessary as an attempt to commit an offence is itself an offence under section 294 of the Criminal Procedure (Scotland) Act 1995 – so an attempted sexual offence, the nature of which is such that a forensic medical examination may result in evidence being collected, will still fall within the description set out in subsection (4).

14. The second type of incident involves alleged harmful sexual behaviour by children under the age of criminal responsibility.[4] Victims of such behaviour may also require a forensic medical examination. Again, "non-contact" behaviour would not necessitate the carrying out of a forensic medical examination and is not included in the definition of harmful sexual behaviour set out in subsection (4).[5] The reference to behaviour which risks causing harm covers attempted harmful sexual behaviour.

15. Subsection (2) sets out the two ways in which the examination service is accessed by victims. The first possibility is that a victim is referred to a health board for an examination by Police Scotland, following the incident being reported by the victim or another person – see subsection (2)(a). The second possibility is that a victim "self-refers", that is, requests the health board to carry out a forensic medical examination without the incident having been reported to the police (see subsection (2)(b)). A victim might access self-referral by phoning and arranging an appointment at the appropriate health board facility.

16. Self-referral is not available to children aged under 16. So even if a child aged under 16 requests a forensic medical examination on a self-referral basis, the health board will not be able to carry out such an examination until Police Scotland request an examination under subsection (2)(a). This does not prevent the young person accessing healthcare support ahead of police involvement.

17. Health board staff do not, under subsection (2)(b), have to make a judgement about whether an offence has been committed (or harmful sexual behaviour has occurred) in order for

[4] The age of criminal responsibility in Scotland is currently eight. The Age of Criminal Responsibility (Scotland) Act 2019 raises the age to 12, although that Act is not yet in force. A child below the age of criminal responsibility cannot commit an offence, but harmful behaviour can still be dealt with through the children's hearings system and forensic evidence may be relevant to establishing that such behaviour has occurred in some cases (as well as for the purposes of investigating the incident more generally).

[5] Which means that the definition of "harmful sexual behaviour" used in the Bill differs from descriptions of behaviour used for different purposes in the Age of Criminal Responsibility (Scotland) Act 2019.

an examination to be carried out on a self-referral basis – the effect of the Bill is that it is sufficient that the victim alleges that they have been the victim of such an offence (or behaviour).

18. Subsection (3) describes the "criminal justice" purpose for which forensic medical examinations are carried out, while referencing the fact that the examination also serves other purposes (in practice, addressing the health care needs of victims). "Investigation" and "proceedings" are both defined in section 13. A non-exhaustive definition of "evidence" is also provided in that section.

Section 3: Limitations on provision of forensic medical examinations

19. This section ensures that decisions about forensic medical examination are made on the basis of professional judgement. This means that the Bill does not confer on individuals a right to have a forensic medical examination, a particular type of examination, or to have particular items of property taken and retained by health boards in self-referral cases.

20. There are a number of circumstances where a professional judgment might be made that a forensic medical examination, or certain parts of the full examination process, should not be carried out. For example, a forensic medical examination requires to be carried out sufficiently soon after the incident that there will still be evidence to gather.[6] This section ensures that a health board is not obliged to carry out an examination if, in the professional judgement of healthcare professionals, it is not appropriate to proceed with the examination or full examination for any reason. Professional judgement includes both clinical and non-clinical elements, and is supported by guidance from the Faculty of Forensic and Legal Medicine (FFLM) and others. FFLM guidance covers matters including what non-sample evidence to retain in particular self-referral scenarios.

Section 4: Information to be provided before examination

21. The effect of subsections (2) and (3) is that health boards must make victims fully aware of what may happen to the evidence collected during a forensic medical examination. In police-referral cases, a police officer will request the transfer of the evidence under section 9. In self-referral cases, evidence is not transferred to the police until such time as the victim reports the incident to the police. Until that time, the victim can request the return of certain items to them under section 7 or the destruction of stored evidence under section 8(1)(a). The information to be provided to the victim under subsection (2) includes information about these rights. In addition, the victim must be informed that, if the return or destruction of evidence is not requested by the victim, and no police report is made, the stored evidence will, after a period of time, be destroyed under section 8(1)(b).

22. Subsection (4) ensures that failure to comply with subsection (2) does not, by itself, mean that any evidence collected during the examination is inadmissible in subsequent proceedings in relation to the incident which gave rise to the examination. The ability to challenge the admissibility of evidence on any other grounds is preserved.

[6] The precise length of the forensic capture "window" may vary according to circumstances, but it is generally seven days.

Section 5: Health care needs

23. This section requires health boards to provide their examination service in an integrated way with their health care functions, so that health care needs arising from the incident (for example, prescription of emergency contraception, sexual health tests or referral for psychological support where appropriate) are identified and addressed as quickly as possible after the incident, as well as the necessary forensic evidence capture taking place. This reflects that there may be cases where a victim presents for forensic medical examination but no examination takes place in their particular case.

Sections 6, 7 and 8: The retention service

24. The retention service consists of the storage of evidence collected during a forensic medical examination under a health board's examination service. The nature of the storage will depend on the item being stored. The retention service does not include the analysis of samples or other information – such analysis will only take place following the transfer of the evidence to Police Scotland.

25. The purpose for which evidence is being stored is set out in section 6(2). The purpose is closely aligned with the purposes for which forensic medical examinations may be carried out, as set out in section 2(3).

26. A victim who has undergone a forensic medical examination on a self-referral basis may make a request under section 7 that certain stored items that belong to them (for example, clothing) be returned to them. The health board must comply with such requests. The Bill does not give victims a right to request other types of stored evidence from the health board (for example, samples).

27. Victims who have self-referred can request the destruction of all forms of stored evidence relating to their forensic medical examination under section 8(1)(a) (if, for example, they subsequently decide not to report the incident to the police). If a victim does decide to report the incident to police, any evidence being stored under the retention service will be transferred to the police following the making of a transfer request under section 9. If neither of these things happens, the evidence will be destroyed after a specified period of time, which will be set by the Scottish Ministers in regulations. This does not mean that the incident cannot be reported to the police after this time, just that the evidence collected in a forensic medical examination under the Bill will no longer be available for use in relation to such a report.

Section 9: Transfer of samples and information to police

28. Subsection (1) sets out the circumstances in which a police officer can request the transfer of evidence gathered during a forensic medical examination carried out under the examination service. Paragraph (a) deals with police-referral cases and paragraph (b) with self-referral cases. In self-referral cases, the incident must have been reported to the police by the victim – so even if the police become aware of an incident, and of the fact that evidence is being stored under the retention service, in some other way, evidence cannot be transferred without the victim taking the step of making a report to the police about the incident.

29. Health boards must comply with requests for transfer of evidence as soon as reasonably practicable. In practice, a police constable is likely to collect the evidence either from the place where the forensic medical examination is carried out or from the place where the evidence is being stored. Samples in sexual offences cases are tested and analysed by the Scottish Police Authority, independently from Police Scotland, in accordance with section 31 of the Police and Fire Reform (Scotland) Act 2012. Police constables transfer information and evidence to the Scottish Police Authority as part of their duties to prevent and detect crime under section 20 of that Act. The Bill does not require to re-legislate for these practices.

Section 10: Power to confer functions on other bodies

30. This section gives the Scottish Ministers power to confer functions relating to the examination service and the retention service on special health boards, the Common Services Agency (typically known as NHS National Services Scotland or NSS) and Healthcare Improvement Scotland (HIS). NHS National Education Scotland (NES), for example, is the special health board with responsibility for providing education and training relating to the health service, including trauma training. This power might be used to ensure that it can also provide education and training to healthcare professionals in relation to the functions conferred by the Bill (which are not, as already noted, exercised entirely for health purposes).

Section 11: Co-operation

31. Section 11 requires health boards to co-operate with each other, and with special health boards and the Common Services Agency, in planning and providing the examination service and the retention service. The purpose of the co-operation is to secure adequate provision of the examination service and the retention service across Scotland and to secure continuous improvement in the delivery of these services. The precise nature of the co-operation is not specified but could include, for example, co-operation on training, development of information for victims and the sharing of best practice. It could also include working across health board boundaries.

32. Section 12J(1) of the National Health Service (Scotland) Act 1978 ("the 1978 Act") requires health boards to co-operate with one another, and with special health boards and the Common Services Agency in relation to the planning and provision of services under that Act – subsection (1) of section 11 is the equivalent of that duty in relation to the services to be provided under the Bill. Subsections (2) and (3) of section 12J provide further details in relation to such co-operation, providing, for example, that a health board can undertake to provide (or secure the provision of) services as respects the area of another health board and do anything for the purposes of providing such services which it could do as respects its own area. These subsections are applied for the purposes of subsection (1) of section 11 of the Bill. This would allow, for example, a number of health boards to agree that one of them would enter into a contract for the provision of out-of-hours services across all of the boards' areas.

33. The Bill provides a platform for wider multi-agency working (for example the development of multi-agency facilities) and no amendments require to be made to policing, local authority or other legislation for this to happen.

Schedule: Minor and consequential modifications

34. The amendments to the 1978 Act and the Functions of Health Boards (Scotland) Order 1991 made by paragraphs 1 and 2 of the schedule ensure that health boards are able to exercise their existing functions in relation to the provision of facilities and medical and nursing staff for the purposes of the Bill (as well as the purposes of the 1978 Act). Similarly, health boards will be able to purchase land and other property for the purposes of the Bill.

35. The amendments to the Patient Rights (Scotland) Act 2011 ensure that relevant provisions of the Act apply to all elements of a health board's interaction with a victim in relation to whom the functions conferred by section 1 are being exercised – that is, to health care aspects and to forensic medical services aspects (these services not being, strictly speaking, "health" functions, as indicated by the purposes described in section 2(3) and 6(2)). So, for example, the health care principles set out in the schedule of the 2011 Act apply in relation to a health board's provision of the examination service, meaning that, amongst other things, a health board carrying out a forensic medical examination must uphold the principle of care being provided in a caring and compassionate manner. The principle of trauma-informed care is added to the schedule of health care principles, for the purposes of the Bill.

36. Paragraphs 4(2) and (3) amend sections 3C and 3D of the Victims and Witnesses (Scotland) Act 2014, ("the 2014 Act") so that health boards, when providing the services mentioned in section 1 of the Bill, are required to provide victims with certain information, for example a copy of the Victims' Code for Scotland (published by the Scottish Ministers under section 3B of that Act) (or information on where to obtain a copy) and, if requested, refer the victim on to other victim support services.

37. Paragraph 4(4) of the schedule amends section 9 of the 2014 Act. This section provides that victims of sexual offences must be given an opportunity to request that the person who is to carry out a forensic medical examination be of a specified gender. The person due to carry out the examination must be informed of the nature of any such request. The amendments made by the Bill will keep section 9 aligned with the wider changes made by the Bill, for example, by removing the references to police constables, given that the Bill requires examinations to also be available on a self-referral basis.

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

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