



Response

by

THE FACULTY OF ADVOCATES

to

the Consultation Document

on

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

1 Introduction

- 1.1 The Faculty of Advocates welcomes the opportunity to comment on the proposal for a Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill (“the FMS Bill”).
- 1.2 The Faculty would propose to make a number of general observations followed by responses to the specific questions posed.

2 General observations

- 2.1 In general, the Faculty notes the FMS Bill seeks to carve out responsibility for examination services and retention services from Police Scotland and transfer that responsibility to the health boards. While this may make sense operationally, it gives rise to significant concerns about the management and delivery of those vital services within the criminal justice system. The FMS Bill places on a statutory footing certain provisions which are presently set out in the Memorandum of Understanding between Police Scotland and Scotland’s health boards (“[the MOU](#)”). The Faculty considers it appropriate that the MOU remains

in place for those services which are not covered by the provisions of the FMS Bill, albeit that a revised version of the MOU might be required once the FMS Bill becomes law.

2.2 Forensic Medical Examiners. The Faculty notes that neither the MOU nor the FMS Bill contains a definition of ‘forensic medical examiner’ (“the FME”). As matters stand, an FME is a qualified medical doctor often with a degree of specialism in the area of forensic medicine, and colloquially referred to as a ‘police surgeon’. It is vital that FMEs remain qualified medical doctors with a required degree of specialism in the field. This is both in the interests of the persons being examined, and in the interests of justice, since FMEs will be expected to attend Court and speak to their findings arising from a forensic medical examination. FMEs are also required, at Section 3, to form their own professional judgement as to whether an examination should be carried out and whether any particular action should form part of that examination. Such professional judgement must remain the preserve of a medical doctor with the appropriate degree of specialism. FMEs of course also carry out general (rather than specifically sexual) forensic examinations and if such a general examination is also required in a particular case then it would be preferable that it take place at the same time as the sexual examination.

2.3 FME’s Reports. Furthermore, at present FMEs will make a report of their findings from a forensic medical examination. That report does not simply note the samples which were recovered. It might also note the general presentation of the person being examined (for example whether the person is agitated, upset or under the influence of drink or drugs), any injuries, any relevant medical history and other relevant forensic information. The FME’s report then routinely becomes a key document disclosed to the defence and lodged as a Crown Production in advance of trial in order to be spoken to by the FME when attending Court to give evidence. It is thus essential that such reports, together with any samples recovered, are properly retained by health boards for transmission to Police

Scotland in any circumstances. The continued provision of reports by FMEs appears to be provided for within Part 4 of the MOU.

- 2.4 Issues with Self-Referral. Section 1 of the FMS Bill concerns the provision of the ‘examination service’ (1(a)) and the ‘retention service’ (1(b)). Section 1 ensures that it is Scotland’s health boards which are primarily responsible for the provision of these services. The examination service (Section 2) is defined as the provision of forensic medical examinations to an alleged victim of a sexual offence, where the sexual offence is alleged to have been committed by an adult, child, or child under the age of criminal responsibility (currently age 8, but to be raised to 12 once the Age of Criminal Responsibility (Scotland) Act 2019 is brought into force). Section 2 states that health boards must provide forensic medical examinations to persons who are either referred to the health board by a police constable (“Police Referral”) or to persons who are aged 16 or over and request a forensic medical examination (“Self-Referral”).
- 2.5 Self-Referral appears now to be an expanded concept which was not specifically provided for within the MOU. It may be difficult to estimate the number of Self-Referrals relative to Police Referrals: however the Faculty can envisage some issues with the carrying out of a forensic medical examination by a health board in circumstances where a person self-refers.
- 2.6 As matters stand, a constable is generally present during the conduct of a forensic medical examination by an FME. That constable oversees the collection of forensic samples taken in the course of the examination and ensures their safe transit to the laboratory. Where a person self-refers, however, no constable will be present for the examination. The practical implications for the integrity and security of samples collected during the examination are obvious. The health board and, in particular, the FME conducting the forensic medical examination will become directly responsible for the proper labelling and description of samples. Those samples must then be retained until either the person who

underwent the examination requests that the evidence be destroyed (Section 8(1)(a)) or after the expiry of such period of time as the Scottish Ministers may specify (Section 8(1)(b)). Where a person self-refers for examination and then subsequently reports the incident in connection with which the examination took place to the police, the police may request the transfer of the evidence collected (Section 9). The health board must then comply with any such request as soon as reasonably practicable.

2.7 Broadly speaking, therefore, health boards (and, in particular, FMEs) will be responsible for retaining samples and reports, particularly when a self-referral takes place. At present, such reports and samples pass immediately into the control of Police Scotland and constables trained in the handling of forensic samples and reports. Health board professionals may lack that training, leading to the integrity of samples and reports being compromised. In the Faculty's view, such training is essential.

2.8 Provision of examination service by 'another person'. The Faculty notes that Section 1(2) provides that a health board may secure the provision of an examination service in respect of its area by 'another person', but that Section 1(3) provides that 'another person' cannot be another health board, albeit that Section 11 provides that health boards must co-operate with one another in relation to the planning and provision of an examination service. The Faculty notes that this may assist with the provision of examination services in rural or island areas. Where another person provides examination services on behalf of the health board, or indeed when provided by the health board itself, the Faculty considers the examination should be provided as soon as is reasonably practicable (for example, in circumstances where a person has to travel from an island to the mainland for examination, with resulting delay which could compromise the integrity of any evidence obtained at examination and add to the distress of the person who is to be examined). Furthermore, the Faculty considers that

examinations (whether conducted by health boards or another person) should only be conducted within suitable clinical facilities.

2.9 Corroboration. At present, the attendance of a constable or constables, together with the presence of the FME, ensures that the evidential chain can be corroborated back to the point of being obtained. Where forensic medical examinations take place in the absence of a constable (namely in a self-referral situation), it remains necessary to corroborate the collection of any samples. This means that another person, aside from the FME, is required during the forensic medical examination to corroborate the collection and transmission of samples. That person must be qualified or trained in the proper handling and transmission of evidential samples and other material, at least to the standards which operate within Police Scotland.

2.10 Destruction of evidence. The Faculty considers the provision at Section 8 for the destruction of evidence upon the request of the person who underwent the examination might reasonably be subject to a ‘cooling off’ period, since persons can change their mind around engagement with the criminal justice system.

Having made those general observations, the Faculty addresses the specific questions as follows.

Question 1:

What are the key advantages and disadvantages of placing the examination of victims of sexual offences (and harmful sexual behaviour by children under the age of criminal responsibility) by health boards on a statutory basis?

The FMS Bill provides a framework for the provision of examination services and retention services, and the division of responsibility between health boards and Police Scotland. However the FMS Bill neither includes nor specifically addresses issues which remain in the MOU, which relates to the provision of medical services to those in the care

of Police Scotland. The FMS Bill accordingly carves out responsibility for examination services and retention services from Police Scotland and transfers that responsibility to the health boards. Beyond doing so, the FMS Bill makes no provision for the proper conduct of examination services and retention services by the health boards, being functions which are presently the responsibility of Police Scotland. In the Faculty's view there is accordingly a gap in the legislation as it relates to the quality and practical delivery of those services by the health boards.

The Faculty sees no difficulty in placing the examination of persons by health boards on a statutory footing *per se*; however it is the transfer of those functions from Police Scotland to the health boards, and how they will be delivered to an acceptable standard within the criminal justice system, that needs to be addressed.

Question 2:

What are the key benefits of providing forensic examination on a self-referral basis (whereby victims can undergo a forensic medical examination without first having reported the incident to the police)? What problems may arise from this process?

The Faculty does envisage problems with this process, as set out in paragraphs 2.4 to 2.10 inclusive above, however it may be that the option of self-referral being more widely available would be welcomed by persons wishing to be forensically examined.

Question 3:

Are there any issues with the proposal to restrict self-referral to people over 16 years old?

The Faculty considers the proposal to restrict self-referral to those aged 16 and over to be a reasonable restriction.

Question 4:

Are there any issues with the health board storing and retaining evidence gathered during self-referred forensic examinations?

The Faculty considers there to be a number of concerns arising from such a scenario. These concerns are already set out above under General Observations.

Question 5:

Do you have any other comments to make on the Bill?

No.