

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

---

## Delegated Powers Memorandum

### Introduction

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill ("the Bill"). It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of the Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament.

### Outline of Bill provisions

3. The main purpose of the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill is to confer a duty 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).

4. The Bill has sixteen sections and one schedule. In summary, they make provision as follows:

- Section 1 confers a duty on health boards to provide a forensic medical service comprising an examination service and a retention service, with section 2 containing further detail on the examination service.

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

- Section 3 provides that health boards are not required to provide a forensic medical examination where its provision would conflict with a professional judgement, including that there is no requirement to conduct particular actions as part of a forensic medical examination where a professional judgement is made that a particular action should not be carried out. Section 4 requires health boards to provide and explain certain information to a victim before they undergo a forensic medical examination. Section 5 requires health boards to identify and address a victim's health care needs as part of them being referred for a forensic medical examination.
- Section 6 contains detail on the retention service, which requires health boards to store evidence collected during a forensic medical examination for the purpose of preserving that evidence for any future police investigation or proceedings in relation to the incident that the person received the examination service for.
- Section 7 requires the health board to return certain items that were stored under the retention service, on request of a victim to whom those items belong. Section 8 requires the health board to ensure that any evidence collected and stored under the retention service is destroyed in either of two circumstances. The first is where the victim makes a destruction request in relation to the evidence that was stored in connection with their forensic medical examination. The second is where a fixed period of time has passed (which will be set by the Scottish Ministers in regulations) and a victim has made no destruction request.
- Section 9 provides for the transfer of evidence collected from a forensic medical examination following a request from the police.
- Sections 10, 14 and 15 respectively confer power to confer functions on other health service bodies, contain ancillary provision and provide commencement powers.

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

## Rationale for subordinate legislation

5. The Government has had regard, when deciding where and how provision should be set out in delegated legislation rather than on the face of the Bill, to:

- the need to strike a balance between the importance of the issue and providing flexibility to respond to changing circumstances (for example changes in forensic science);
- the need to make proper use of valuable parliamentary time; and
- the need to anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament (for example unexpected service delivery issues in the development of a national coordinated model of self-referral).

6. The Bill confers four powers on the Scottish Ministers which are set out below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of parliamentary procedure has been considered appropriate.

## Delegated Powers

### **Section 8 – Destruction of samples, information etc.**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: regulations made by Scottish statutory instrument**

**Parliamentary procedure: affirmative**

### **Provision**

7. Section 8 provides that the Scottish Ministers may specify a maximum period of time that health boards are required to hold samples and other evidence taken from victims who have had a forensic medical examination. After that period expires, a health board must ensure the destruction of any samples and any other evidence that has not been

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

transferred to the police. During the retention period, section 7 empowers a victim to request the return of clothing or other property, which means it would not be subject to destruction at the end of the retention period. Section 8 empowers a victim to instruct the destruction of samples and other evidence, which means it would be destroyed before the end of the retention period.

### **Reason for taking power**

8. The collection and retention of samples engages a person's right to respect for private life under article 8 of the European Convention of Human Rights. Yet the collection and retention of samples is necessary in order to allow a victim time to consider whether they wish to make a police report. Respecting the need for the victim to take sufficient time to come to a decision must be balanced against an interference with the right to privacy. This regulation making power is considered necessary in order to allow for a proportionate and ongoing review to be made in relation to the retention period to be fixed.

### **Choice of procedure**

9. Affirmative procedure is felt to be appropriate in order to allow for a higher level of scrutiny given the importance of the rights that are engaged. The Policy Memorandum references the creation of a self-referral sub group under the Chief Medical Officer's Taskforce to develop self-referral guidance for health boards and this will include a recommendation to the Scottish Ministers on the appropriate statutory retention period. Further information on the role of the Taskforce in relation to the Bill is contained in the Policy Memorandum.

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

## **Section 10 – Functions**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: regulations made by Scottish statutory instrument**

**Parliamentary procedure: affirmative procedure if they add to, replace or omit any part of the text of an Act, otherwise subject to negative procedure**

### **Provision**

10. Section 10 provides that the Scottish Ministers may confer functions relating to the examination service and retention service on three types of health service bodies: special health boards (including from April 2020 Public Health Scotland), the Common Services Agency (referred to in other accompanying documents as NHS National Services Scotland) and Healthcare Improvement Scotland (commonly known as HIS). All of these bodies have a Scotland-wide remit whereas territorial health boards have geographically limited remits. The power includes power to make different provision for different purposes as well as incidental, supplementary, consequential, transitional, transitory or saving provision.

### **Reason for taking power**

10. These three types of health service bodies are likely to have a connection to the provision of the examination and retention service. The power will enable relevant functions to be identified and conferred on the health service bodies in order to ensure that there is a flexible response to the practical delivery and provision of the services under the Bill. One example of this may be extending NHS National Education Scotland's responsibility to provide education and training to the health service so that it relates to healthcare professionals who will provide the examination service.

### **Choice of procedure**

11. Section 10(4)(a) provides that any regulations made under section 10(1) will be subject to affirmative procedure if they contain provisions which textually amend primary legislation. Otherwise, they will be subject to

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

negative procedure. This provides the appropriate level of parliamentary scrutiny for the textual amendment of primary legislation while ensuring that power to confer functions and make other ancillary provision is still subject to sufficient scrutiny by the Parliament. This power relates to technical arrangements for how the examination and retention service will be delivered in practice and the regulations will be procedural in nature. Negative procedure is therefore thought to afford sufficient parliamentary scrutiny.

## **Section 14 – Ancillary provision**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: regulations made by Scottish statutory instrument**

**Parliamentary procedure: affirmative procedure if they add to, replace or omit any part of the text of an Act, otherwise subject to negative procedure**

### **Provision**

12. Section 14 allows the Scottish Ministers to make incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of or in connection with or for giving full effect to the Bill.

### **Reason for taking power**

13. Any conferral of new legal duties may give rise to a need for a range of ancillary provisions. The Government is conscious that the retention service will be a new service for most health boards, and unexpected service delivery issues could arise in the course of implementation of the Bill. Also, whilst there is very little pre-existing legislation on forensic medical issues it is possible that legislation requiring consequential amendment could emerge during implementation, and it would be desirable for the Scottish Ministers to have power to make appropriate amendments.

14. Without the power to make incidental, supplemental and consequential provision it may be necessary to return to the Parliament,

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

through subsequent primary legislation, to deal with minor matters which require to be dealt with to give full effect to the original Bill. That would not be an effective use of either the Parliament's or the Government's resources. The power is restricted by being ancillary to the provisions of the Bill and any such provision must clearly be for the purposes of the Bill, or in consequence of it, or for giving full effect to it.

### **Choice of procedure**

15. Under section 14(3)(a) any regulations made under section 14(1) will be subject to affirmative procedure if they contain provisions which textually amend primary legislation. Otherwise they will be subject to negative parliamentary procedure. It is appropriate for significant transitional, transitory or saving provision (as opposed to routine provision regarding commencement) to be subject to parliamentary procedure. This provides the appropriate level of parliamentary scrutiny for the textual amendment of primary legislation while ensuring that other ancillary provision is still subject to sufficient scrutiny by the Parliament. These procedures are typical for ancillary powers.

### **Section 15 – Commencement**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: regulations made by Scottish statutory instrument**

**Parliamentary procedure: none**

### **Provision**

16. Section 15 provides that all of the provisions of the Bill, except certain provisions containing definitions, regulation making powers and the short title, come into force on a day set by the Scottish Ministers by regulations. It is prudent given the territorial remits of health boards that there is power to make different provision for different areas.

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

### **Reason for taking power**

17. The decision on when and to what extent the Bill is commenced is an administrative issue for the Scottish Ministers. Section 15(3) allows the commencement regulations to make ancillary provision to ensure the smooth and orderly commencement of provisions of the Bill.

### **Choice of procedure**

18. The decision on commencement is a matter for the Scottish Ministers and as is usual for commencement regulations, the default laying requirement applies under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010. This is considered appropriate because the policy behind the provisions will have already been considered by the Parliament during the passage of the Bill.



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

## Delegated Powers Memorandum