These notes relate to the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Act 2021 (asp 3) which received Royal Assent on 20 January 2021

FORENSIC MEDICAL SERVICES (VICTIMS OF SEXUAL OFFENCES) (SCOTLAND) ACT 2021

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Act 2021. They do not form part of the Act and have not been endorsed by the Parliament.

2. These Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. 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 ACT: AN OVERVIEW

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

4. The Act places on a statutory footing the pre-existing arrangements under which forensic medical examinations of such victims were carried out by health boards. Those arrangements were set out in a memorandum of understanding agreed between Police Scotland and health boards, which allowed Police Scotland to refer victims to health boards for forensic medical examination.[1] 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.

5. As well as providing examinations in these "police-referral" cases, some health boards[2] also provided forensic medical examinations on a "self-referral" basis. "Self-referral" 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 Act requires all health boards to make forensic medical examination available on a self-referral basis in cases involving sexual offences (or harmful sexual behaviour by children under the age of criminal responsibility).

6. What makes a physical 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 Act from health boards' other functions.

---

1 https://www.policecare.scot.nhs.uk/wp-content/uploads/2015/03/Police-Healthcare-Forensic-Medical-Services-MoU-Final-v1.pdf. The 2014 memorandum of understanding covers services other than those dealt with in the Act (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 Act continue to be dealt with under the memorandum of understanding.

2 NHS Greater Glasgow and Clyde and NHS Tayside.

The Act 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]).

7. The Act requires health boards to have regard to the importance of exercising the functions it confers in a trauma-informed way.

8. The Act 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; creates rights for victims to request victim support information from health boards; requires reports to be made on the operation of the Act for 10 years following implementation; and makes various consequential modifications of other enactments.

THE ACT: SECTION BY SECTION

Section 1: Provision of certain forensic medical services

9. Section 1 places formal legal responsibility for the delivery of certain forensic medical services on health boards. Health boards are 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.

10. Each health board is to provide the services in respect of the health board's area (although health boards can, under section 14, co-operate with other health boards in doing so – for example, by agreeing that staff from one health board will be available to assist another health board in certain circumstances). The examination service provided by each health board in its area can be accessed by any person who falls within section 2(2), regardless of where the person lives (section 1(2)(a)). So, for example, a person who is the victim of a sexual offence while visiting Scotland can access a forensic medical examination in the same way as a victim who lives in Scotland. A health board's retention service is to be available to any person who uses that health board's examination service (section 1(2)(b)).

11. Both the examination service and the retention service must be provided directly by health boards (except where two or more health boards are co-operating under section 14). But this does not prevent health boards contracting with third parties, where necessary, to supply any additional staff needed to assist in health boards' provision of these services, for example to provide out of hours cover.

Section 2: The examination service

12. The examination service that each health board must provide 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 (11), but includes rape and sexual assault as defined in the Sexual Offences (Scotland) Act 2009 ("the 2009 Act"). 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 Act therefore does not cover such cases.

13. The Act does not refer to attempts to commit offences of the kind described in subsection (11). This is unnecessary as an attempt to commit an offence is itself

---

3 Which may be "personal data" for the purposes of data protection legislation.

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 (11).

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 (11).[5] The reference to behaviour which risks causing harm covers attempted harmful sexual behaviour.

15. It may not be known at the time a forensic medical examination takes place whether the incident involves an alleged offence or an alleged case of harmful sexual behaviour by a child under the age of criminal responsibility. This does not matter for the purposes of section 2(2) – an incident giving rise to a need for a forensic medical examination will always involve an allegation that an incident falling, one way or the other, within section 2(2)(a) has taken place and so the duty on the health board to provide a forensic medical examination still applies.[6]

16. It does not matter, for the purposes of the provision of a forensic medical examination, whether the incident giving rise to the need for the examination took place in Scotland or elsewhere.[7] So, for example, a person aged 16 or over who lives in Scotland and who is sexually assaulted while abroad or elsewhere in the UK can request an examination on a self-referral basis on their return home.

17. 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 a constable (following the incident being reported to police) – see subsection (2)(a).[8] The second possibility is that a victim "self-refers", that is, requests

---

4 The age of criminal responsibility in Scotland is 12 (following commencement of section 1 of the Age of Criminal Responsibility (Scotland) Act 2019 on 17 December 2021). 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 Act differs from descriptions of behaviour used for different purposes in the Age of Criminal Responsibility (Scotland) Act 2019.

6 It follows, with regard to the description of the purposes for which a forensic medical examination is carried out in section 2(3), that it need not be known at the time the forensic medical examination takes place which of the types of investigation or proceedings described in the definitions of these terms in section 18(1) might subsequently take place.

7 It also does not matter, where the incident giving rise to the need for an examination took place outside Scotland and the behaviour in question was carried out by a person below the age of criminal responsibility in that place, whether that age of criminal responsibility is higher, lower or the same as in Scotland: behaviour outside Scotland will be regarded as either a sexual offence or harmful sexual behaviour by a child under the age of criminal responsibility according to age of criminal responsibility in Scotland. For example, a person who is sexually assaulted by a person aged 14 in a country where the age of criminal responsibility is 15 will be able to access a forensic medical examination under the Act on the basis that the behaviour to which they were subject would be a sexual offence in Scotland.

8 Section 2 (and other sections) refer a person being referred (or other things being done) by "a constable". Section 18(1) defines that term to mean Police Scotland constables. In order to ensure that the same arrangements apply in relation to all of the police forces operating in Scotland which might be involved in investigation of incidents of the type described in section 2(2), the Scottish Government has worked with the UK Government to develop the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Act 2021 (Consequential Modifications) Order 2022 (S.I. 2022/261). (At the time of publication of these Notes, this Order has been made and laid before Parliament, but may be objected to until 29 April 2022.) When in force, the order will have the effect of:

- • extending the duty on health boards to carry out forensic medical examinations to cases where the victim is referred to the health board by the British Transport Police, the Ministry of Defence Police or one of the service police forces (that is, the Royal Military Police, the Royal Navy Police and the Royal Air Force Police),
- • extending the power to request the transfer of evidence under section 9(2) to members of the service police forces (British Transport Police constables and members of the Ministry of Defence Police are considered to already have this power by virtue of, respectively, the Railways and Transport Safety Act 2003 and the Ministry of Defence Police Act 1987), and

the health board to carry out a forensic medical examination without the incident having been reported to police (see subsection (2)(b)). A victim might access self-referral by phoning and arranging an appointment at the appropriate health board facility.

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

19. Self-referral is not available to children aged under 16 (but see also paragraph 24 below). 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 a constable requests an examination under subsection (2)(a). This does not prevent the young person accessing healthcare support ahead of police involvement.

20. 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 18(1), while section 17 expands, in a number of respects, on the meaning of references to "evidence" – see paragraphs 59 to 62 below.

21. Subsection (3) also states that forensic medical examinations are physical medical examinations. So, for example, an entirely non-physical assessment of whether a person was incapable of consenting to sexual conduct as mentioned in section 17(2) of the 2009 Act is not a forensic medical examination for the purposes of the Act.[9]

22. However, in some cases where a person is referred for or requests a forensic medical examination following an incident of a type described in subsection (2), a full physical examination will not be carried out. Examinations may only proceed to the extent that the victim consents under general law and practice – so one reason why a full physical examination might not be carried out is that the victim consents only to a limited examination. As discussed below in relation to section 3, it is also possible for a professional judgement to be made that a full physical examination ought not to be carried out. Sections 17(3) and 18(2) ensure that, in a case where the physical examination does not in the end proceed for some reason, the provisions of the Act still apply in relation to whatever evidence is collected (including by providing that references to the need for an examination, such as that in section 2(3)(a), include reference to the need for the original referral or request for examination). So, for example, if a victim is referred by police for a forensic medical examination but does not consent to a full physical examination, notes taken by health board staff in anticipation of such an examination taking place are "evidence" (as long as they were not taken purely for health care reasons). This means that they must be transferred to a constable under section 9(3) following a request being made under section 9(2).

23. The fact that forensic medical examinations are physical medical examinations does not limit the health boards' duty under section 5 of identifying and addressing any health care needs of persons undergoing a forensic medical examination – as explained below, that duty extends to mental health care needs as well as physical health care needs.

24. Subsection (4) confers power on the Scottish Ministers, by regulations subject to the affirmative procedure, to change the age at which self-referral becomes available (as

---

- • ensuring that health boards are required to comply with requests for the transfer of evidence made under section 9(2) by the British Transport Police, the Ministry of Defence Police or one of the service police forces.

9 This does not mean that no evidence relevant to the issue of consent can be collected during a forensic medical examination (for example, a urine or blood sample collected during such an examination may indicate that a person was incapable of consenting to sexual conduct because of the effect of alcohol or any other substance, as mentioned in section 13(2)(a) of the 2009 Act).

set out in subsection (2)(b)) to any age from 13 to 18. This power may be exercised more than once (so, for example, the age could in principle be changed from 16 to 15, and then further changed to 14 or 13, or from 16 to 17 and then further changed to 18).[10]

25. Subsection (8) requires the Scottish Ministers to make a statement to the Scottish Parliament annually on the reasons for the self-referral age set out in subsection (2)(b) being changed (or not changed) using the power conferred by subsection (4). A statement under subsection (8) must also provide details of the support which is provided to persons aged under 16 who are referred for a forensic medical examination by a constable under subsection (2)(a), as well as details of any consideration given to the question of what support would be provided to such persons if the self-referral age was changed to allow that age group to self-refer under subsection (2)(b).

Section 3: Limitations on provision of forensic medical examinations

26. This section ensures that decisions about forensic medical examination are made on the basis of professional judgement. This means that the Act 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.

27. 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.[11] This section ensures that a health board is not obliged to carry out an examination where a professional judgement is made that it is not appropriate to proceed with the examination or full examination for any reason. Professional judgement includes both clinical and non-clinical elements. It includes, for example, consideration of whether a person can consent to the examination, whether decisions need to be taken on a multi-agency basis and whether in the circumstances of the case it is in the public interest for a police report to be made. It 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

28. The effect of subsections (2) and (3) is that health boards must (before the process of collecting evidence begins) make victims fully aware of what may happen to the evidence collected during a forensic medical examination. In police-referral cases, a constable 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, and a constable subsequently requests a transfer of evidence under section 9. 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).

29. 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.

---

10 The power includes power to make transitional, transitory or saving provision – for example, if the age of self-referral was increased at any time, this would allow regulations to provide that persons under the new age who had previously undergone an examination on a self-referral basis continued to be able to request the destruction of evidence collected during the examination under section 8.

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

Section 5: Health care needs

30. Subsections (1) and (2) require 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.

31. The duty imposed on health boards by subsection (1) only applies to the extent that the health board is responsible for a person's health care. As noted in paragraph 10 above, health boards must provide the examination service regardless of the place of residence of the person being referred for or requesting a forensic medical examination. The persons in relation to whom health boards' health care functions are exercisable are set out in the Functions of Health Boards (Scotland) Order 1991. Under that Order, a health board is generally responsible for the health care of persons resident within its area, as well as, for example, emergency care for all persons in its area. Paragraph 2 of the schedule to the Act amends the Order to provide that, where a health board is not generally responsible for the health care of a person who has been referred for or requests a forensic medical examination (and the health care required is not emergency care), the health board is responsible for providing health care at the time the examination service is provided to the person and also for providing such follow-up care as the health board considers it appropriate to provide. To illustrate: suppose that a person who lives in Aberdeen is sexually assaulted while visiting Edinburgh, and that the person immediately requests a forensic medical examination from NHS Lothian on a self-referral basis. NHS Lothian will be responsible for carrying out the forensic medical examination and for identifying and addressing the victim's immediate health care needs in that context. Separately, NHS Lothian could opt to provide certain follow-up care – for example, by suggesting that the victim returns a day or so after the examination in order for a dressing on a wound to be changed. But NHS Lothian is not obliged to provide any longer term health care that the person requires as a result of the sexual assault. Instead, the victim could be referred to, or given information about, relevant services provided by NHS Grampian. [12]

32. Subsection (3) provides that the subsection (1) duty applies even in cases where a victim presents for forensic medical examination but no examination takes place (for example, because a professional judgement is made that such an examination should not be carried out or because a victim does not consent to undergo examination).

Sections 6, 7 and 8: The retention service

33. 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.

34. 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).

35. As mentioned in paragraph 22 above in connection with section 2(3), the victim might not proceed to undergo a full physical medical examination in all cases. As already noted, section 17(3) makes clear that things can be "evidence" even where this happens and section 18(2) ensures that references to the need for an examination (such as that in section 6(2)(a)) are adjusted in such cases. Section 18(3) and (4) further clarifies that, in such cases, sections 6 to 8 are nevertheless to be read as if a forensic medical examination has taken place.

---

12 In this regard, see also the discussion of section 12, on victim support information and referrals, in paragraphs 48 to 53 below.

36. A victim who self-referred for a forensic medical examination may make a request under section 7 that certain stored items (that is, items which were worn or otherwise present during the incident which gave rise to the examination, such as underwear) be returned to them. The Act does not give victims a right to request other types of stored evidence from the health board (for example, samples).

37. Section 7(3) sets out a limited number of cases in which requests for the return of stored items must be refused by the health board. Where the health board is not satisfied that the requested item belongs to the victim or considers that there are safety reasons why the requested item cannot be returned, the health board must explain the reason for the refusal to return the item to the victim. The health board must also refuse to return a requested item if there is an overlapping police request for the transfer of the item under section 9 (that is, if the police request is made before the request for the item to be returned is made or if the police request is made after that request but before the health board has returned the item to the victim). The health board does not require to inform the victim of the reason for the refusal to return the item in this case (as a police request for the transfer of the item under section 9 can only be made, in a self-referral case, where the victim has reported the incident which gave rise to the examination to police – so the victim will already be in contact with the police in such cases[13]). If none of these reasons for refusing to return the requested item apply, the health board must comply with the request and return the item to the victim as soon as reasonably practicable.

38. Victims who have self-referred can request the destruction of all forms of stored evidence[14] 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 police 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 made under section 8(1)(b).[15] This does not mean that the incident cannot be reported to the police after this time, just that the evidence will no longer be available for use in relation to such a report.

39. A 30 day "cooling-off period" applies following the victim making a request for the destruction of evidence under section 8(1)(a). The victim can withdraw the request during that period, in which case the evidence will continue to be stored under section 6 rather than destroyed at the end of the 30 day period (see section 8(2)(a)). Further requests for destruction can be made (and withdrawn). The making (and withdrawal) of a request for evidence to be destroyed does not have any impact on the period specified under section 8(1)(b).[16] If a request made under section 8(1)(a) is not withdrawn, the evidence is destroyed at the end of the 30 day period.

40. Section 8(2)(b) and (3) to (5) provide for what is to happen if a police request for evidence to be transferred under section 9 is made just before or just after evidence

---

13 See also section 3I of the Victims and Witnesses (Scotland) Act 2014, which makes provision about the return to victims of property held by various persons (excluding health boards) for the purposes of a criminal investigation.

14 But note that medical records are not "evidence" if they were created entirely for health care reasons – see section 17 (subsection (2) in particular) and the discussion of that section in paragraphs 59 to 62 below. Requests under section 8 therefore do not extend to such records (and request for such records to be destroyed would instead fall to be dealt with under general NHS Scotland information governance arrangements).

15 Regulations made under section 8(1)(b) will be subject to the affirmative procedure. Again, the power includes power to make ancillary provision of various types. Transitional or saving provision might, for example, be required in order to set out what is to happen to evidence already stored if the period for which evidence is to be held is increased or decreased. The Forensic Medical Services (Self-Referral Evidence Retention Period) (Scotland) Regulations 2022 (S.S.I. 2022/89) provide for the retention period, on implementation, to be 26 months beginning with the day on which the forensic medical examination under section 2(2)(b) takes place (although the fact that the period is set in regulations means that it could change in future – the Act provides for the period to be set in this way specifically in order to allow it to be changed in light of experience if necessary).

16 In particular, if a request for destruction is made under section 8(1)(a) fewer than 30 days before the period specified under section 8(1)(b) is due to expire, then the evidence will be destroyed by virtue of section 8(1)(b) at the end of the period specified under that section, rather than the expiry of the 30 day period provided for in section 8(1)(a). It follows that, in such a case, it will not be possible to withdraw a request made under section 8(1)(a) after the expiry of the period specified under section 8(1)(b).

is due to be destroyed under section 8(1) (whether by virtue of the expiry of the 30 day period following the making of a request under section 8(1)(a) or the expiry of the period specified under section 8(1)(b)). If, at the time whichever of those periods is relevant in a particular case expires, the evidence is still in the health board's possession despite a request under section 9(2) having been made before the period expired, the health board must not destroy the evidence under section 8(1) (but must instead comply with the request for transfer under section 9(2), as required by section 9(3)). And, if a request under section 9(2) is made after the expiry of whichever of those periods applies but before the evidence has actually been destroyed, the health board again must not destroy the evidence under section 8(1), but instead comply with the request under section 9(2) (although this does not apply if the destruction of the evidence is already in train and it is not reasonably practicable to stop it).

Section 9: Transfer of evidence to police

41. Subsection (1) sets out the circumstances in which a constable[17] can, for the purposes set out in subsection (2)[18], request the transfer of evidence[19] gathered during a forensic medical examination carried out (or, in the case of subsection (1)(c), purportedly carried out) under the examination service.[20] Paragraph (a) deals with police-referral cases and paragraph (b) with self-referral cases. In the latter case, the incident must have been reported to the police by the victim in order for a request to be made – 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. Paragraph (c) deals with cases where a health board report to the police that an examination has been carried out erroneously (due to the victim being under the self-referral age which applied at the time the examination took place) (see also the discussion of section 11 in paragraphs 45 to 47 below).

42. Health boards must comply with requests for transfer of evidence as soon as reasonably practicable. In practice, a 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 offence cases being investigated by Police Scotland 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 officers 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 Act does not require to re-legislate for these practices.[21]

Section 10: Trauma-informed care

43. The schedule of the Patient Rights (Scotland) Act 2011 ("the 2011 Act") sets out a number of health care principles. Under section 5(1) of that Act, health boards must uphold those principles in performing their health service functions (in so far as each principle is relevant to the function being performed). This Act's schedule makes a number of amendments to that Act, including amendments which ensure that those health care principles also apply (as appropriate) in relation to the exercise of functions under the Act (see paragraph 68 below).

44. Section 10 adds a further health care principle to the schedule of the 2011 Act. The new principle applies only in relation to the exercise of functions under this Act. The effect of the new principle is that, in exercising functions under this Act (for example,

---

17 See footnote 8 above.
18 Again, the purposes align with the purposes set out in section 2(3) and 6(2).
19 See footnote 14 above and paragraphs 59 to 62 below.
20 Again, by virtue of section 18(2), (3) and (4), the references in this section to a forensic medical examination having been carried out, and to the incident which gave rise to the need for the examination, include reference to cases where the victim did not proceed to undergo a full physical examination.
21 Where the investigation is not being carried out by Police Scotland, the arrangements for the analysis of samples will vary according to which of the other police forces mentioned in footnote 8 is involved.

in carrying out forensic medical examinations under the Act, and in any subsequent dealings with the victim (for example, if the victim makes a request for evidence to be destroyed under section 8)), the health board must have regard to the importance of providing care in a way that seeks to avoid re-traumatisation and is otherwise trauma-informed.

Section 11: Examination of under-age person under section 2(2)(b)

45. This section makes provision to cover the possibility of a health board discovering, following a forensic medical examination having been carried out on a self-referral basis, that the victim was, at the time of the examination, under the self-referral age at that time specified in section 2(2)(b). Subsection (2) provides that things done by the health board up to the point where the health board discovers the victim's true age remain valid, as well as ensuring that the health board can continue to store any evidence collected under section 6 (despite the examination not technically having been carried out by virtue of either section 2(2)(a) (due to there having been no police referral) or (b) (due to the victim being under the self-referral age)).

46. Following discovery of the victim's true age, the victim cannot request the return of items of evidence under section 7 and section 8 no longer applies – so the victim cannot request destruction of the evidence held by the health board under section 8(1)(a), and the duty on the health board to destroy the evidence at the end of the period specified under section 8(1)(b) falls away (subsection (3)). By virtue of subsection (4), any requests for return of items of evidence under section 7 or for the destruction of evidence under section 8(1)(a) which are outstanding at the time the victim's true age is discovered must not be complied with (except where destruction of the evidence is already in train and cannot reasonably practicably be stopped).

47. In practice, it is expected that evidence would only require to be stored for a short period under section 6 following discovery of the victim's true age. This is because the health board would be likely to immediately report the situation to the police and, given the seriousness with which any report of a sexual offence (or of harmful sexual behaviour by a person under the age of criminal responsibility) against a child would be treated, the evidence then quickly requested by the police under section 9(1)(c).

Section 12: Victim support information and referrals

48. This section (along with the new section 8A inserted into the Victims and Witnesses (Scotland) Act 2014 ("the 2014 Act") by paragraph 5(2) of the schedule) complements provision already made by sections 3C(1) and 3D(1) of the 2014 Act.

49. Those sections of the 2014 Act require Police Scotland[22] to provide victims of offences (or alleged offences) with information about victims' rights to request a copy of the Victims' Code for Scotland, to request information about the rights of victims more generally and to request referral to providers of victim support services (or to contact such providers directly without referral). Requests under these sections can be made to certain "competent authorities" (including Police Scotland).[23] Sections 3C and 3D also provide for how such requests are to be responded to by the authority to which the request is made (for example, section 3C(3) requires the person, following the victim requesting a copy of the Victims' Code for Scotland, to provide the victim with such a copy or advise where a copy can be obtained).

50. As these provisions apply in relation to all offences (or alleged offences), Police Scotland already require to comply with them in the circumstances set out in section 2(2)(a)(i) of the Act. But they do not apply where a victim of an alleged sexual

---

22 Sections 3C(1) and 3D(1) of the 2014 Act (and also new section 8A(2)) impose duties on the chief constable of Police Scotland, but in practice these duties will be delegated to other police officers – for ease, references here to these duties simply refer to "Police Scotland"

23 "Competent authorities" are defined in section 32 of the 2014 Act.

offence chooses to self-refer for a forensic medical examination (as the police are not involved in such cases at this point). Section 12 therefore, in relation to such cases, imposes on health boards broadly equivalent duties to those imposed on Police Scotland by sections 3C(1) and 3D(1) of the 2014 Act – see subsection (2).

51. New section 8A of the 2014 Act adds to the existing duties imposed by sections 3C(1) and 3D(1) of that Act. It requires Police Scotland to inform victims who are being referred to a health board for a forensic medical examination under section 2(2)(a)(i) that they may request a copy of the Victims' Code for Scotland or information about the rights of victims from the health board which will carry out the examination. Police Scotland must also inform such victims that they can ask the health board to refer them to providers of victim support services (but also that victims can contact such providers without such a referral).

52. Subsections (3) and (4) of section 12 then impose on health boards equivalent duties to those imposed on "competent authorities" by sections 3C(3) and (5) and 3D(2) of the 2014 Act (that is, to provide the requested information (or advise where it may be obtained) or to make the requested referral to providers of victim support services (or to provide contact details for such services)). These duties apply in both police referral cases (that is, where the victim makes the request as a result of being informed of their rights under new section 8A(2) of the 2014 Act) and self-referral cases (that is, where the victim makes the request as a result of being so informed under subsection (2)).

53. Subsections (5) to (8) (mirroring subsections (3) and (4) of section 3B of the 2014 Act) make provision which ensures that victims who cannot understand English can request that the health board provides a copy of the Victims' Code for Scotland in a language that they do understand. The health board may ask the Scottish Ministers to provide a translated version of the Code (and the Scottish Ministers must comply with such requests).

Section 13: Power to confer functions on other bodies

54. This section gives the Scottish Ministers power[24] 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 Act (which are not, as already noted, exercised entirely for health purposes).

Section 14: Co-operation

55. Section 14 requires health boards to co-operate with each other, and with special health boards, the Common Services Agency and HIS, 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.

56. 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 14 is the equivalent of that duty in relation to

24 Exercisable by regulations, which are subject to the affirmative procedure if they modify the text of any Act and otherwise to the negative procedure.

the services to be provided under this Act. 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 (and subsection (4) of section 12J) are applied for the purposes of subsection (1) of section 14 of this Act (subject to one minor modification[25]). 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.

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

Section 15: Report on operation of Act

58. This section requires Public Health Scotland[26] to produce (for a limited time following the Act's enactment) reports on the operation of the Act. Each report is to relate to a reporting period: the first reporting period runs from the day on which section 1 comes into force until 31 March in the following year[27], the second reporting period runs from 1 April in that following year until 31 March in the year after that, and so on until a total of 10 reports have been produced. Each report is to be prepared as soon as reasonably practicable after the expiry of the relevant reporting period, with the report then being laid before the Scottish Parliament and published no later than 31 May each year.

Section 17: Meaning of references to "evidence"

59. The Act contains a number of references to evidence (see sections 2(3), 4(2), (3) and (4), 6(1) and (2), 7(1), 8 and 9). Section 17(1) provides an non-exhaustive list of things that might constitute evidence (for example, samples collected or images created during or in connection a forensic medical examination). But section 17(2) then provides that things collected or created during or in connection with a forensic medical examination are not evidence if they were collected or created for a purpose other than use in connection with any investigation of the incident which gave rise to the need for the examination or any proceedings in relation to that incident – for example, for use in connection with addressing the health care needs of the victim. This means, for example, that notes taken entirely for health care purposes would not fall to be transferred to police in compliance with a request under section 9(2) for the transfer of evidence. Such health care records would also not fall within the destruction provisions of the Act, and therefore any request for them to be destroyed would be dealt with under general NHS Scotland information governance arrangements.

60. In light of section 2(3) stating that a forensic medical examination is a physical medical examination, paragraph (c) of section 17(1) in particular clarifies that notes or other records can be evidence even where they relate to matters other than the victim's physical condition. So, for example, notes about a victim's psychological state during the carrying out of a forensic medical examination can be evidence – but only if, as provided in section 17(2), the notes are created for the purpose of use in any investigation or proceedings relating to the incident which led to the examination. Similar notes created solely for use in addressing the victim's mental health care needs would not be evidence.

61. In practice, certain things (for example, urine samples) may be collected before the physical medical examination which constitutes the forensic medical examination

---

25 The addition of a reference to HIS, which is mentioned in section 14(1) of the Act, but not in section 12J(1) of the 1978 Act.
26 A special health board, established on 1 April 2020 by the Public Health Scotland Order 2019 (S.S.I. 2019/336)
27 Under the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Act 2021 Commencement Regulations 2022 (S.S.I. 2022/24), all of the provisions of the Act (other than sections 17 to 21, which have already come into force by virtue of section 20) will come into force on 1 April 2022. The first reporting period under section 15 will therefore be 1 April 2022 to 31 March 2023.

proper starts – such non-intimate samples are sometimes known as "early evidence". In some cases, the physical medical examination might then not proceed (for example, because of a lack of consent or because a professional judgment is made that the examination should not be carried out). Section 17(3) provides for things collected or created (for example, urine samples or preliminary notes) in anticipation of a forensic medical examination being carried out to be regarded as having been collected or created during or in connection with such an examination, regardless of whether the examination actually takes place. This ensures that things collected or created at this preliminary stage are still caught by the references in section 17(1) and (2) to things being collected or created "during or in connection with" a forensic medical examination (and therefore that such things will or will not be evidence, according to the purpose for which they were collected or created).

62. Section 17(4) provides that references to images, notes and other records include reference to those things in all forms that they exist, including digital form. Images and notes created during or in connection with a forensic medical examination (for use in connection with any investigation of the incident which gave rise to the need for the examination or any proceedings in relation to that incident) and stored by the health board in digital form – whether standard photographs or special magnified images taken with a colposcope device – are therefore caught by references in the Act to evidence. So, for example, the duty to destroy evidence under section 8 extends to the destruction of such images and notes.

Schedule: Minor and consequential modifications

63. The 1978 Act is the principal statute governing the operation of NHS Scotland (along with the various orders and regulations made under that Act). As well as conferring specific health care functions, that Act (and various orders and regulations made under it) confer various functions which, in one way or another, support the operational delivery of health care services (see, for example, section 79 of the 1978 Act, which deals with the purchase of land and other property for the purposes of that Act). Many of these "support" functions are also relevant to the exercise of the functions conferred by this Act. Some provisions in the 1978 Act will automatically apply in relation to the health boards' exercise of these functions (for example, section 2D, which requires health boards to discharge their functions in a way that encourages equal opportunities). But other provisions of the 1978 Act, such as section 79, would not automatically apply (for example, because they refer to things being done for the purposes of the 1978 Act). Part 1 of the schedule to this Act makes various amendments to the 1978 Act (and certain orders and regulations made under that Act) to assist, broadly speaking, in ensuring that the necessary "support" functions are exercisable in the same way in relation to the functions conferred by this Act as they are in relation to health boards' health care functions.

64. In more detail, paragraph 1(3) extends the duty to consult persons to whom health services are provided on the planning and development of such services so that consultation is also required in relation to the planning and development of services under this Act. Similarly, the amendments to the 1978 Act and the Functions of Health Boards (Scotland) Order 1991 made by paragraphs 1(6) and (11) and 2(4) and (5) 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, and in relation to the purchase of land and other property, for the purposes of the Act (as well as the purposes of the 1978 Act). Paragraph 1(5) ensures that NHS contracts (as defined in section 17A of the 1978 Act) can be entered into for the purposes of this Act. The Ministerial powers conferred by section 2(5) of the 1978 Act (general duty on health boards to act in accordance with regulations made, and directions given by, the Scottish Ministers) and sections 76 to 78A of the 1978 Act (holding of inquiries, and various default and emergency powers) are also modified so that they are exercisable in relation to the

functions conferred by the Act (see paragraph 1(2)(a) and (7) to (10) respectively).[28] Paragraph 1(4) amends section 10H of the 1978 Act so that the Scottish Ministers can publish standards and outcomes relating to services provided under this Act. Any such standards and outcomes must be taken into account by HIS in doing certain things under the 1978 Act (in line with the functions conferred on HIS under regulations made under section 13 relating to the examination and retention services).[29]

65. The amendments made to the Functions of Health Boards (Scotland) Order 1991 by paragraph 2(3) are discussed in paragraph 31 above.

66. Paragraph 3 amends the National Health Service (Clinical Negligence and Other Risks Indemnity Scheme) (Scotland) Regulations 2000. Those Regulations establish a scheme for (broadly speaking) the meeting of liabilities arising out of negligence in the carrying out of health board functions and financial losses arising during the carrying of such functions. The Act ensures that references in the regulations to functions of health boards include reference to the functions conferred by the Act (by modifying the definition of "relevant function" in regulation 1(2) – that term is then used in, for example, regulation 4(2)). So, for example, the scheme applies in relation to any liability arising from a personal injury suffered by a person due to negligence in the carrying out of a forensic medical examination.

67. Part 2 of the schedule amends two other Acts in consequence of this Act: the Patient Rights (Scotland) Act 2011 ("the 2011 Act" – see also the discussion of section 10 in paragraphs 43 and 44 above) and the Victims and Witnesses (Scotland) Act 2014 ("the 2014 Act").

68. The amendments to the 2011 Act made by paragraph 4 ensure that relevant provisions of that 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.

69. Paragraph 5 amends the 2014 Act. New section 8A of that Act, inserted by paragraph 5(2), is discussed in paragraphs 48 to 53 above (with paragraph 5(4) then making a minor consequential amendment to section 29A of the 2014 Act).

70. Paragraph 5(3) amends section 9 of the 2014 Act. As amended, this section provides that persons who are to undergo a forensic medical examination (under section 2 of this Act) must be given an opportunity to request that the person who is to carry out a forensic medical examination be of a specified sex. The person due to carry out the examination must be informed of the nature of any such request. As well as changing the word "gender" to "sex", the amendments made by paragraph 5(3) keep section 9 more generally aligned with the wider changes made by this Act, for example, by removing the references to police constables, given that examinations will require to also be available on a self-referral basis.

71. It is possible that the regulation-making power conferred on the Scottish Ministers by section 19 of this Act might be used to make further amendments of existing Acts which are needed in consequence of this Act.

---

28 Although the functions conferred by this Act are excluded (by paragraph 1(2)(b)) from the operation of subsection (6) of section 2 of the 1978 Act, with the effect that health boards do not require to make a scheme for the exercise of their functions under this Act.

29 See the Forensic Medical Services (Modification of Functions of Healthcare Improvement Scotland and Supplementary Provision) Regulations 2022 (S.S.I. 2022/88).

PARLIAMENTARY HISTORY

72. The following is a list of the proceedings in the Scottish Parliament on the Bill for the Act and significant documents connected to the Bill published by the Parliament during the Bill's parliamentary passage.

Proceedings and reports	***Reference***
Introduction	
Bill as introduced (26 November 2019)	SP Bill 60 (Session 5 (2019))
Explanatory Notes (26 November 2019)	SP Bill 60–EN (Session 5 (2019))
Financial Memorandum (26 November 2019)	SP Bill 60–FM (Session 5 (2019))
Policy Memorandum (26 November 2019)	SP Bill 60–PM (Session 5 (2019))
Statements on legislative competence (26 November 2019)	SP Bill 60–LC (Session 5 (2019))
Delegated Powers Memorandum (26 November 2019)	SP Bill 60–DPM (Session 5(2019))
SPICe briefing (27 February 2020)	Sb 20–19
Stage 1	
Health and Sport Committee	
Consideration in private (3 December 2019)	Minutes of proceedings (HS/S5/19/29/M)
Evidence session (17 March 2020)	Official Report (cols. 1 to 52)
Consideration in private (24 March 2020)	Minutes of proceedings (HS/S5/20/8/M)
Evidence session (12 May 2020)	Official Report (cols. 1 to 19)
Evidence session (20 May 2020)	Official Report (cols. 1 to 18)
Evidence session (9 June 2020)	Official Report (cols. 1 to 20)
Evidence session (23 June 2020)	Official Report (cols. 7 to 26)
Consideration in private (1 September 2020)	Minutes of proceedings (HS/S5/20/21/M)
Stage 1 Report (7 September 2020)	9th Report, 2020 (Session 5) (SP Paper 801)
Delegated Powers and Law Reform Committee	
Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill: Stage 1 (31 January 2020)	8th Report, 2020 (Session 5) (SP Paper 667)
Whole Parliament	
Stage 1 debate (1 October 2020)	Official Report (cols. 42 to 85 and 88)
Stage 2	
Health and Sport Committee consideration of amendments	
Marshalled List of amendments	SP Bill 60–ML (Session 5 (2020))
Groupings of amendments	SP Bill 60–G (Session 5(2020))

Proceedings and reports	***Reference***
Consideration of amendments (10 November 2020)	Official Report (cols. 16 to 40)
	Minutes of proceedings (HS/S5/20/29/M)
Other documents	
Bill as amended at Stage 2 (10 November 2020)	SP Bill 60A (Session 5 (2020))
Supplementary Financial Memorandum (24 November 2020)	SP Bill 60A–FM (Session 5 (2020))
Supplementary Delegated Powers Memorandum (30 November 2020)	SP Bill 60A–DPM (Session 5 (2020))
Revised Explanatory Notes (3 December 2020)	SP Bill 60A–EN (Session 5 (2020))
After Stage 2	
Delegated Powers and Law Reform Committee	
Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill: Stage 2 (9 December 2020)	74th Report, 2020 (Session 5) (SP Paper 883)
Stage 3	
Marshalled List of amendments	SP Bill 60A–ML (Session 5 (2020))
Groupings of amendments	SP Bill 60A–G (Session 5 (2020))
Stage 3 debate (whole Parliament, 10 December 2020)	Official Report (cols. 67 to 117 and 120 to 122)
	Minutes of proceedings
Bill as passed (10 December 2020)	SP–Bill 60B (Session 5 (2020))
After passing	
Royal Assent (20 January 2021)	Forensic Medical Services (Victims of Sexual Offences) (Scotland) Act 2021 (asp 3)