Cabinet Secretary for Health and Sport
Jeane Freeman MSP

Scottish Government
Riaghaltas na h-Alba
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Lewis Macdonald MSP
Convener
Health and Sport Committee

By Email.

25 September 2020

Dear Lewis,

SCOTTISH GOVERNMENT RESPONSE TO THE HEALTH AND SPORT COMMITTEE'S REPORT ON THE FORENSIC MEDICAL SERVICES (VICTIMS OF SEXUAL OFFENCES) (SCOTLAND) BILL AT STAGE 1

I write in response to the Health and Sport Committee's Stage 1 Report on the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill. I would like to thank the Committee for its careful and detailed consideration of the Bill. As I said in my oral evidence before the Committee on 23 June 2020, the continued progress of the Bill by the Government and the Parliament, despite the challenges of the COVID-19 pandemic, sends the important message that we are committed to improving the experience of victims of sexual crime in the health and justice systems.

I am delighted that the Committee has endorsed the general principles of the Bill and recognised that the Bill intends to put the healthcare needs of victims of sexual offences at the forefront of forensic medical services. I particularly welcome the Committee's strong support for nationwide access to self-referral services.

The Government's response in the **Annex** responds to each of the main recommendations in the Report, using the paragraph numbers in the report. In a number of instances the Government accepts the Committee's recommendations for amendments to the Bill whilst for other recommendations the Government is not persuaded that there is a case for amending the Bill, for the reasons set out in the response.

Conclusion

I hope that my response addresses the issues raised in the Committee's Stage 1 Report and are helpful in your further consideration of the Bill. I can confirm that the Government intends to forward technical amendments at Stage 2 to further clarify and improve the Bill. I will be happy to speak to the nature of these in due course.

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I look forward to exploring these issues during the Stage 1 debate on 1 October 2020 and to continue working with the Committee on this important Bill at Stage 2, should the chamber endorse the general principles at Stage 1.

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ANNEX
SCOTTISH GOVERNMENT RESPONSE TO THE HEALTH AND SPORT COMMITTEE'S REPORT ON THE FORENSIC MEDICAL SERVICES (VICTIMS OF SEXUAL OFFENCES) (SCOTLAND) BILL AT STAGE 1

Trauma Informed Care

33. We consider the Bill should explicitly state it delivers the requirement explained by the Cabinet Secretary across the health service and be amended accordingly.

The CMO Taskforce vision, as set out in its five year work plan published in October 2017, is to support health boards to ensure consistent, person-centred, trauma informed healthcare and forensic medical services and access to recovery for anyone who has experienced rape, sexual assault or child sexual abuse in Scotland. The Scottish Government considers that a healthcare focus is clearly legislated for in section 5 of the Bill, and trauma informed care is legislated for in the amendment to the Patient Rights (Scotland) Act 2011 in paragraph 3(5)(b) of the schedule.

Therefore, the Government does not consider that any further provisions need to be brought forward to deliver the expectations set out by the Cabinet Secretary for Health and Sport in her oral evidence.

Age of self-referral

49. We consider the age limit of self-referral requires to be kept under close review. We suggest the Bill be amended to allow the age to be altered in future using super-affirmative procedure.

The Government is persuaded that there is a case for introducing a new delegated power as proposed by the Committee. The Government agrees that an affirmative procedure is appropriate but does not agree that the "super-affirmative" procedure is proportionate to the circumstances. The Scottish Government considers that super-affirmative procedure is not a routine procedure and should only be used for the most sensitive or significant of policy areas.

The Government considers that the standard affirmative procedure – the procedure applicable to the setting of the statutory retention period for self-referral evidence in section 8 of the Bill - is the most appropriate procedure for the new delegated power. The standard affirmative procedure will allow the Committee to consider the adequacy of the Government's consultation preceding any future regulations and take evidence from the Government.

Rights to information and control of evidence

61. All health boards, alongside Police Scotland, should follow a consistent approach to the provision of information about self-referral. This must include clear information allowing for individuals to make informed decisions.

The Government agrees that individuals must be well-informed in order to make self-referral and other important decisions concerning forensic medical examination. The Bill requires at section 4 that victims are provided with key information ahead of examination and that this must be explained to them where necessary. The Patient Rights (Scotland) Act 2011, which the Bill has applied to the provision of forensic medical services, includes amongst its health care principles that communication is clear, accessible and understood.

Work to ensure there is consistency in the provision of information across health and justice partners in the implementation of the legislative requirements is already in hand under the remit of the CMO Taskforce Access to Services Task and Finish Group. This includes the provision of consistent, accessible information on the internet, printed literature and a national awareness raising campaign. All key stakeholders (including the Crown Office and Procurator Fiscal Service, Rape Crisis Scotland, Scottish Police Authority, NHS Scotland and Police Scotland) are involved in that work and this will support the development and finalisation of all information materials/content, including web content.

Public awareness

67. We believe there needs to be a greater focus in the Bill on requiring the system to support all individuals in making choices, informed by the timeous provision of information. We are clear this must apply equally across the country, taking account of issues such as travel, rurality and low population density into account. We look forward to hearing how this will be achieved during the stage 1 debate.

The work of the Access to Services Task and Finish Group mentioned above includes work to establish a dedicated, national rape and sexual assault telephone number as the first point of contact for anyone who has been the victim of a rape or sexual assault and wants to self-refer for a forensic medical examination. Part of the specification of this service will be the requirement for dedicated, fully trained staff who can provide a trauma informed response to these calls. This approach will help to ensure consistency and control over both the provision of information and explanation of the choices available to the person depending on their specific circumstances. The provision of this information will specifically include the difference between self-referral and police referral to ensure people are fully informed before making a decision. NHS 24 has come out as the preferred option of a rigorous options appraisal exercise involving all key partners and the next stages of that work are already underway. This will be complemented by the web content mentioned above so that victims have easy access to key information.

Advocacy and mental health support

78. We recommend the Bill is amended to contain a statutory right to independent advocacy and look forward to hearing how the provision of independent advocacy can be achieved consistently across Scotland in relation to forensic medical services.

The Government has made clear its support for advocacy services and, in particular, the important role in the criminal justice system of the Rape Crisis Scotland National Advocacy Project. There is a minor error in the Committee's report in that it is stated in paragraph 75 that the Policy Memorandum for the Bill failed to reference the role of the National Advocacy Project, whereas the Project is appropriately referenced in paragraph 73 of the Memorandum. The Policy Memorandum notes that the Project is funded by the Scottish

Government – the aim is to offer consistent coverage across Scotland with a comprehensive overview of any issues in terms of justice responses to sexual offending.

The Committee's report usefully highlights that the Victims and Witnesses (Scotland) Act 2014 will require health boards to refer victims on to appropriate victim support services where appropriate. The Government wishes to highlight that this provision is complemented by section 18 of the Patient Rights (Scotland) Act 2011 which requires the Patient Advice and Support Service (PASS) for patients of the NHS in Scotland to "make persons aware of and, where appropriate, direct them to… persons providing representation and advocacy services".

Advocacy, in the particular health context of a forensic medical examination, is about ensuring that people are provided with the right information at the right time, to make informed decisions about their care. This will happen at every stage of the self-referral process, from initial contact with the NHS to request a forensic medical examination; by the Sexual Offence Examiner and Forensically Trained Nurse before, during and after the examination; and by the healthcare staff responsible for supporting the person to access the on-going healthcare support and services they may need. Supporting victims to make decisions in this context is a key part of the NHS Education for Scotland training for the staff involved in providing this care.

Appropriate signposting to independent advocacy, in line with the provisions of the Patient Rights (Scotland) Act 2011 mentioned, is an integral part of the CMO Taskforce's Adult Clinical Pathway (which will be launched as part of a package of CMO Taskforce national resources before the end of this calendar year) and is also a requirement of the Healthcare Improvement Scotland Quality Indicators[1] (Indicator 4.3; 'referral to a third sector support organisation' which includes Rape Crisis Scotland).

A new statutory advocacy provision was not consulted on in 2019 for inclusion in the Bill. The Government would be concerned that a well-intended new advocacy provision could have unintended negative consequences, such as potentially delaying the start time of a forensic medical examination.

In terms of the wider justice system, the Government considers that it is important to not pre-empt the work of the Victims Taskforce which includes a gender based violence workstream. This workstream is jointly chaired by Rape Crisis Scotland and Scottish Women's Aid and includes an action to improve the provision of advocacy for victims of domestic abuse and sexual violence within the criminal justice system. The Government considers that the question of statutory underpinning for advocacy services for victims of sexual crime is best dealt with through the ongoing work of the Victims Taskforce and not in the legislative process for a health policy Bill.

Having carefully considered the matter the Government does not propose any amendments going beyond the existing legislation applicable to health boards in response to this recommendation.

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1 http://www.healthcareimprovementscotland.org/our_work/standards_and_guidelines/stnds/sexual_assault_indicators.aspx

The examination service – 24/7 service

85. We consider the Bill must, in addressing the fundamental issue from the HMICS report, require a 24 hour, 7 day, forensic medical examination service. This is vital to support, and give control, to individuals when sexual offences are alleged to have been committed.

The Government recognises that police referral services have traditionally been available on a 24/7 basis. For self-referral services, the CMO Taskforce's Access to Services Task and Finish Group is working towards 24/7 telephony access for anyone seeking to access a self-referral service and, as mentioned above, NHS 24 are likely to become involved in that work. The Healthcare Improvement Scotland Quality Indicators capture performance against the number of forensic medical services commenced within 3 hours of the person being referred in to the service or making contact with the service. As part of the national package of resources to be launched before the end of this calendar year, the time of the referral will be recorded on a national form to give an indication of the overall waiting time between initial referral and commencement of a forensic medical examination. Where the 3 hour indicator is not met in a particular case, services should record the reasons for the delay on the national dataset. Services will be expected to consider the reasons for delay as part of wide self-evaluation.

Female practitioners

90. We consider the definition of gender could be ambiguous in the Bill, which has the potential to cause distress to individuals undergoing forensic medical examination. We recommend the Bill be amended to guarantee an individual's right to choose the sex of the examiner.

Section 9 of the Victims and Witnesses (Scotland) Act 2014 ensures that people who access forensic medical examination can request a female examiner and so therefore the Government is not immediately convinced that there is legislative ambiguity on this matter. Nonetheless, the Government will of course consider proposals to improve the Bill in light of the Committee's recommendation. The Government does also note that the point suggested to the Committee following the conclusion of oral evidence on the Bill had not been raised by other stakeholders in the 2019 consultation on the Bill or in the Committee's call for evidence window earlier this year.

Section 9 was enacted by the Parliament relatively recently and carries deliberate similarities to the preceding section 8, including the use of the word "gender". The Government's policy remains to commence section 9, as amended by the Bill, at the same time as the rest of the Bill. The Government will consider with stakeholders what might be done in the implementation of the legislation to maximise choice for victims in line with the Healthcare Improvement Scotland Standards[2] and Quality Indicators.

Measures for the Healthcare Improvement Scotland Indicator 1, the foremost indicator, include the percentage of examinations where a female examiner was available without delay and the percentage of people able to express a preference before the start of the examination.

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2 http://www.healthcareimprovementscotland.org/our_work/standards_and_guidelines/stnds/sexual_assault_services.aspx

Good progress is being made by the CMO Taskforce to support health boards to increase the availability of female Sexual Offence Examiners in Scotland, in the context that experienced, competent, trauma-trained male examiners are in post and providing a good service. The Government wishes to highlight that where a victim is unable to be examined by a female examiner, they will very often have support from a female Forensically Trained Nurse who amongst other things will act as chaperone for the examination.

The Scottish Government is committed to developing the role of nurse sexual offence examiners in Scotland, as recommended by HM Inspectorate of Constabulary in Scotland. For the first time in Scotland, two appropriately qualified and experienced nurses are currently being recruited to the role of sexual offence examiner. This work is key to developing a multi-disciplinary workforce for the future, so that where a victim requests a female examiner, this choice can be met. Backed by over £200,000 of Scottish Government funding, this work will be hosted by NHS Greater Glasgow and Clyde. This funding will also pay for priority places on a new Postgraduate Qualification course in Advanced Forensic Practice being developed at Queen Margaret University in Edinburgh which will start in January 2021.

Equity of access

101. We as the Scottish Government to require all health boards to capture, analyse and publish data addressing equity of access.

As part of a package of resources to be launched by the CMO Taskforce before the end of this calendar year, a new national form for adults and a revised Child Protection (CP) proforma for children and young people will capture key information about people accessing these services. The forms will specifically capture data to monitor equality of access to services which will include statistics on protected characteristics such as ethnicity, age and sex. To monitor access to services for vulnerable groups, the CP dataset collects information on child protection (whether the child or young person is now or has even been on the Child Protection register), Looked After or Accommodated Children, and children and young people with vulnerabilities will also be captured. The adult dataset also gathers information about vulnerabilities.

Ethnicity data will be included in the Public Health Scotland publication (described in relation to recommendation 136 below), at a Scotland level. If the data allows for further breakdowns to be released, without any risk of individuals being identified, then Public Health Scotland will include this in the publication by disaggregating the ethnic group and presenting this at smaller geography e.g. health board. Other statistics will be part of the Management Information provided to health boards which will enable them to manage and improve their service delivery and outcomes for people. Typically “MI” statistics are not for public release. Both health boards and the Scottish Government can receive management information however, release of any data will be subject to strict disclosure control protocols.

The retention service – recording and storage

111. We expect the Scottish Government to set out what is required to be stored by health boards in regulations. We consider this should only cover samples collected from the forensic examination and any underwear worn at the time of the offence or immediately afterwards.

It is a deliberate aspect of Bill policy that whilst the retention period for self-referral samples would be prescribed by regulations, decisions on what evidence should be taken in the course of forensic medical examination should not be. The Government recognises that this is an important matter and that there should be as much national consistency as possible. The CMO Taskforce's Self-Referral Subgroup is already drawing up a national protocol to provide clarity to health boards about what evidence should be taken. Police Scotland, the Scottish Police Authority, the Crown Office and Procurator Fiscal Services and health boards are all key members of this Subgroup and the final protocol will be submitted to the Lord Advocate for approval. At this stage it is envisaged that the protocol will recommend the taking only of samples, underwear and – exceptionally – relevant outerwear. Whilst the Bill recognises the role of Sexual Offence Examiners' professional judgement in section 3, the protocol is intended to minimise the need for individual judgments to have to be made. In cases of doubt, the on-call forensic scientist at the Scottish Police Authority can be contacted to provide advice.

Data

131. Having considered the evidence set out above, the Bill, and associated DPIA, should make clear the differentiation between personal data, samples taken, and the data obtained from those samples. Given the concerns we have heard we consider there is a need for a revised DPIA addressing each of the issues and this should be lodged before stage 2 commences. We would appreciate any appropriate amendments being lodged to take account of the revised findings.

The Government is persuaded that a revised Data Protection Impact Assessment (DPIA) for the Bill should be drawn up and submitted to the Committee ahead of Stage 2 proceedings. The Government considers that it would be premature to give a position on amendments to the Bill until the impact assessment exercise has commenced and completed. The Government wishes to emphasise that the original DPIA and the revised one for the Bill will focus on the Bill's provisions and not matters of practical delivery and implementation by health boards and justice partners. Those matters are being considered by the CMO Taskforce's Information Governance Delivery Group (IGDG) who consulted on an operational DPIA in August 2019.

Data and Technology

136. We ask the Scottish Government for detail how a paper-based system will ensure Scotland-wide information will be collated quickly, and consistently reported allowing lessons to be learned, and crucially, service issues promptly identified and rectified. We wonder how Public Health Scotland can analyse paper-based national data without supporting IT infrastructure and how any information can be accessed from such a system? While it is essential to ensure there is no delay in implementation, we urge the Scottish Government to put in place a national clinical IT system as soon as possible.

The Quality Improvement sub group of the CMO Taskforce has worked with Public Health Scotland to develop national datasets for adults and for children and young people. These will provide consistent national information which can be used to plan, monitor and improve services. The datasets will also support monitoring of performance information relating to the HIS Quality Indicators.

Until the IT system is implemented, the data will be captured on either the new national form for adults or the revised Child Protection (CP) proforma for children and young people (mentioned above). The adult national form is in two parts - a health assessment form and a forensic examination form which together will ensure consistency in how data is captured and reported across the country. The CP proforma captures all relevant information and is currently in use across all health boards. This has been revised to include national children and young people dataset requirements. Health boards will collate the relevant information from the national forms or proforma and input it on to data collection templates, which will then be electronically and securely submitted to Public Health Scotland.

The national datasets, the national form, CP proforma and the data collection templates are all part of the wider package of resources also referred to above (which includes the first national clinical pathways for adults and for children and young people and associated guidance documentation). These were due to be launched on 1 April 2020 but this was delayed due to COVID-19. Once this package has been launched, data collection will begin.

Public Health Scotland advise that the first 3 to 4 months of data tend to be imperfect as health boards get used to the process and any teething problems are ironed out. As such, Management Information for the period December 2020 to March 2021, will be provided to health boards to enable them to identify any immediate areas for improvement (with a caution that the "MI" is based on 'imperfect data'). This is a common approach in line with normal practice for new data sets, when the quality of initial data received from health boards may be variable.

CMO Taskforce funding is supporting the development and procurement of a new national clinical IT system. This will negate the need for paper based national forms and the manual input of data in to the data collection template. The new IT system will enable Public Health Scotland to extract the data they need to analyse health board performance against the Healthcare Improvement Scotland Quality Indicators automatically. It is anticipated that the IT system will be ready to go live in Spring 2021. This means that reliance on a paper based or manual process, will only be for a relatively short period of time.

Irrespective of the date on which the IT system goes live, from 1 April 2021, 'clean' data will be captured by health boards - as any initial 'teething problems' will have been addressed. Due to the relatively small volume of cases (compared to other healthcare services), it is intended that performance data will be published in a report annually. However, to support health boards in their preparation for Bill implementation, there will be a report published after the first six months of data collection and again after the second six months. Thereafter, data will be published on an annual basis.

Data protection and children

144. We ask the Scottish Government to review the children's rights in relation to ownership of data to ensure a child's best interests are at the heart of sharing personal, private and sensitive information with alleged perpetrators.

The Government has committed, in response to the recommendation in paragraph 131 of the Committee's report, to preparing a revised DPIA on the Bill. The Government will incorporate consideration of the concerns leading to the recommendation in paragraph 144 in the course of that exercise.

Examination of children and young people alleged to have perpetrated sexual assault and abuse

158. We ask the Scottish Government how it will take into account the needs of alleged perpetrators, including those who are former victims of abuse, and how they will receive trauma-informed care?

Whilst the Bill is focussed on victims of sexual offences, the Government recognises that children suspected of causing harm are entitled to age appropriate, trauma-informed care when undergoing forensic medical examination. The current governing legislation for children undergoing forensic medical examination is the Criminal Procedure (Scotland) Act 1995. The Age of Criminal Responsibility (Scotland) Act 2019, which is expected to come into force in Autumn 2021, will further strengthen the care that is given to a younger child suspected of causing harm. Examinations are carried out by healthcare professionals under the same professional and ethical standards as examinations of victims.

The National Police Care Network aims to support consistency in service quality and healthcare outcomes for individuals in police care who receive services across Scotland, recognising that each health board will have different service models which meet the needs of their population and geography. This includes facilitating and supporting the delivery of person centred healthcare and high quality forensic medical services for people in police custody who are accused of sexual offences (or suspected of causing harm in the case of children under the age of criminal responsibility).

The Network has developed its workplan in partnership with a range of stakeholders and is in the process of establishing two working groups to take forward the top priorities. The Criminal Justice and Forensics working group's aim is to improve the quality and consistency in the delivery of forensic medical services to people in police custody through the development of guidance and sharing of best practice. Under the umbrella of this working group a multi-agency Short Life-Working Group has been established to review the process for the examination of children under 16 who are suspected of causing serious harm. A set of principles and an accompanying pathway have been drafted. In recognition of the fact that many children suspected of causing serious harm may themselves have experienced some form of abuse, the principles help to ensure a child centred, trauma informed approach and reference the need to make sure that appropriate health and social care services are in place for the individual. The draft principles require further discussion with key agencies prior to agreement and implementation.

The second working group - Education and Workforce - will firstly undertake a scoping exercise to ascertain the training needs of healthcare professionals involved in the delivery of healthcare and forensic medical services. This will inform the development of high quality, standardised training packages for healthcare professionals, which will include best practice in relation to the provision of services for people accused of serious sexual and violent crime. It will also include signposting to education and training currently available such as NHS Education Scotland's National Trauma Training Programme resources.

Monitoring and Evaluation

167. We agree it is essential the changes being brought about by the Bill are monitored closely. To achieve that we consider the Bill should require an annual report to be produced by NHS Scotland setting out what actions are in place to ensure the forensic medical examinations processes are being monitored and evaluated, what systems are in place to drive forward identified improvements, and how the service will ensure the provisions of the Bill are consistently applied across the country. The report should also indicate the ways in which mechanisms are in place and being used providing for the sharing of experiences and learning across NHS Boards.

The Government is persuaded that the CMO Taskforce reporting arrangements referenced above should have statutory underpinning and will work with stakeholders to develop appropriate amendments for Stage 2.