

Health, Social Care and Sport Committee

9th Meeting, 2022 (Session 6), Tuesday, 1 March 2022

Subordinate legislation cover note

Background

1. The Forensic Medical Services (Victims of Sexual Offences) (Scotland) Act 2021 (FMS Act) gained Royal Assent in January 2021 and is due to commence on 1 April 2022. The FMS Act will provide a statutory basis for health boards to provide Forensic Medical Services (FMS) for victims of sexual offences and will establish a legal framework for consistent access to self-referral so a victim can access healthcare and request a forensic examination without first having to make a report to the police.
2. A package of SSIs was laid on 27 January, including two affirmative instruments and two laid only instruments.
3. This paper invites the Committee to consider the following affirmative instruments:
 - [The Forensic Medical Services \(Modification of Functions of Healthcare Improvement Scotland and Supplementary Provision\) Regulations 2022](#)
 - [The Forensic Medical Services \(Self-Referral Evidence Retention Period\) \(Scotland\) Regulations 2022](#)
4. This paper also sets out the following laid only instruments, which have been included in this paper for information purposes only:
 - [The Victims and Witnesses \(Scotland\) Act 2014 \(Commencement No. 9\) Order 2022](#)
 - [The Forensic Medical Services \(Victims of Sexual Offences\) \(Scotland\) Act 2021 Commencement Regulations 2022](#)

Parliamentary procedure:

Affirmative instruments

5. The affirmative procedure means that an instrument cannot be made and come into force unless the Parliament has voted to approve it (rule 10.6.1 of standing orders).
6. Affirmative instruments are first looked at by the DPLR Committee before being considered by the lead committee (usually the committee which examined the Bill for the Act that the SSI is made under or whose remit is most aligned).
7. It is usual practice for the lead committee to take evidence from the relevant Scottish minister in advance of considering the instrument. The committee can ask the minister and any officials questions about the SSI.
8. During its formal consideration, a member of the Scottish Government proposes, by motion, that the lead committee recommend that the instrument or draft instrument be approved. The committee has up to 90 minutes to debate the motion.
9. The lead committee must report its recommendation to Parliament within 40 days of the SSI being laid. If the committee agrees the SSI should be approved, the whole of the Parliament then gets a chance to vote on it in the Chamber. If the lead committee decides the SSI should not be approved, the Parliamentary Bureau decides whether MSPs should vote on it in the Chamber.

Laid only instruments

10. Some subordinate legislation is not subject to any procedure or control by the Parliament, other than the requirement for them to be laid before it. These instruments are known as 'laid only' instruments. The Parliament has no role in annulling or not approving a laid only SSI. Committees can, however, write a report to the Parliament with their concerns or raise issues directly with the Scottish Government.

Title of Instrument:	The Forensic Medical Services (Modification of Functions of Healthcare Improvement Scotland and Supplementary Provision) Regulations 2022
Laid Date:	27 January 2022
Reporting deadline:	16 March 2022
Type of instrument:	Affirmative

Purpose

12. These Regulations make technical amendments to the National Health Service (Scotland) Act 1978. The amendments ensure that relevant Healthcare Improvement Scotland (HIS) functions extend to forensic medical services in respect of victims of rape and sexual assault (as set out in the FMS Act). The instrument also ensures health boards extend their quality of care requirements to services under the FMS Act.

13. The Policy Note is attached at Annexe A.

Delegated Powers and Law Reform Committee consideration

14. The Delegated Powers and Law Reform Committee considered the instrument at its meeting on [22 February 2022](#), and made no recommendations in relation to this instrument.

For decision

15. The Committee must decide whether or not to agree the motion, and then report to Parliament accordingly, by 16 March 2022.

Title of Instrument:	The Forensic Medical Services (Self-Referral Evidence Retention Period) (Scotland) Regulations 2022
Laid Date:	27 January 2022
Reporting deadline:	16 March 2022
Type of instrument:	Affirmative

Purpose

16. These regulations set the length of time that evidence, such as biological samples, collected during a self-referral Forensic Medical Examination (FME) and stored by health boards, will be retained. This is referred to as the “retention period”. After the retention period has expired, health boards must destroy the evidence.
17. The regulations set the retention period of 26 months (two years and two months). This aims to strike a balance between ensuring that evidence is held for a reasonable timescale, should an individual decide to report to the police, and the practical considerations for health boards if required to retain evidence for lengthy periods of time. The human rights implications of forensic data storage have also been taken into account in setting a proportionate time frame, ensuring it does not coincide with the anniversary of a traumatic event.
18. The policy note states that consideration can be given to amending the retention period in the future based on emerging evidence. The Policy Note is attached at Annexe B.

Additional Information

19. During session 5, the Health and Sport Committee took extensive evidence at stage one on the retention period. During that scrutiny, various timescales were proposed. The Faculty of Forensic & Legal Medicine recommended the period should be two years, individuals who had used forensic medical services thought the retention period should be longer. The Information Commissioner's Office noted that under data protection legislation, personal identifiable information must only be retained for as long as is necessary for the specified purposes for processing. It further highlighted that timescales for retention needed to balance the rights of the individual against those of the state.

20. The Committee concluded in its [report](#):

“We recognise this is a complex issue and while there is no consensus on an optimum timescale, there is consensus retention periods should be informed by service-users and reviewed regularly. We are satisfied the timescales for retention should be set in regulations, subject to the affirmative procedure. This process allows for greater flexibility to make revisions to the period.”

Delegated Powers and Law Reform Committee consideration

21. The Delegated Powers and Law Reform Committee considered the instrument at its meeting on [22 February 2022](#), and made no recommendations in relation to this instrument.

For decision

22. The Committee must decide whether or not to agree the motion, and then report to Parliament accordingly, by 16 March 2022.

Laid only instruments

The Parliament has no role in annulling or not approving a laid only SSI.

Title of Instrument: [The Victims and Witnesses \(Scotland\) Act 2014 \(Commencement No. 9\) Order 2022](#)

Laid Date: 27 January 2022

Reporting deadline: 16 March 2022

Type of instrument: Laid only

Purpose

23. This Order commences section 9 of the Victims and Witnesses (Scotland) Act 2014 (“the 2014 Act”) on 1 April 2022. Section 9 allows a person who is a victim of a sexual offence, to request that any forensic medical examination of them is carried out by a registered medical practitioner of a sex specified by the person.

Title of Instrument: [The Forensic Medical Services \(Victims of Sexual Offences\) \(Scotland\) Act 2021 Commencement Regulations 2022](#)

Laid Date: 27 January 2022

Reporting deadline: 16 March 2022

Type of instrument: Laid only

Purpose

24. These Regulations bring into force the provisions of the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Act 2021 (“the Act”), so far as not already in force, on 1 April 2022.

POLICY NOTE**THE FORENSIC MEDICAL SERVICES (MODIFICATION OF FUNCTIONS OF HEALTHCARE IMPROVEMENT SCOTLAND AND SUPPLEMENTARY PROVISION) REGULATIONS 2022****SSI 2022/XXX**

The above instrument is made in exercise of the powers conferred by sections 13(1) and 19(1) of the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Act 2021 (“the FMS Act”). The instrument is subject to the affirmative procedure.

Purpose of the instrument.

These Regulations make technical amendments to the National Health Service (Scotland) Act 1978. The amendments ensure that relevant Healthcare Improvement Scotland (HIS) functions extend to forensic medical services in respect of victims of rape and sexual assault (as set out in the FMS Act). The instrument also ensures health boards extend their quality of care requirements to services under the FMS Act.

What the FMS Act does

The FMS Act places a statutory duty on all territorial health boards in Scotland to provide forensic medical services for people who have experienced rape or sexual assault. The Act enshrines the principles of trauma informed care and will establish a legal framework for access to appropriate support and healthcare services as well as a Forensic Medical Examination (FME) to collect any potential evidence, at a time when a person may not feel ready to report to the police. This is known as “self-referral” and will be available to those who are 16 and over, subject to professional judgement.

Policy Objectives

The instrument gives HIS functions in relation to services provided under the FMS Act similar to those it holds in relation to other clinical services.

The functions include a general duty of furthering the improvement in the quality of services provided under the FMS Act and also functions of providing information to the public about the availability and quality of those services.

This instrument also extends the inspection power of HIS to any service provided under the FMS Act, so that HIS can carry out an inspection of its own volition or must do so if instructed by Scottish Ministers (for example, if performance data highlighted a particular issue (s) that required specific attention/resolution).

This instrument also amends section 12(H) of the 1978 Act so that health boards are required to have arrangements in place to monitor and improve the quality of the services which they provide under the FMS Act, as they are required to do for other health care services provided to individuals. This will be done by applying their

business-as-usual governance and audit processes. For example, performance data may feed in to health board regular board meetings and/or, the Ministerial- led Board Annual Review process, as and when required/appropriate. This information is likely to inform Scottish Ministers as to whether an inspection is deemed to be necessary.

Consultation

The Forensic Medical Services (Modification of functions of Healthcare Improvement Scotland and Supplemental Provision) Regulations 2022 were subject to targeted consultation with Healthcare Improvement Scotland and health boards in respect of the functions to be conferred on them. No concerns were raised in response to this consultation.

Impact Assessments

The following impact assessments have been published which cover this instrument and other secondary legislation being prepared for the FMS Act:

- Children's Rights and Wellbeing Impact Assessment¹
- Island Communities Impact Assessment²
- Equalities Impact Assessment³

A screening process was carried out which determined there was no further update required to the following impact assessments which were previously carried out to accompany the introduction of the FMS Bill:

- Data Protection Impact Assessment (DPIA)⁴.
- A revised DPIA was published in November 2020⁵.
- Fairer Scotland Duty Assessment (FSDA)⁶
- No Strategic Environmental Assessment (SEA) has been undertaken as there are no environmental impacts.

Financial Effects

The Cabinet Secretary for Health and Social Care has confirmed that a Business and Regulatory Impact Assessment is not required for this instrument. There is no anticipated cost in conferring the duties in respect of furthering the improvement in the quality of services and providing information to the public about the availability and quality of those services. Should any cost be incurred by HIS in this regard this would be met by the Scottish Government.

Any work undertaken by HIS in relation to carrying out its functions, for example undertaking an inspection, would also be met by the Scottish Government (if the need arose). There is no additional cost to health boards in relation to the extension of the duty of quality provision. Health boards are already required do this in order to meet the national Healthcare Improvement Scotland Standards⁷ in relation to these services and a range of performance measures are in place to monitor this.

Scottish Government

CMO Rape and Sexual Assault Taskforce Unit January 2022

1 <https://www.gov.scot/isbn/9781802019278>

2 <https://www.gov.scot/isbn/9781802019261>

3 <https://www.gov.scot/isbn/9781802019254>

4 <https://www.gov.scot/publications/forensic-medical-services-victims-sexual-offences-scotland-bill-dpia/>

5 <https://www.gov.scot/publications/forensic-medical-services-victims-sexual-offences-scotland-bill-revised-data-protection-impact-assessment/>

6 <https://www.gov.scot/publications/forensic-medical-services-victims-sexual-offences-scotland-bill-fsda/>

7 https://www.healthcareimprovementscotland.org/our_work/standards_and_guidelines/stnds/sexual_assault_services.aspx

POLICY NOTE**THE FORENSIC MEDICAL SERVICES (SELF-REFERRAL EVIDENCE RETENTION PERIOD) (SCOTLAND) REGULATIONS 2022****SSI 2022/XXX**

The above instrument is made in exercise of the powers conferred by section 8(1)(b) of the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Act 2021 (“the FMS Act”). This instrument is subject to affirmative procedure.

Purpose of the instrument.

These regulations set the length of time that evidence, such as biological samples, collected during a self-referral Forensic Medical Examination (FME) and stored by health boards, will be retained. This is referred to as the “retention period”. After the retention period has expired, health boards must destroy the evidence.

Policy Objectives

The FMS Act places a statutory duty on all territorial health boards in Scotland to provide forensic medical services for those who may have been raped or sexually assaulted and enshrines the principles of trauma informed care. The Act will establish a legal framework for consistent access to appropriate support and healthcare services as well as a FME to collect any potential evidence, at a time when a person may not feel ready to report to the police. This is known as “self-referral” and will be available to those who are 16 and over, subject to professional judgement.

The regulations set a retention period of 26 months (two years and two months). This aims to strike the right balance between ensuring that evidence is held for a reasonable timescale, should an individual decide to report to the police, and the practical considerations for health boards if required to retain evidence for lengthy periods of time. The human rights implications of forensic data storage have also been taken into account in setting a proportionate time frame. Consideration can be given to amending the retention period in the future based on emerging evidence.

The retention period is the same for all of Scotland and is calculated from the day that evidence is collected. In circumstances where a FME begins on one day, but is not concluded that day, the day that the FME was started is the relevant date for the purpose of calculating the retention period. This approach will ensure consistency of service, regardless of which health board provides someone with support. People who access these services will be clear about how long evidence will be retained for and health boards will be clear about what is expected of them.

There are circumstances where the 26 month retention period does not apply. These are set out below:

the person who underwent the self-referral FME requests that their evidence is destroyed (under section 8(1)(a) of the FMS Act). A 30 day cooling off period applies and health boards must ensure that evidence is only destroyed either once 30 days have elapsed from the date of that request or from the retention period date if that expires before the end of the cooling off period.

the person who underwent the self-referral FME reports the related incident to the police, who request that the evidence is passed to them (as allowed for in section 9 of the FMS Act).

Consultation

A public consultation¹, held between 5 February and 30 April 2021, gathered views on the recommendation that the retention period for evidence collected during the course of a self-referral FME should be 26 months.

A retention period of 26 months had been recommended to Scottish Ministers by the CMO Taskforce for Rape and Sexual Assault (made up of key health, justice and third sector partners) based on a range of evidence and practice:

Those who decide to report to the police usually do so between three and six months after they have been raped or sexually assaulted;

The retention period in England, Wales and Northern Ireland is under two years;

The Scottish Government wants to make sure people have enough time to make a decision whether to tell the police or not;

The Scottish Government suggested a further two months to avoid the risk of distressing or re-traumatising people, if the retention period falls on the anniversary of their assault.

Just over half of those who responded (32 out of 63 responses) agreed that the retention period should be 26 months. For those that did not, there was no consensus both in terms of whether the retention period should be longer or shorter, or what a longer or shorter period should be. 33 organisations responded: this included health boards, victim support organisations, justice organisations, educational organisations and organisations representing specific groups of people.

The Scottish Government has produced an analysis report² and where permission was given consultation responses³ have been published.

Impact Assessments

The following impact assessments have been published:

- Children's Rights and Wellbeing Impact Assessment⁴
- Island Communities Impact Assessment⁵
- Equalities Impact Assessment⁶

A screening process was carried out which determined there was no further update required to the following impact assessments which were previously carried out to accompany the introduction of the FMS Bill:

- Data Protection Impact Assessment (DPIA)⁷.
- A revised DPIA was published in November 2020.
- Fairer Scotland Duty Assessment (FSDA)⁸
- No Strategic Environmental Assessment (SEA) has been undertaken as there are no environmental impacts.

Financial Effects

The Cabinet Secretary for Health and Social Care has confirmed that a Business and Regulatory Impact Assessment is not required for these regulations. There are no direct costs placed on health boards, third sector or other relevant organisations. Any costs incurred by health boards, (for instance to provide equipment for the storage and retention of evidence obtained from a self-referral FME), is being met by the Scottish Government.

Scottish Government

CMO Rape and Sexual Assault Taskforce Unit

24 January 2022

¹ <https://consult.gov.scot/equally-safe/equally-safe-retention-period-of-samples/>

² <https://www.gov.scot/publications/analysis-responses-equally-safe/>

³ https://consult.gov.scot/equally-safe/equally-safe-retention-period-of-samples/consultation/published_select_respondent

⁴ <https://www.gov.scot/isbn/9781802019278>

⁵ <https://www.gov.scot/isbn/9781802019261>

⁶ <https://www.gov.scot/isbn/9781802019254>

⁷ <https://www.gov.scot/publications/forensic-medical-services-victims-sexual-offences-scotland-bill-dpia/>

⁸ <https://www.gov.scot/publications/forensic-medical-services-victims-sexual-offences-scotland-bill-fsda/>