

Equally Safe - A consultation on legislation to improve forensic
medical services for victims of rape and sexual assault –
#EquallySafeFMS –
SCRA Consultation Response



Equally Safe – A consultation on legislation to improve forensic medical services for victims of rape and sexual assault

1. Should a specific statutory duty be conferred on Health Boards to provide forensic medical services to victims of rape and sexual assault, for people who have reported to the police as well as for those who have not?

Yes.

The specific statutory duty should be the basis / framework for service provision as well as implementation and evaluation.

A clear and consistent approach to the delivery of forensic medical services within a Health Board area should then derive from the specific statutory duty. The focus on individuals who have experienced harm is the most appropriate approach and local delivery of support is also the most helpful for individuals. SCRA also thinks that the focus on recovery is important – but that in the context of an individual requiring specific service support a clear, standardised forensic approach regardless of the intent of the individual service user is also crucial.

SCRA fully understands that ‘protection’ and ‘justice’ may not be at the forefront of an individual’s thinking when presenting for support – but it is central to keeping children safe and to keeping the public safe.

Crucially, keeping a child safe may depend on evidential data gathered during any forensic examination. Child protection considerations can arise both when the victim is a child and when the victim is an adult, and any gathered evidence / data has to be readily available to the statutory agencies charged with any compulsory state intervention in the life of the child.

2. Do you have any views on how a legislative framework for the taking and retention of samples, personal data and other evidence in the case of police referral should operate?

Yes.

The taking of samples will be the responsibility of Health Board employees, but will need to follow a ‘set’ or ‘standardised’ process within the Health Board to fulfil requirements in respect of the chain of evidence.

SCRA understand that distinguishing the case of a Police referral and the case of a self-referral is important when considering the approach of an individual to the support on offer within a Health Board – but we are of the view that some additional thinking is required in relation to samples in cases where there is a live child protection concern and data requires to be shared, even if the victim does not want police involvement in the case.





These cases may or may not be subject to a Police referral and likewise, may or may not have sharing consents in respect of the sample gathered. Child protection proceedings cannot be delayed whilst an individual decides whether to authorise the use of their samples or not. Regardless of whether a case is a police referral / self-referral or a child protection referral the samples would need to be available in order for any associated child protection procedures to be progressed on a firm, evidence based footing.

The retention of samples is a separate matter. We understand that samples may be held by different agencies (if the case is a self-referral and there is no basis for health to refer to Police then health will hold the samples) but SCRA would have some concerns if samples were not held in the same way (or at the very least according to an agreed set of standards) for Police referral / self-referral / child protection cases.

We feel quite strongly that the same approach should be taken to the storage and release of samples and following on from that the same approach would be taken to the evidence of professionals which could be given in any relevant criminal, civil or children's hearings court proceedings involving the sample. By this we mean that we would have the same expectations of the professionals involved in the collection and retention and release of forensic samples or data and would approach the precognition / citation of these professional witnesses in the same manner.

It may be that there requires to be a statutory provision which allows for this and / or a legislative framework for the taking and retention of samples; data derived from testing of the samples; and other evidence associated with the taking of the samples (ie: evidence from professionals; context and / or contemporaneous account of what occurred from the individual harmed). There has to be a robust chain of evidence in place whether the case is a self-referral or a Police referral.

3. Do you have any views on how a legislative framework for the taking and retention of samples, personal data and other evidence in the case of self-referral should operate?

Yes.

Answered as part of our response to (2).

4. More generally, do you have any views on potential impacts of the proposals in the Chapters of this paper on data protection and privacy (the handling of personal data including "special category" data about health)?

Yes

SCRA are not convinced that data collected from a forensic examination and retained for evidential use fits neatly within the "special category" health data. We think that there are child protection concerns and public interest concerns which also apply – and which override the individual's right to determine how the samples taken from them are used.





As a result, we think it will be crucial that firm provisions about data sharing are written which will make clear to individuals who have been harmed and to professionals how / when and why forensic samples and associated evidence may be used. Without these clear provisions child protection and other civil and criminal proceedings may be adversely affected to the detriment of keeping children safe.

5. How might legislation help safeguard victims' rights to respect for their dignity?

See below:

SCRA absolutely agrees that individuals who have experienced harm should be treated with respect and dignity at all stages of the process, and that treating people with dignity and respect can be done whilst fulfilling statutory functions in relation to data collection and retention.

It could be, for example, that an individual has a definite input into planning for any forensic medical examination, including their preference around the gender of any medical or other professionals attending at the examination. This will be just as relevant for any child which has been harmed and should apply in a wide variety of circumstances; for example, a child who has been sexually abused by a mother may not want a female professional to do any intimate examination / sample collection.

This has implications for staffing within Health Boards (and within Police Scotland Forensic Services as well) as there will need to be an appropriate range of staff to respond appropriately to an individual's stated preferences. Trauma informed practice needs to underpin the work of every professional involved.

6. More generally, do you have any views on potential impacts of the proposals in the Chapters of this paper on human rights (including economic, social and cultural rights such as the right to the highest attainable standard of physical and mental health)?

Yes.

As outlined in (5) SCRA thinks that there needs to be an overriding statutory framework. This framework needs to recognise issues around consent, information sharing and child protection and needs to be explicit in relation to the impact of different 'routes' within the framework on people's rights (including children's rights under UNCRC).

7. Should special provisions be included in legislation to reflect the distinct position and needs of children and young people? Do you have any views on how such special provisions should operate?

Yes.

For children and young people who have been harmed the decision about the help they may need or what will keep them safe is often made by other people.





Consequently there needs to be strong, clear evidence which forms the basis of this decision making – and without this strong clear evidence we may not be able to respond swiftly and appropriately to children’s needs.

SCRA agrees that young people may report harm long after the opportunity to gather forensic data has passed. In these circumstances the ‘other’ evidence they can give (as indicated in our response to Q2) will be pivotal. In addition, the lack of forensic data does not mean that a child does not require holistic therapeutic supports in order for them to recover from the harm they have experienced.

For a while SCRA has advocated support for Scotland to introduce a Barnahus approach to children and young people. We think that forensic evidence in a medical examination and any oral evidence from children should be taken at the earliest opportunity. We think that the approach to forensic examination as outlined in this consultation gets part of the way there – but seems to miss an opportunity in relation to taking the oral evidence of the children at the same time.

We think that the provisions in the Vulnerable Witnesses (Criminal Evidence) Bill begin to ‘take children out of the court’ but we have concerns that evidence gathered and presented for different court proceedings may not be read through to different proceedings, and much is left to the decision making of individual Sheriffs. For example, unless a child uses the special measure of evidence on commission, which is recorded in full, their evidence cannot be re-visited or used in alternative or parallel proceedings and a child may need to give this evidence more than once. Even if evidence on commission is recorded it would be for the Court to decide if that evidence could be released to alternate (ie child protection) proceedings, so this may not always happen.

We feel that our approach to video recorded joint investigative interviews in Scotland is a firm basis for us to build a national Barnahus approach, which links key therapeutic support to a young person at the same time as taking their evidence.

SCRA thinks that taking oral evidence and forensic evidence timeously, in one place and providing support whilst this is happening is the best approach for Scotland’s children. We think that a shift towards taking evidence within a Barnahus and linking children to support at the same time is not that far away and can be achieved with some focus and drive.

8. More generally, do you have any views on potential impacts of the proposals in the Chapters of this paper on children and young people including their human rights or wellbeing?

Don’t know.

In many ways our response to this depends on what statutory provisions are made in order for child protection proceedings to progress.





9. Do you have any views on potential impacts of the proposals in this paper on equalities (the protected characteristics of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation)?

Don't know.

For adults with the capacity to consent SCRA thinks that the approach based on personal preference and engaging an individual who has experienced harm from the planning stages will help to protect specific effects linked to protected characteristics. However, there may be aspects of the approach which will impact on people with protected characteristics which we have not anticipated.

10. Do you have any views on potential impacts of the proposals in this paper on socio-economic equality (the Fairer Scotland Duty)?

No

11. Do you have any views on potential impacts of the proposals in this paper on people in rural or island communities?

Yes.

Scotland's Island communities will need to be fully resourced if they are to respond locally. It may be that this resourcing is inappropriate and that the Islands should be serviced from the mainland. It may also be that Health Boards, tasked with resourcing according to local need, do not see Island communities as a priority and / or are unlikely to fully resource / staff an Island community on the basis of need.

For example, a Barnahus centralised resource may need to be located on the mainland. Basing resources on the mainland may help in respect of issues of privacy and data protection – and may help individuals from small communities receive support without others within their community being fully aware of this. We should continue to remember the impact of allegations on Island communities and the lasting effect this can have on the collective memory within a place.

12. Do you have any views on the financial implications of the proposals in this consultation paper for NHS Scotland and other bodies?

Don't know.

SCRA accept that upskilling staff across the board in relation to the forensic medical examination is important and we hope that this will not delay the national adoption of the Barnahus approach.

We are unclear whether the set-up of Barnahus has been costed, and in the same way that the approach to forensic medical examination has been devolved to local Health Boards we anticipate that the approach to Barnahus provision will be subject to local variation. We have some apprehension about this, and think





that evidence collection and retention may be compromised if it is not done in a standardised / consistent way (see our response to Q2).

For SCRA the Barnahus model focuses on children and young people, not on all victims of crime who may require a forensic medical examination. The Barnahus also goes beyond sexual offending – in that it should be the place where ALL the evidence of children and young people is taken.

We are a little concerned that the focus on forensic medical examination more widely may limit the development of the Scottish Barnahus and prevent access to the Barnahus model for children who have been harmed by domestic abuse, a schedule 1 offence, the drug use of parents or for children who are witnesses to other adult offending but are not victims of that offending (for example).

We would be disappointed if this were the case.

13. Finally, do you have any other comments that have not been captured in the responses to the other questions you have provided?

No additional comments.

SCRA Practice & Policy Team, 2019.

