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SCOTLAND'S PROSECUTION SERVICE

Policy and Engagement  
Crown Office  
25 Chambers Street  
Edinburgh EH1 1LA

Lewis Macdonald  
Convener,  
Health and Sport Committee  
T3.60  
The Scottish Parliament  
Edinburgh  
EH99 1SP

19 June 2020

By Email

Dear Mr Macdonald,

Thank you for your letter dated 11 June 2020 on behalf of the Health and Sport Committee seeking additional evidence from COPFS in relation to the Forensic Medical Services (Victims of Sexual Crime) (Scotland) Bill.

I have attached with this letter further submissions that COPFS wish to make in response to the specific questions you asked.

Yours sincerely,

Anne Marie Hicks  
Head of Victims and Witnesses Policy



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## List of questions from the Health and Sport Committee meeting on 9 June 2020

Please note, you do not need to reply to each question unless you have additional evidence to add to the evidence from the session.

### Reporting rates

1. Do you consider that the Scottish Government's estimates of the increase in demand from the implementation of the Bill, as set out in the Financial Memorandum, are reasonable?

***The Scottish Government's estimates are noted as being highly caveated and subject to a number of assumptions and estimations. COPFS notes that cognisance was taken both of the current demand for self-referral services in Scotland and the demand in other jurisdictions where self-referral services are available. Given the evidence sources examined, the projected increase in demand would appear to be reasonable. However, there remains the possibility that the projection may prove to be an underestimate in light of the generally accepted underreporting of sexual offences.***

2. Do you believe that, in light of the COVID-19 pandemic and a possible rise in domestic abuse, the estimates in the Financial Memorandum should be revisited?

***It is not anticipated that the lockdown as a result of the COVID 19 pandemic will have an impact on the demand for self-referral examinations in 2021 after the Bill (if passed) comes into force. This is because of the timeframe during which any forensic medical examination would require to be carried out.***

3. Do you consider that fewer offences will be reported to the police as a result of people having the option to self-refer for a forensic medical examination?

***It is possible that there may be some complainers who will self-refer but do not later report to the police, who would have reported to the police at the outset if self-referral had not been available. Equally, there may be some complainers who would not have reported to the police at all but who will now self-refer and later report to the police. However, the important point is not about the potential increase or decrease in the number of reports to the police but rather that self-referral gives the person who has been raped or sexually assaulted more time to decide if they wish to report the matter to the police. It helps to empower victims of a sexual offence at a time when they may feel powerless in other ways. It also enables potential evidence to be obtained and preserved at the outset, thereby potentially strengthening any subsequent investigation and prosecution should the person decide to report the incident to the police at a later stage. COPFS would regard this as a positive development.***

### Retention service

4. Do you have any concerns about the type of evidence that should be collected and retained by health boards in cases of self-referral?

***In relation to self-referrals the Bill intends to extend the availability of forensic medical examinations to victims without requiring them to report an offence to the police prior to an examination taking place. The view of COPFS is that Health Boards should only be collecting and retaining the relevant samples collected from the forensic examination.***

5. Do you believe important evidence could be lost if health boards are not able to store all evidence?

***Prior to the enactment of the legislation, there will require to be a clear agreement about the evidence that health boards will gather and retain in relation to self-referral examinations, both in order to ensure consistency and to maintain the integrity of potential evidence retained. It will be important that health boards appreciate the forensic importance of that evidence and that they have in place protocols and procedures which ensure that the evidence can be relied on in any subsequent criminal proceedings. It would be desirable for these to be consistent national standards. The Lord Advocate, as head of the system for the investigation and prosecution of crime would require to be satisfied that such standards are such as to enable evidential requirements to be satisfied.***

6. What is your view on the need for a national storage standard across all NHS Boards to ensure consistency in storage and compliance with evidential considerations?

***COPFS considers that there should be a national storage standard applied across all NHS Boards to ensure consistency in storage and compliance with evidential considerations. It is imperative that any forensic samples are stored in a manner that preserves their evidential integrity for any potential court proceedings, should the victim subsequently decide to report the alleged offending to the police. The Lord Advocate, as head of the system for the investigation and prosecution of crime in Scotland, will require to be satisfied with that storage standard.***

7. What information should be given to people about the implications of choosing a self-referral examination rather than reporting the incident to the police?

***The person should be reassured that the nature of the forensic examination will be the same as one that would occur following a police report; and that forensic samples will be taken and stored in accordance with the self-referral process and timescales. They can also access other healthcare or support as required. They should also be reassured that they can report the matter to the police at any time for investigation.***

***However, it will be important that the person is informed in clear terms that self-referral is not a substitute for reporting the alleged offending to the police. They should be advised that, if the matter is not reported to the police, the police are not able to investigate the alleged offending, or to take other action to address any risk or safety considerations. They should be advised that***

***there may be other investigations or evidence-gathering that would be undertaken by the police were the matter to be reported to them, and that a delay in reporting could potentially have a detrimental impact on any subsequent investigation and prosecution.***

8. In cases of self-referral, should victims be able to request that evidence collected in the forensic medical examination be destroyed? Should witnesses have a cooling-off period before evidence is destroyed?

***Any legislative consideration of a proposal that victims should be able to request that evidence collected be destroyed should take full account of the following considerations. First, if there is a criminal investigation, and prosecution, the samples are likely to be essential evidence. And, second, circumstances may arise, particularly in a domestic abuse setting, where victims may be put under pressure to withdraw allegations, and this might extend to pressure to have evidence destroyed.***

***The Crown recognises that a right to request destruction of the samples would be consistent with respect for the autonomy of the victim. However it would, in principle, be wrong to allow samples to be destroyed if the offending has been reported to the police and a criminal investigation has already commenced. Further, having regard to the risk of pressure being brought to bear on victims, if legislators are considering giving a victim who has not reported the matter to the police such a right, they should ensure that there are safeguards (including a cooling off period) to ensure that the decision is fully free and informed. Specialist support agencies may be well placed to advise further on this due to their ongoing engagement with victims of sexual offending.***

9. In cases of self-referral when should victims be notified that the evidence from their forensic medical examination will be destroyed? - Should they be able to request that their samples are retained?

***All victims should be advised of the retention period for any samples collected during a self-referral examination at the time of the examination. Consideration could be given to whether any regulations or guidance governing the self-referral process should enable the person to be contacted at a later stage towards the end of the retention period, before any evidence is destroyed, and given the option of requesting that samples be retained for a further period. Specialist support agencies may be able to offer guidance to ensure a trauma-informed approach was adopted.***

#### **Storage of items**

10. Do you have a view on the storage of evidence, such as clothing and duvets, by the Health Board?

***COPFS does not believe that Health Boards should undertake any collection or storage of items beyond the samples collected during the forensic examination, with the one exception of underwear worn at the time of the***

***offence or immediately afterwards (which experience would indicate can often provide evidentially significant forensic evidence).***

***The purpose of the self-referral service is not to replace a police enquiry and it should not attempt to replicate the investigations undertaken by the police. It is unreasonable to expect medical professionals to make decisions on the relevance or otherwise of physical evidence in potential criminal proceedings at some point in the future. Providing for storage of such items would further opens up the possibility of medical witnesses being cross examined as to why they did or did not retain certain physical items as part of the self-referral examination.***

11. Should the Health Board be required to store this type of evidence? If not, what would the implications of this be?

***COPFS does not hold the view that Health Boards should be collecting and retaining such evidence with the exception of underwear worn at the time of the offence or immediately afterwards.***

#### **Transfer of evidence**

12. What is your view on the transfer of evidence from health boards to Police Scotland?

***There should be a nationally applied process for transfer of evidence between Health Boards and Police Scotland which ensures that the integrity of the evidence for use in any potential future court proceedings is maintained. The Lord Advocate, as head of the system for the investigation and prosecution of crime in Scotland, will require to be satisfied with that process.***

13. Do you have any concerns related to the provision whereby it will not be able to access evidence in self-referral cases unless a report of the incident is made by the victim?

***This follows from the principle (which respects the autonomy of the victim) that the victim may self-refer for a forensic medical examination without being required to report the alleged offending to the police.***

14. Would there be any advantage of Police Scotland being made aware that a self-referred forensic medical examination had taken place, in terms of crime trend analysis?

***COPFS would defer to the view of Police Scotland as to whether they assess there being an advantage to them being advised of the undertaking of a self-referral forensic medical examination.***

15. What would be the advantages and disadvantages of an anonymous DNA database? Is this something you would welcome?

***COPFS is unable to offer any comment on the advantages of an anonymous DNA database without further information on the format and purpose of any such database.***

#### **Admissibility of evidence**

16. Are you confident that the evidence collected and stored by health boards in cases of self-referral will be robust?

***The legislation will require to be supported by appropriate training for medical professionals conducting self-referral forensic medical examinations and appropriate national standards regarding storage and transfer of evidence by Health Boards. If these are implemented and applied then the evidence gathered during self-referral forensic medical examinations should be of the same quality as that gathered during forensic medical examinations in police referral cases. The Lord Advocate, as head of the system for the investigation and prosecution of crime in Scotland, should approve the content of those national standards and any supporting training package.***

17. Do you share the concerns of the Faculty of Advocates that health board professionals may lack training, in handling forensic samples and reports, potentially leading to the integrity of samples and reports being compromised?

***The answer to question 16 applies to this question.***

18. Are any potential issues with continuity of evidence?

***The answer to question 16 applies to this question.***

#### **Timescales for retention**

19. Do you have a view on the retention period for evidence in cases of self-referral?

***COPFS considers that the appropriate retention period should be determined taking account of all relevant factors, including what would be proportionate and fair and would achieve the policy intention of the legislation. In determining this, account should be taken of advice from Health Boards and the Scottish Police Authority regarding the period for which samples can be stored in a way that ensures that their integrity is retained; and representations from relevant groups who represent victims.***

20. Are you content that timescales for retention will not be specified in the Bill but set by Scottish Ministers in regulations (subject to affirmative procedure)?

***COPFS is content that the retention period should be specified in this manner.***