



Sent by email to Health and Sport Committee

Mr Lewis Macdonald
Convener

18 June 2020

Dear Mr. Macdonald

Forensic Medical Services (Victims of Sexual Crimes) (Scotland) Bill (the Bill)

Thank you for your letter dated 11 June 2020 following the Committee's evidence session on 9 June 2020. The question was whether an anonymous DNA database could/should be set up, reporting that this may be useful if the same DNA appeared four or five times, even if a crime has not been reported. This followed an observation during the Committee's Evidence session on 12 May 2020.

The Bill currently makes no provision for an anonymised DNA database. We assume that what is being suggested is a mandatory national database where samples are anonymised.

We suggest that there are two aspects to examine regarding this suggestion. These can be split into the input of data to the DNA database and the purpose/result to be anticipated from it.

Input of data into the DNA database

Regarding the input, the information is coming from the sample which has been extracted from the victim. That sample or data is not going to be used in a criminal case unless subsequently there is a complaint made. It is the victim's right whether to make any complaint of a crime. The sample's retention is therefore subject to the consent which will have been given for it to be obtained in the first place. Unless informed and appropriate consent is obtained, no use can be made of it as this negates the purpose of it being obtained. To do otherwise would undermine the complainer's autonomy.

There are significant issues with protecting confidentiality of the person from whom the sample has been obtained. There may be a large amount of data involved, from any number of self-referrals which have been made so that individual consent could not be sought. We understand that in relation to medical research, efforts are made to inform patients of the possible use of their data and their rights of privacy. This is not a clear and simple process and we would suggest that would complicate matters further in the circumstances envisaged by the Bill. Obtaining of samples already are being taken in what are challenging and distressing circumstances.

From the perspective of conducting criminal investigations, no doubt the bigger the database, the better. But privacy concerns prevent the state obliging citizens to supply

DNA except where they have been accused and then convicted of a crime. Is it necessarily less of an invasion of privacy to require the DNA to be provided from a victim and to anonymise it? It could lead their DNA to implicate them in a crime. Just how is it intended to be anonymised? Unless it is effectively anonymised, this could have legal implications.



We considered the issue of medical research where anonymised data is used. Two approaches apply:

“Researchers may use (and anonymise) data without prior notification of the data subjects only if they can comply with the special provisions in the data protection legislation, which provide for sensitive data to be processed for the purposes of medical research only by a health professional or a person who owes a duty of confidentiality that is equivalent to that which would arise if that person were a health professional. Personal data may be used for research purposes without prior consent of the data subjects if a list of rigorous requirements [is] followed.”^[1]

Purpose of the DNA database

Why would this information be required? What purpose would it serve? If the same DNA was linked to, say, 5 different crimes, and there was clear (traditional) evidence of identification for at least one of them then this might be a way forward. But how would this be tracked back to the victim if it is anonymised and they would be required for evidential purposes?

We have concerns too about the public interest in retaining samples and then overcoming the anonymisation.

There may well be considerable data implications arising which were raised by us in our response to the original call for evidence^[2] where we indicated in relation to evidence and data that *“Clarification as to the position regarding the data obtained would be welcomed. Section 9 of the Bill refers to transfer of evidence but the definition of evidence under section 13 of the Bill does not include data. The Data Impact Assessment does not differentiate between the samples and data to be obtained.”*

We hope this is helpful to you as an indication of some of our concerns. Please let us know if we can assist further.

Yours faithfully,

Gillian Mawdsley
Policy Executive
Law Society of
Scotland

^[1] <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC420174/>

^[2] <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12637&mode=pdf>



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