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Consultation Response

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

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Introduction

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We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Law Committee, Mental Health and Disability Committee, Medical and Healthcare Committee and Privacy Committee welcome the opportunity to consider and respond to the Scottish Government consultation: Equally Safe: A consultation on legislation to improve forensic medical services for victims of rape and sexual assault (the consultation). Our Committees' interests span health and medical services, criminal and equality law and the rights to privacy under Article 8 of the European Convention on Human Rights.

We have the following comments to put forward for consideration.

General

Ultimately, those accused of rape or sexual assaults will find themselves in the criminal courts as it is essential that those who committed such serious offences must face the full consequences of the criminal law. In order for such prosecutions to be pursued, there must be sufficient evidence in accordance with the evidential requirements of Scots criminal law to establish the actus reus and mens rea of a crime and the identity of the accused. As well as the victim's own account of the incident, identification and corroboration will tend to lie in the forensic samples to be obtained.

The role of the healthcare officials involved in obtaining forensic evidential samples is essential as the way in which that evidence is obtained and retained will underpin the prosecution case. Inevitably, obtaining what are in many cases intimate samples will add to the trauma of those who have been the victims of alleged rape or sexual assault. The reaction of those who have suffered from the commission of such crimes may well have long term effects which are outlined in paragraph 11 of the consultation. Information, availability and access to forensic medical services is very important in providing a holistic service and support for the victim.

The manner of taking samples must be reliable in order for them to be used effectively and used in criminal justice processes. The number of drug driving cases that were dropped by the Crown Prosecution Service in England and Wales through problems with obtaining and the analysis of forensic samples demonstrates the importance of rigorous, consistent and robust procedures for obtaining samples.¹

It is essential to ensure that Health Boards (where responsibilities are allocated to them) have the means to deliver such services consistently and to a high standard. We welcome the aims of the consultation to ensure that delivery of these services is achieved in a people-centred way. By providing trauma-informed healthcare and forensic services with access to recovery to anyone who has experienced rape or sexual assault in Scotland, this will represent significant progress². That goes a long way towards creating a world leading process for complainants of all forms of sexual violence.³

The consultation addresses the need for such services to improve and to set out the legal position for aspects of service provision.⁴ The intention is to bring forward legislation in the next legislative programme beginning in September 2019.⁵ Although paragraph 12 of the consultation highlights the prevalence of sexual offending involving women, it is important to recognise that rape does affect men as well. There is a need for any legislation that is brought forward to be gender neutral in keeping with equality and diversity implications as illustrated by the Sexual Offences (Scotland) Act 2009 (and indeed, the requirements of modern drafting guidance).⁶

Chapter 2: Functions of the Health Boards

Question 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 those that have not?

Conferring such a duty on Health Boards would provide a clear legal basis for these services in contrast to the current arrangements set out in the National Memorandum of Understanding between Police Scotland and the Health Boards for the provision of healthcare and forensic medical services for those in the care of Police Service of Scotland.⁷ Views have been expressed that the current arrangements were “confusing

¹ <https://www.bbc.co.uk/news/uk-42067094>

² Equally Safe Ministerial foreword (<https://consult.gov.scot/equally-safe/equally-safe-improve-forensic-medical-services/>)

³ <https://onescotland.org/nacwg-news/2018-first-report-and-recommendations/>

⁴ Paragraph 5. Of the consultation

⁵ Paragraph 8 of the consultation

⁶ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727629/drafting_guidance_July_2018.2..pdf

⁷ <https://www.policecare.scot.nhs.uk/wp-content/uploads/2015/03/Police-Healthcare-Forensic-Medical-Services-MoU-Final-v1.pdf>

and ineffective” so setting out the roles and responsibilities for each organisation clearly would seem a sensible approach. This would make it easier for individuals and communities to hold local services to account. It would also ensure that such bodies, as appropriate, require to comply with their statutory requirements and their public sector duties under Equality Act 2010.

Providing the services in a health service environment might also assist in changing the perception primarily that such services are there for the police who are concerned with ingathering of criminal evidence, rather than offering healthcare to the victim. These services should be there both to assist and support the victim, irrespective of whether the incident is to be reported or not.

In turn, this should provide greater confidence about the role of such services to victims which should also be there to support them. This should encourage more victims to seek out and to make use of these services. By increasing their trust as well as promoting the awareness of the purpose of such services, this could also result in the earlier reporting of some incidents. That would lead to the better preservation of evidence (as it would have been recently obtained in relation to the alleged commission of any offence). This would of course be of benefit to the criminal justice system generally.

It is clear from recent reports of historical abuse that many victims do not feel able to report to the police immediately after the crime but the opportunity to obtain essential evidence may have been lost if they later change their minds. An option to self-refer for healthcare and to have the evidence of the alleged crime preserved for the future, without reporting to the police at the time, would be helpful in these situations.

Maintaining victims’ dignity and respect is essential as is ensuring the equality of service provision regardless of the postcode, identity and circumstances of the individual victim.

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

We note that the Scottish Government intend to bring forward a Biometric Data Bill in the current parliamentary year⁸ so that much will depend on how that legislative framework is set out. Bringing forward statutory provisions will benefit all in providing clarity of the process, outlining respective rights and ensuring the consistent retention of samples etc.

We are fully supportive of the principles of the consultation being focused on the health and recovery of victims.

⁸ Paragraph 35 of the consultation

However, any legislative framework would need to balance the rights of the victim with those of any person accused of rape or a sexual offence. Where samples taken in an examination are required for prosecution purposes, established data protection principles should of course apply. Where victims consent to a sample being taken, they continue to own the sample and further consent should be required to share or process it. The same applies to other forms of personal data. Victims should have absolute confidence in the preservation of their privacy and power to consent or withhold consent to the transfer or other use of their personal data. Special rules are required for children. There is much more that could be done to advise victims of why there are benefits in samples being shared or processed. This is about promoting confidence and providing support to the victim.

There must be a robust audit trail to ensure that such evidence as is gathered and kept, complies with the rules of criminal evidence. From that perspective, it is essential that transfer of samples or analysis of those samples and other personal data is carried out, securely and expeditiously, between the Health Boards and Police Scotland. Continuity of evidence of such personal data or samples must be capable of being relied upon in any criminal trial. That includes the need for corroboration of each and every step of the process.

We also emphasise the need to ensure equality. There is very clear case law from the European Court on Human Rights that failure to give full protection to people with mental and intellectual disabilities is a breach of their human rights. They must have the full protection of the data protection law and must not be denied this by restrictive approaches to questions of ability to giving consent. That position is now reinforced by the obligations undertaken by the UK under the UN Convention on the Rights of Person with Disabilities.⁹

With regard to paragraph 32, we would suggest that there is a need to consider the issue of consent at an earlier stage. The wording of this section presumes consent from all in the case of police referral. In addition, there is a need to consider the issue of those who are not able to consent.

It may be relevant to consider how the role of the Appropriate Adult fits in here and the work going forward from the relevant Scottish Government department following the recent consultation.¹⁰ In our response to the clinical pathways and guidance for healthcare professionals working to support adults who present having experienced rape or sexual assault in Scotland, we referred to equal protection of the law for disabled persons.¹¹ There is a need to support the exercise of legal capacity. There may be a role for the doctrine of necessity in some situations where consideration can be made if it is necessary to make a decision on someone's behalf. If so, is the decision in the person's best interests?

⁹ <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>

¹⁰ <https://consult.gov.scot/criminal-justice/appropriate-adult-service/>

¹¹ <https://www.lawscot.org.uk/media/361727/19-02-04-mhd-consultation-guidance-for-healthcare-professionals.pdf>

Question 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?

There might be a distinction between the taking of samples themselves and the data which is obtained from them and for how long those would respectively require to be kept. Certain samples might have a shelf life but there is also a need to make sure they can be interrogated, when required, to obtain the relevant information. In this context, it is important to recognise that medical science is constantly developing and advancing. At any future date, a particular sample might be able to offer information which it cannot give at present. Retained samples could therefore potentially be used either to support a criminal prosecution and obtain a conviction or equally, prove the innocence at some future juncture. At the same time, this potential benefit needs to be balanced against the risk to privacy of the individuals involved if the sample could reveal personal information which was of no relevance to the case in question.

We also note that police referrals may be more likely in cases of vulnerable individuals.

Question 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)?

The proposal to undertake a Data Protection Impact Assessment¹² is welcomed, both as an objective in its own right and as an important facet of ensuring public trust in the system.

It is reasonable to expect significant concern to be expressed regarding proposals to hold data of such a personal nature and suitable protections will be required to promote and ensure confidence in the system which will be developed and used. In an environment where prosecutions for rape or sexual offences are lower than may be expected, though there are multiple and complex factors involved in such under-reporting, any actions which might undermine confidence in the process must be avoided.

Practical distinctions can be drawn between the police and self-referrals. In the second, data may be recorded by one of a number of health boards across the country. It may not necessarily be the ‘home’ or local board of the person self-referring. Consistency in the application of the relevant legislation must be

¹² Paragraph 37 of the consultation

ensured to promote confidence in the system. Production and publication of detailed guidance on the application of relevant legislation will support this within the relevant Health Boards.

Sexual health services may be an obvious location for self-referrals to be made. Health and Social Care Partnerships who are responsible for providing such services will need to engage in the development of processes.

The timescales for holding of such data should be considered, with reflection on the experience gained from recent historical sexual abuse cases. 'Ownership' of data by the individual should be respected, and capacity to authorise destruction or transfer should be supported by the provision of or access to relevant support services.

Reference in the consultation has been made to an Information Governance Delivery group which brought clarity and consistency to how information on victims of rape and sexual assault is stored and shared. As any Information Sharing Agreement is developed, there is a need for co-ordination from the Scottish Government Reviews of the Mental Health (Care and Treatment) Act 2003¹³ that:

“will examine the full legislative framework that supports and protects people with a mental disorder. People who are affected by profound mental health issues must have the same rights as everyone else, which includes respecting their rights to have a private and family life, to protection from discrimination and to participate in the decisions that involve them”.

Chapter 4: Safeguarding respect for victims' human rights

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

We welcome the commitment¹⁴ to responding to the individual's needs identifying those that may require additional support needs but this should extend to anyone who requires support because they are a vulnerable person. We refer to our earlier comments with regard to the ongoing work and the role of the Appropriate Adult who may be in a position to help with communication needs.

¹³ <https://www.theyworkforyou.com/sp/?id=2019-03-19.6.0>

¹⁴ Paragraph 39 of the consultation

Placing these services in a healthcare setting puts the focus on the welfare of the victim, which is helpful. It is crucial that no conflict of interest is allowed to arise between the need to provide care for the victim and the need to obtain evidence to secure a criminal prosecution.

With regard to paragraph 46 of the consultation, UN Convention on the Rights of Persons with Disabilities¹⁵ should also be acknowledged which also includes the right to equal protection.

With regard to safeguarding victims' rights, section 275(2)(b)(ii) of the Criminal Procedure (Scotland) Act 1995 provides an example of the statutory protection of these kinds of rights when dealing in court with the proposed examination of a victim in court. It outlines the circumstances where there is an intention to permit the evidence or questioning relating only to a specific occurrence or occurrences of sexual or other behaviour or to specific facts demonstrating—

- the complainer's character or
- any condition or predisposition to which the complainer is or has been subject.

This may be permitted where the occurrence(s) of behaviour or facts are relevant to establishing whether the accused is guilty of the offence with which he is charged. The probative value of the evidence sought to be admitted or elicited is significant and is likely to outweigh any risk of prejudice to the proper administration of justice arising from its being admitted or elicited. These are decisions that will be made by a judge on application being made in advance of leading such evidence.

Regard to this section could be helpful when considering how to safeguard victims' rights under any proposed legislation.

Question 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)?

We refer to the answer to question 5.

Chapter 5: Victims who are children or young people

¹⁵ <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>

We note that there is a chapter dedicated to children though no specific attention has been given to mental health/disability and other forms of vulnerability. We have raised concerns over the definition of vulnerability¹⁶ before. This does appear to be a gap within the consultation. It is important to deal with vulnerability while still addressing the need for and right to justice.

Question 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?

We note that the CMO Taskforce will be consulting on a draft clinical pathway for children and young people which may be best placed to take the input and experience from those who can advise. That will outline how to obtain such samples from children and young people who may also be the victims of rape or sexual assault.

We also refer to our earlier answer to Questions 2 and 5 with regard to the UN Convention on the Rights of Persons with Disabilities as this equally applies to children and young persons. There is also a need to consider the provisions of both the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill¹⁷ and the Age of Criminal Responsibility (Scotland) Bill¹⁸ that are currently progressing through the Scottish Parliament.

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

We refer to the answer to Question 7 above.

Chapter 6: Impact assessments

Question 9: Do you have any views on potential impacts of the proposals in the Chapter in this paper on equalities (the protected characteristics of age, disability gender reassignment, marriage and civil partnership, pregnancy and maternity, race

¹⁶ <http://www.journalonline.co.uk/News/1027250.aspx#.XMlgD2dYaUk>

¹⁷ <https://www.parliament.scot/parliamentarybusiness/Bills/108702.aspx>

¹⁸ <https://www.parliament.scot/parliamentarybusiness/Bills/107986.aspx>

religion or belief, sex and sexual orientation?

There is nothing in this consultation that would appear to impact on the rights of the accused person, regardless of any “protected characteristic” under the Equality Act 2010. Any samples which were obtained and are to be relied on in any criminal prosecution would be subject to the requirements of disclosure from the Crown.

Question 10: Do you have any views on potential impacts of the proposals in the chapters on socio-economic equality (the fairer Scotland Duty)?

We have no comment to make in relation to this question.

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

There is a need for consistency in application of any forthcoming legislation. There may be implications in such communities in relation to timeous access to the relevant Health Services, in particular the availability of suitably qualified individuals. Paragraph 69 sets out the funding provisions which should consider specifically the issue of rural access and support.

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

In reflecting the financial implications of the proposals, it may be useful to consider the impact on legal aid with regard to the provision of legal advice and assistance. This could be involved where criminal proceedings for rape or sexual assault are raised where there may be challenges to how any such forensic samples have been obtained. In civil cases, there could be implications requiring legal advice where a damages action is brought against a person who has been acquitted of an alleged rape¹⁹.

Question 13: Finally, do you have any other comments that have not been captured

¹⁹ <https://www.bbc.co.uk/news/uk-scotland-43044323>

in the responses to other questions you have provided?

We have no further comment to make.

For further information, please contact:

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