OFFICIAL REPORT
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Health and Sport Committee

Tuesday 9 June 2020

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

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HEALTH AND SPORT COMMITTEE
16th Meeting 2020, Session 5

CONVENER

*Lewis Macdonald (North East Scotland) (Lab)

DEPUTY CONVENER

*Emma Harper (South Scotland) (SNP)

COMMITTEE MEMBERS

*George Adam (Paisley) (SNP)
*Miles Briggs (Lothian) (Con)
*Alex Cole-Hamilton (Edinburgh Western) (LD)
*David Stewart (Highlands and Islands) (Lab)
*David Torrance (Kirkcaldy) (SNP)
*Sandra White (Glasgow Kelvin) (SNP)
*Brian Whittle (South Scotland) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Detective Superintendent Filippo Capaldi (Police Scotland)
Gillian Mawdsley (Law Society of Scotland)

CLERK TO THE COMMITTEE

David Cullum

LOCATION

Virtual Meeting

Scottish Parliament

Health and Sport Committee

Tuesday 9 June 2020

[The Convener opened the meeting at 09:00]

Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill: Stage 1

The Convener (Lewis Macdonald): Good morning, and welcome to the 16th meeting in 2020 of the Health and Sport Committee. The first item on our agenda is our fourth public evidence session on the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill at stage 1. We will hear from two witnesses on the provisions of the bill, with questions on matters including the retention service and data protection.

I welcome first Gillian Mawdsley, who is the secretary to the criminal law committee of the Law Society of Scotland. Welcome, and thank you for joining us.

Due to the challenges of managing a virtual meeting, we will take questions in a prearranged order. I will start with the first question and will then ask each member in turn to ask their questions, then invite the witness to respond. I ask members and witnesses to be succinct. Members—please say when you are on your final question. It would be very helpful if everyone could, please, give broadcasting staff a few seconds to operate the microphones before you begin to speak.

I will start with the first questions, on the retention service and provision in cases of self-referral. Is the Law Society content that victims in such cases should be able to request that evidence that has been collected for forensic medical examination be destroyed?

Gillian Mawdsley (Law Society of Scotland): The bill is very important because it intersects the interests of private law, public law and, obviously, healthcare. On retention, it is fundamental that the victim or the person from whom samples are being obtained is clear about what is being obtained, why it is being obtained and what it will be used for. Therefore, it is that person's right to say what will be kept.

That is largely about information. Fundamentally, I have, as a criminal lawyer—which is what you know me best for—always been a believer in clarity. When someone is clear about what is being done, I think that they should have the right to say yea or nay, because they have self-referred. We are not talking about a case that has gone to the police, which would move it into the criminal sphere, where the interests and balance can be slightly different.

Is that what you were aiming at, Mr Macdonald?

The Convener: Yes—that is certainly helpful. Given some of the evidence that we have heard, when a victim in those circumstances has the right to request the destruction of evidence, should a cooling-off period be applied?

Gillian Mawdsley: My understanding is that, from a scientific perspective, there might be a limited period for which samples are live for the purposes of collecting evidence. That is a problem. You will have heard from experts who are much better placed than I am to answer, but my understanding is that that period is roughly seven days, depending on what has been collected.

However, I understand exactly where you are coming from. To say "a cooling-off period" is perhaps a bit graphic; the idea is to say, "Here's the advice. Think about it."

That raises the role of advocacy, which the committee will come on to. Who is there to support the victim? Who is the person who allows them to leave the room? When we obtain medical or other information that we do not understand, we often take somebody else with us and we go away, we think about it, then we come back. Therefore, there is an opportunity for that to happen. The trouble is that, with the person having self-referred in the first place, it might retraumatise them to come back. There is something be said for getting it over with. However, as we see, victims' responses are very different, and until we are in that position, we cannot say how we would respond.

I understand about giving the person time to think, but perhaps it is as much about support as it is about time. No one should be badgered about whether they might, at some point, change their mind. This is the danger: if the person is told to go away for 48 hours to think about it, then come back, will they realise that after 48 hours the sample will be worthless? There is a finite period in which to act. There are many issues, but I stress the importance of the information and support that must be given at the first point of self-referral.

The Convener: Thank you. You mentioned the possibility that some evidence is of value, in terms of a criminal investigation, for only a limited period. Other evidence might be very bulky and take up a lot of space. When evidence that has been kept for a period is due to be destroyed, should victims be notified of that in good time? When should they

be notified? Should they be able to request that samples be retained, even if they have not reached the point of saying that they want to pursue a criminal case?

Gillian Mawdsley: My understanding is that the proposal is to make secondary legislation to deal with retention periods. Various periods have been talked about. The problem is when the period ends and where the line is drawn. Samples could be retained for up to two years then automatically destroyed at the end of that period, if nothing has changed. An end point is needed, but that is my personal opinion.

The trouble for the person whose samples they are is that that refreshes their experience. Their getting a letter two years down the line to say that samples will be destroyed unless they say otherwise could raise complex issues. I think that there is a point when retention should end, provided that the period is sufficiently long and the process is guided by professionals.

The Convener: Thank you. I call Brian Whittle to ask his questions. I am sorry—it is George Adam. I have the running order back to front.

George Adam (Paisley) (SNP): There is no difference between us, convener. One of us used to be an Olympic athlete, and the other one comes from Paisley. [*Laughter*.]

Good morning, Gillian. On storage of some items, we heard from Dr Anne McLellan, who said:

"The problem will be the storage of large items such as a duvet or clothing. It is unrealistic to take all of that on board for an indefinite period."—[*Official Report, Health and Sport Committee*, 12 May 2020; c 3.]

Does the Law Society have a view on storage of evidence such as clothing and duvets? Should that be done by the health board? What should we do with that type of evidence, and who should store it?

Gillian Mawdsley: I am aware of the physical problem of storage of productions. It is necessary to consider what the item is and to look at the rule of best evidence for the purposes of criminal proceedings. On a number of occasions, productions have been retained that were not physically required in the future. We need to differentiate between something that is required for forensic examination and the item itself being physically required. On most occasions, the item itself will not necessarily be required for criminal proceedings. There is a very well-known case that involved a poached salmon; the question was whether it was required. A clear decision needs to be taken on why we would keep an item: are we keeping it because someone might want to examine it in the future, or have we extracted from it and retained every evidential part for analysis, be it on slides or whatever? That is the first question.

There is a question of law as to whether an item is required. Clearly, keeping large items in storage costs money and will become increasingly complicated. However, I am not sure that the number of self-referrals is so high that the number of productions would be great, or that the productions themselves would be so enormous that that would cause a problem.

The matter goes back to the guidance that accompanies the legislation—it is not part of the legislation—for those who would be involved in seizing and examining items. Furthermore, even when a case has not been reported, the prosecution authority can advise on whether something should be retained, or on whether photographs can be taken.

George Adam: Finally on that, should health boards be required to store that type of evidence? Is there a need for such evidence to be stored for any length of time?

Gillian Mawdsley: There is not a yes or no answer to that. Guidance to accompany the legislation will be needed to make it clear what questions health boards should be looking at when considering whether something needs to be retained. Advice could be sought on a one-off situation that is not clear-cut.

Generally speaking, some items might need to be retained, but I suspect that, in most cases, once the scientific evidence has been extracted, photographs should suffice, unless the item is unique and needs to be retained for the purposes of defence examination in due course, if there are to be criminal proceedings.

However, that comes down to guidance that will need to be drawn up by all those who are interested and involved, and it will require relevant legal advice, because fundamentally this comes back to the fact that one would not want to lose a criminal prosecution because an item was not there for examination by the defence when required. It is about the interests of justice, and that is a question that could be seen coming down the line. Therefore, there is not a yes or no answer.

The Convener: Thank you.

Brian Whittle (South Scotland) (Con): Good morning, Ms Mawdsley. I want to discuss the timescale for retention. I am thinking specifically of cases of historical sexual abuse and how it can be decades later that a prosecution is brought to court. Does the Law Society of Scotland have a view on the retention period for evidence in cases of self-referral?

Gillian Mawdsley: We do not have a specific view on that; advice from scientists who are involved in forensic examination is needed. They understand the conditions under which it is necessary to keep items that might need to be examined in due course, and they understand what can be extracted from items to allow appropriate examination to be carried out. I have heard mention of periods of between two and three years. I am not a scientist; I have no reason to dispute that.

My concern, which perhaps ties in with Brian Whittle's question, is that it is important that the bill be future proofed. We are aware that advances in science might in the future make examination possible, or could mean that it might later become possible to obtain some aspect of DNA or biometric data, so there is a balance to be struck.

However, the trouble with a lot of historical sexual abuse cases is that—for example, for a self-referral now that is reported for criminal proceedings only many years from now—there is a limit on the efficacy of the actual product and the actual examination. Therefore—to come back again to the clarity that I stressed—there is an advantage to having a clear period, but that could be looked at again. The period could be kept under review, such that if scientists were to say that samples would last longer, that might be an appropriate stage at which to consider a longer period. However, that would be some way down the line.

This legislation is important, at this stage. We stressed in our evidence the need for monitoring and for taking account of all the other areas of law that are dealt with by the Parliament. For example, the Scottish Biometrics Commissioner Act 2020 has just been passed. All the legislation needs to come together.

Does that help?

Brian Whittle: Thank you—yes. I do not want to put words in your mouth; I want to be absolutely clear about what you are saying. My understanding is that, if scientists said that, for example—I do not want to be too graphic—fluids could be frozen and kept indefinitely, they could be retained. Does the Law Society have a view on that?

09:15

Gillian Mawdsley: If the scientific advice was that what was being retained could be kept indefinitely, or for the foreseeable future, I certainly do not think that the Law Society would object, provided that the victim was told that and the information was clear. We have to be guided by scientists about how long items remain effective.

Again, there is the question about storage, but that can, ultimately, be reviewed. I think that to hold items indefinitely is too long. It might be that, from looking at victims' groups' responses, it could be considered that the time for reporting such things would be 10 to 15 years, so the legislation might specify that period, if scientists said that a sample could be examined effectively after that time. I do not think that the Law Society would oppose a longer period, subject to the appropriate expert advice from various parties.

The Convener: Thank you.

Alex Cole-Hamilton (Edinburgh Western) (LD): Good morning and thank you for coming to the committee. Does the Law Society of Scotland foresee issues relating to processing or storing of personal data?

Gillian Mawdsley: Yes—we have some difficulties in relation to data. I cannot say much more than what we said in our original evidence. The bill does not talk about data in an effective way, and it is not clear that it differentiates between samples and data. We stated:

> "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."

Having looked at some of the evidence that has been submitted so far, I am not sure that that has been explained, so that remains an issue for us.

Alex Cole-Hamilton: Would you and the Law Society therefore recommend to the committee that we amend the bill to provide that clarity and to differentiate between evidence samples and data? It strikes me that that is an important distinction.

Gillian Mawdsley: Yes.

Alex Cole-Hamilton: Thank you. A straightforward answer—that is terrific. Does the bill throw up any potential issues with continuity of evidence?

Gillian Mawdsley: No, it does not, immediately. Continuity of evidence is vital, and we stress that. Again, I would say that, with my background as a criminal lawyer. Every stage in the chain of evidence must be sufficiently corroborated. There is nothing more frustrating than being unable to have an item, or to refer to evidence, in court because the chain has broken down. It needs to be very clear who—medics, police or whoever else—took the sample and at what point. Continuity right through to the criminal process, if that takes place, must be clear.

The Convener: Thank you.

David Stewart (Highlands and Islands) (Lab): What assessment has the Law Society made of the value of an anonymous DNA database?

Gillian Mawdsley: We have not made any assessment of that. If that is something that you wish us to look at, I will need to take it back to the relevant committees and obtain their respective views. As I said earlier, the bill was very much looked at from the criminal law perspective, with the support of our privacy and other committees. If you would like us to come back on the issue, we can certainly seek the views of the committees.

David Stewart: Yes—thank you. I am sure that the committee would be grateful for that. Perhaps you could discuss the matter with one of your committees and drop our committee clerks a line.

My next question is probably related to the previous one, so it might get the same answer. What is the Law Society's view of DNA samples being analysed without the victim reporting the offence?

Gillian Mawdsley: That is a difficult one, because it very much depends on the facts and circumstances of each case. We are aware that the person from whom DNA might have been extracted might not need to be a witness in a criminal proceeding. The interests of justice might override that factor in certain circumstances, but decisions would be taken on a case-by-case basis.

David Stewart: The national police care network said:

> "in certain circumstances, some information may have to be handed to the police in the wider public interest—for eg. In the case of stranger rape, where"

other victims are involved. Do you agree?

Gillian Mawdsley: I can understand the interests of justice requiring that. Again, it comes back to the interests of justice and the balance, of which we are all aware, between the rights of the state, the rights of the individual, the case circumstances and the greater need. As I said, I can see circumstances in which handing that information to the police would be justified; equally, I can see circumstances in which that would not be justified. The decision would have to be taken on a case-by-case basis.

Sandra White (Glasgow Kelvin) (SNP): Good morning, convener and Ms Mawdsley. The Law Society submission says, "Equality considerations are paramount." Is there a risk that the bill might discriminate against people with learning disabilities who wish to access the self-referral service?

Gillian Mawdsley: That is an interesting question. I do not think that the bill discriminates against people with learning disabilities, but it is vital that the guidance for health boards, the police and supporters is very clear about the need for a person with learning disabilities to be supported with appropriate help at each stage of the process.

As I think I said, the appropriate adult would normally be available in a police station, so perhaps they could play a role in helping people with learning disabilities in self-referral circumstances. I stress that it is not about discrimination as much as it is about ensuring that the system can support those people to make the best choices with the best information available. The issue is not whether the bill is discriminatory but what we can do to support such vulnerable people.

One of the submissions to the committee raised the issue of the word "vulnerable", which the Law Society is very challenged by. We are concerned about the use of the word "vulnerable" across civil and criminal legislation and about what exactly it means. I would therefore go one stage further than your question and ask how we will ensure that we can support people with learning difficulties and all those in other recognised areas of vulnerability to understand the self-referral process and make the decisions that they need to make.

Sandra White: Thank you. That is very interesting and helpful. In your answer to the convener's first question you referred to advocacy, clarity and people being given full information. Should the committee push for the bill to take account of issues to do with advocacy, clarity and full information with regard to not only people who are vulnerable but all who seek self-referral?

Gillian Mawdsley: Yes. We have highlighted that we support this important bill, and victims' groups very much support it. However, it is just a bill; there needs to be a clear steer, perhaps from the committee, on all the aspects that you have stressed, as the bill progresses through the Parliament, to ensure that those necessary areas are covered and supported. After all, the people who are the most vulnerable in society are possibly more likely to seek self-referral. However, there is a difficulty with the lack of a clear definition of vulnerability, because someone who is vulnerable today might be a perpetrator tomorrow.

There are so many factors involved in vulnerability. The bill gives the opportunity to raise awareness of them and ensure that advocacy, guidance and support are all available for the groups whom we recognise as vulnerable and in need of additional support—that is not quite right, though, because everyone should get the same standard of support; however, we recognise that some people need extra help and time.

Mr Macdonald referred to cooling-off periods. Perhaps dealing with vulnerable people is an example of where more time should be taken to explain matters to them; they should also be given more time to process the information before making decisions that are appropriate for them. That would be what the committee has talked about: a victim-centric process.

Sandra White: Thank you for that. The word "vulnerable" includes many different aspects, and there could be issues to do with the forensic medical examination of vulnerable adults. In some cases, people are frightened to come forward for self-referral because they are worried about social work becoming involved and about being put under guardianship—I read that somewhere. Would that prevent vulnerable adults from seeking self-referral? Are there other issues that would prevent them from doing that?

Gillian Mawdsley: I am not the best person to ask, because I do not represent groups of vulnerable people; people who do so would be best placed to answer your question about whether that category of client would come forward for self-referral. Vulnerable people could have concerns because of social work involvement or because of language difficulties and lack of cultural understanding arising from their background or community. A vast range of issues, including those around family members and so on, could prevent people from self-referring. It would be good to ask people who represent vulnerable groups what prevents people from coming forward; I think that myriad factors are involved.

The important point to stress is that people must be adequately supported, in whatever way they come forward. I would not want to see anyone in the system failing to give adequate support, including lawyers, when they are involved. It is important to be aware that one size does not fit all and time must be taken to ensure that vulnerable people get appropriate care and attention. In our submission, we referred to education. Not only must awareness be raised but there must be education for everybody, including those in my profession.

Sandra White: That is fine. Thank you.

David Torrance (Kirkcaldy) (SNP): Good morning to Gillian Mawdsley. My question is about sharing best practice and continuous improvement. The Law Society of Scotland commented on section 11 of the bill, which sets out the requirement for co-operation between health boards

"in relation to the planning and provision of ... services ... with a view to securing, across Scotland, adequate provision and continuous improvement in the delivery of those services."

What is the Law Society's view on the sharing of best practice between NHS boards?

Gillian Mawdsley: Again, I am probably not the best person to ask about that. It goes back to a point about education that I have always raised, which is that, for best practice to prevail, there must be communication among those affected. A number of territorial boards will be involved in implementing the bill's provisions, and I am aware that some of them were ahead of others in doing bits of work previously. The boards involved must therefore have a forum for sharing experiences.

That is why we talked about monitoring the bill's provisions after they are implemented. I do not know how monitoring will be done, but there must be opportunities for health boards to meet and exchange experiences. I have no doubt that all that information will be pooled and distilled down as doctors, nurses and others who are involved share practices and ensure that those who are trained in the required processes get the benefit of innovative and creative methods that the territorial boards develop. I am not an expert in this area, but I know that boards will have ways of sharing, through conferences and so on. Monitoring will be useful, to see how the provisions are working and how effective they are, given that the aim of the bill is to make the situation better for the people whom the legislation serves—that is, the victims and therefore us, as the public interest.

09:30

David Torrance: How could or should continuous improvement be facilitated by legislation?

Gillian Mawdsley: Once legislation has been passed, an opportunity for review and monitoring is needed to look at whether the laudable aims of the bill, as they were set out, are being achieved. This bill involves healthcare, aspects of criminal law and other areas of law, and its purpose is to make the system clearer and better for victims and to ensure that it is easier for victims to get support and help. It is essential to monitor and review the situation and to report on how well the approach is working, in whatever period of time this committee and the Parliament feel is appropriate.

This is important legislation. Members might touch on whether it should, in due course, involve children. There are mixed views on that. It will be important to see whether and how the legislation is working before you extend it to other areas.

Miles Briggs (Lothian) (Con): Good morning, Ms Mawdsley. Thank you for joining us today. The Law Society of Scotland's submission states that

"absent from the Bill seems to be any provision as to ongoing monitoring and reporting of how well the delivery of these statutory functions are being achieved."

In your opinion, what reporting of standards should be in place?

Gillian Mawdsley: There are means to report through the health boards on how the standards are being applied, and those standards can be reviewed. Fundamentally, we were talking about the standards that apply to health boards and we saw such a review as involving a health board process. I am not an expert in how health boards work and it would very much depend on that. However, we certainly felt that there should be a review of the standards and how they were operating, with a view to maintaining best practice and sharing experiences.

Miles Briggs: That is helpful. Should the reporting requirement around those standards be in the legislation, so that we, too, can find out what is going on in health boards? Should that report be made to Parliament, in a set time period?

Gillian Mawdsley: Again, I am not the best person to answer that. It is a matter for the committee. If boards have appropriate standards, that does not necessarily require to be reported to Parliament. I do not think that I can take that any further.

It is for the committee to obtain information from health boards and decide what scrutiny and monitoring should be involved. I repeat my point that scrutiny and monitoring are required in respect of all legislation. I am saying that carefully because I am here as a criminal lawyer from the Law Society of Scotland, not as someone with any healthcare or medical background.

I stress again that I felt that absent from the bill was the business of reporting on the overall effectiveness of the legislation. Part of that is about the standards, obviously, but whether that is a health board matter is for the committee to determine.

Miles Briggs: That is helpful.

The Convener: Brian Whittle would like to ask a supplementary question.

Brian Whittle: As things stand, the length of time for retention will not be included in the bill, but will be decided by Scottish ministers, through an instrument that is subject to affirmative procedure. Does that create any concern for the Law Society? Should there be more clarity on that in the bill?

Gillian Mawdsley: I have just lost my visual connection with the committee—it is back again now; I beg your pardon. Could you repeat your question, Mr Whittle?

Brian Whittle: Of course. Technology is a wonderful thing, if it works.

I was asking about the timescale for retention, which, as things stand, is not included in the bill. It will be down to the Scottish ministers to decide, through an instrument that is subject to affirmative procedure, how long that timescale will be. Does that concern the Law Society? Should there be more clarity in the bill, given what it is trying to achieve?

Gillian Mawdsley: No. Usually, we would very much promote inclusion in primary legislation, but I understood from the policy memorandum that there was not a consensus. I was happy enough that the issue would be agreed to through affirmative procedure by Parliament after appropriate consultation of the relevant parties. I see that as a perfectly appropriate use of affirmative procedure. Again, I would stress that, once the period of retention has been agreed, that very much needs to be communicated. I do not know whether what you are getting at is that there could be a review of the period of retention at some point—that is certainly the sort of thing that could be included in primary legislation. In these circumstances, though, secondary legislation by affirmative means would be appropriate.

The Convener: I thank Gillian Mawdsley for her evidence, which has been extremely helpful and was well focused on the issues that the committee will have to consider. She has given us some very clear pointers to areas on which we will want to take a lead.

We will now move to questions for Police Scotland. I welcome to the committee Detective Superintendent Filippo Capaldi. Thank you very much for joining us. I think that you will have heard the previous evidence session. We will follow a similar format in your case.

One of the issues that has caught our attention is the estimate in the Scottish Government's financial memorandum of the potential increase in demand as a result of the new provisions in the bill in relation to self-referral. Does Police Scotland believe that those estimates of the increase in demand are reasonable?

Detective Superintendent Filippo Capaldi (Police Scotland): Good morning, convener. The estimates that have been used are highly subjective. I know from personal experience of the self-referral process that is operating in NHS Greater Glasgow and Clyde and NHS Tayside that the numbers are very low. I think that the situation is highly dependent on the number of people who come forward for self-referral, and it is difficult to properly assess and articulate that. I have looked at the methodology, and the numbers appear reasonable. However, at present, the actual numbers for self-referral are low.

The Convener: You will know from your own sources that the Covid pandemic and lockdown have resulted in an increase in domestic abuse.

We know that Scottish Women's Aid and other organisations in that field have raised concerns about that. In your view, would that have an impact on the estimates of the potential impact? Is it a reason to reconsider the estimates?

Detective Superintendent Capaldi: In terms of reporting during the Covid pandemic, over the past 11 weeks, we have seen significant decreases in the numbers of sexual crimes and rapes that are reported to Police Scotland. The numbers are down by about a quarter on what we would usually experience, if we compare them with the numbers from this time last year. That will be a blip, so to speak. Without being blunt about it, I think that the figures will increase. We know that those crimes have not gone away and, when things settle down and we return to some normality, the reporting will increase again.

I would not say that a reassessment of the estimates is required; the estimates that have been made are probably the most accurate that can be pulled together using the assumptions that are made in the financial memorandum.

David Stewart: What assessment has Police Scotland made of the effect that self-referral for forensic medical examinations may have on the future reporting of relevant offences?

Detective Superintendent Capaldi: Sorry, just to clarify, are you asking how that will impact on us operationally?

David Stewart: Has Police Scotland done an assessment of the effect on the reporting of, for example, sexual offences in the future, once we have self-referral for forensic medical examinations? Will that have an effect on individual victims coming forward and reporting sexual crimes?

Detective Superintendent Capaldi: The short answer to whether such an assessment has been made is no. I do not think that self-referral will impact on victims coming forward. With regard to dealing with victims of rape and serious sexual crime, it is business as usual for Police Scotland. We know, and no doubt the committee will have heard from other witnesses, that such crimes are vastly underreported, so we do not know the true nature of the criminality. The reality is that self-referral will not have a significant impact on what we do day to day.

David Stewart: Thank you. My final question is, in the future, when victims contact the police about an offence, such as sexual assault, will they be informed about the option of self-referral for forensic medical examination?

Detective Superintendent Capaldi: To clarify, self-referral means no contact with the police. It is for the victim to make the referral directly to the health board without police involvement. Therefore, we would not know if somebody had self-referred. We would not give someone advice to self-refer if they are reporting to us. Does that clarify the position?

David Stewart: Yes, thank you. To give an example, in my early life in social work, I worked closely with the police on managing child sexual assault. I realise from my personal experience in social work over many years, that reporting rates are incredibly low, particularly for family abuse. How well known will the option of self-referral for forensic medical examination be? I assume that it will not be well known, even after the legislation goes through; therefore, will the police have a signposting role, whereby they will say to victims, "Have you thought about self-referral for forensic medical examination?"

If you have not considered that point, is it something that you could discuss with your colleagues in Police Scotland?

Detective Superintendent Capaldi: That work is on-going as part of the work of the self-referral sub-group of the chief medical officer task force. It is considering a number of options around the promotion of the self-referral process. For anyone who has not come to us directly, we would advise that there is an option of self-referral, through media campaigns or in the literature that we display or give out to potential victims.

09:45

Alex Cole-Hamilton: I have a couple of questions about storage and collection of evidence by health boards. Is Police Scotland confident that the evidence that is collected and stored by health boards in self-referral cases will be robust enough for your standards?

Detective Superintendent Capaldi: I think that extensive additional discussion is required on what measures, protocols and procedures health boards have in place.

It is difficult to ask doctors to make decisions on secondary evidence and on what samples should and should not be taken. In our submission to the committee, we are clear that samples that are obtained by doctors should be limited to forensic samples obtained at medical examinations.

We heard from Gillian Mawdsley in response to previous questions on the storage of certain items. That is problematic to say the least, particularly in relation to the conditions in which those items should be stored, how they are packaged and what medics seize at the time from the victim. Should we limit that to clothing? Should we extend it to bottles, cans and cups? There is the potential

for DNA to be obtained from all or any of those items.

There are significant concerns about the range and nature of what should be seized and what should be stored, but I do not think that the issues are insurmountable in terms of providing advice on that and ensuring that health boards are aware of the required procedures to store, properly package and retain the evidence.

Alex Cole-Hamilton: Does your organisation share the concerns of the Faculty of Advocates that health board professionals may lack training in handling forensic samples and reports, which would potentially lead to the integrity of samples and reports being compromised? Do we need to underpin the standards and training that we would expect in guidance?

Detective Superintendent Capaldi: I suppose that the short answer is yes—we share the concerns of the Faculty of Advocates. I have read its submission. It shares the same concerns not only as Police Scotland, but as the Crown Office and Procurator Fiscal Service and the Law Society of Scotland. Again, I do not think that the issues are insurmountable, and adequate training and the provision of the correct information could achieve what is required. Forensic examiners routinely retain medical samples in the correct conditions and packaged in the correct way.

You asked about the need for guidance. I referred to the self-referral sub-group. I know that that work and those discussions, particularly on the storage and retention of samples, are on-going.

Emma Harper (South Scotland) (SNP): I am interested in issues to do with the retention service, which we have touched on with Alex Cole-Hamilton's questions. Does Police Scotland have any concerns about the type of evidence that should be collected and retained by health boards in self-referral cases? In recent evidence sessions, we have heard about the collection of duvets and even mattresses, and you have just given other examples, including drink cans.

Detective Superintendent Capaldi: We are quite clear in our submission that the items to be collected should be limited to forensic samples obtained during a forensic medical examination. Seizing and retaining other items might be problematic. There have to be very good reasons for doing that. That includes items such as underwear, where there may be opportunities for forensic recovery.

As I mentioned, we would have to have those on-going discussions. However, asking forensic medical examiners to make an assessment of whether an item might yield additional specific evidence probably blurs the lines between investigation and the role of the forensic medical examiner.

Emma Harper: We know that the optimal time for the collection of evidence is between day 1 and day 7, and that it is better for forensic evidence such as cells, fluids and samples for DNA analysis to be obtained as early as possible. However, photographic evidence is also critical, and bruising and bite marks can develop over days. Could important evidence be lost if health boards are not able to store it? There are alternative ways to store evidence—for example, through the use of photographic evidence.

Detective Superintendent Capaldi: You are absolutely right. The optimum timeframe is within seven days for forensic—[*Inaudible.*] Obviously, there are opportunities with other items, such as clothing, cups, glasses and bottles, which will last a lot longer and will enable forensic recovery for a much longer period.

It is difficult to be able to provide advice and direction, because each report will be based on the circumstances of the particular incident that it relates to. We are not asking forensic medical examiners to be detectives or investigators. We should take the opportunity to retain as much as we possibly can but, ultimately, when it comes to the provision of a forensic medical examination, we must give the option to the victim while allowing their health and wellbeing to be catered for.

Emma Harper: Does Police Scotland think that there needs to be a national storage standard across health boards to ensure consistency in storage and compliance with evidential considerations?

Detective Superintendent Capaldi: Yes. There has to be a consistency of approach across all health boards, primarily to ensure that the process is sufficiently robust to enable any legal challenges to be repelled or to allow the process to be accounted for further down the line. If a case goes as far as court proceedings, there has to be a way to demonstrate and audit the process, whereby—as Gillian Mawdsley pointed out—there is continuity of evidence and each part of the chain of evidence can be corroborated. Therefore, national standards are a very good starting point, and we would certainly be supportive of such an approach.

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

Detective Superintendent Capaldi: It is a question of having choices and options. Advocacy services are best placed to do that work. It is important that the service and its availability and

accessibility are promoted, and Police Scotland has—[*Inaudible*.]—signposting, but I think that advocacy has a central role in the end-to-end process, from the point of reporting all the way through to potential court proceedings.

Sandra White: I want to ask about the transfer of evidence. I am interested in what you said previously about self-referral, which is that there would be no contact with the police. You mentioned corroboration in response to a question from Emma Harper. What is Police Scotland's view on the transfer of evidence from health boards?

Detective Superintendent Capaldi: We would have to be assured—[*Inaudible*.]—that there were proper and auditable measures in place for the storage and retention of that evidence. Thereafter, we would have to evidence the—[*Inaudible*.]—in terms of the corroborated aspects of when that evidence was seized, where it was stored and who had moved it from A to B. Ultimately, when we take possession of evidence, in order for the court to accept the admissibility of that evidence, we have to be able to demonstrate not only to the prosecution but to the defence that the opportunities for that evidence to have been tainted or tampered with in any way, shape or form have been absolutely minimised. Ultimately, admissibility is a matter for the court. In order for us to be able to defend the processes that were followed, sufficiently robust processes must be in place at the outset.

Sandra White: As someone who was previously on the Justice Committee, I know about the difficulties of obtaining evidence without corroboration—in the absence of two policemen going to get evidence, for example. Do you see any difficulties with that aspect of self-referral—the presenting of forensic evidence in court? You mentioned that the evidence had to be robust.

Detective Superintendent Capaldi: We face the same situation that is faced with the implementation of any new process. What is proposed is very new and it will take time for it to become business as usual. It is important to set a bedrock for that at the outset, in terms of proper guidelines and protocols for seizing and retaining evidence and passing it on to the police. If we can demonstrate that such guidelines have been followed, there will be credibility around the process. I envisage that, initially, as with anything new, there will be some teething problems. However, further down the line, I think that it will become routine and business as usual.

Sandra White: I know that you cannot do anything unless the matter is reported to the police. From the point of view of your ability to investigate crime, would there be any advantage in Police Scotland being made aware that a self-referral forensic medical examination had taken place?

Detective Superintendent Capaldi: Absolutely. There is obviously intelligence information there, particularly, as mentioned earlier, if a rape—[*Inaudible*.]—it can cause significant public concern. It would be beneficial to know that a self-referral report had been made. Again—[*Inaudible*.]—the self-referral process if we obtained detailed—[*Inaudible*.]—of that, to protect the rights and anonymity at that point of the victim. There would be value in that.

Sandra White: There has been talk of having an anonymous database, which you touched on. Obviously, the police would be informed of the number of self-referrals with regard to rape or other serious crime. Would Police Scotland welcome an anonymous database? Would that be helpful in looking at not just—[*Inaudible*.]—crimes but historical crimes?

10:00

Detective Superintendent Capaldi: That is a very difficult question. When we process items at our lab, we have DNA extraction and a DNA profile. Loading that on to a database would probably necessitate a search against the national database. If we subsequently get a hit on that DNA for a named individual, what do we do with that? Where do we go with it?

Although there are benefits, there are ethical issues around the storage and retention of that information for individuals, and it might cause more problems than it would solve. It would be very beneficial for us from an intelligence-gathering point of view, but we would need to look at how we would act on that intelligence and progress that aspect of the inquiry.

Miles Briggs: I have some questions on advocacy, which you touched on in response to Emma Harper. Does Police Scotland believe that advocacy services should be available for victims? What model do you currently use?

Detective Superintendent Capaldi: Yes, is the short answer. Since the establishment of Police Scotland in 2013, we have developed close links with Rape Crisis Scotland. At the point of reporting, we offer advocacy to victims of serious sexual crime, which has significant benefits. [*Inaudible*.]—engage with them or stay engaged throughout the process. It is one aspect of the overall package of provision to individual victims.

With Rape Crisis Scotland, we operate a model of self-referral at the point of reporting. We offer that to every victim of rape and serious sexual crime and, to date, we have found it to be very beneficial. However, a concern that has been

highlighted with the self-referral process is that we are asking a lot of medics—doctors and/or nurses—if we are asking them to provide that initial advocacy support as well as look at the evidential requirements. Are we really asking that of doctors and medics? Are we asking them to focus on the health and wellbeing of potential victims, or are we asking them to provide that early evidence capture as well as the on-going healthcare and treatment?

Police Scotland certainly supports advocacy for self-referral cases.

Miles Briggs: That is helpful. One area that we have not been able to pursue in the bill is same-sex victims. From your experience, what is the current level of such victims in Scotland? Is the same advocacy provided to them?

Detective Superintendent Capaldi: I do not have the stats on the reporting of that to hand. We know from a recent look at our statistics for rape—[*Inaudible*.]—per cent of victims were female and 4 per cent were male. That is the kind of breakdown that we have at the moment. However, we know that such crimes are vastly underreported for a variety of reasons, so we do not know the true numbers. There is no differentiation—[*Inaudible*.]—female, gay, bisexual or lesbian. Any victim of a sexual crime is offered services via the advocacy support route. No distinction is made on the basis of someone's sexuality.

The Convener: Thank you. Does Miles Briggs have a final question?

Miles Briggs: I do. The sound was breaking up during the evidence on statistics, so maybe Detective Superintendent Capaldi could provide them to the committee after the session. Wider information would be useful.

Would Police Scotland welcome the inclusion in the bill of a statutory right to independent advocacy, or do you think that it is already in place, so we do not need to legislate?

Detective Superintendent Capaldi: I do not think that there is a requirement to legislate—[*Inaudible*.] Existing agreements and alliances with the third sector, particularly advocacy support services, are sufficiently robust. It is probably more for the health boards to have an on-going discussion about the provision of advocacy support at the point of self-referral. I am relatively comfortable with what we have in place for—[*Inaudible*.]—but there might be a small gap when it comes to self-referral. We have identified that gap, so we should put provisions in place to fill it.

The Convener: Thank you. Emma Harper has a brief final supplementary.

Emma Harper: I will pick up on the importance of advocacy. The Rape, Abuse & Incest National Network in the USA reported the statistics that 45 per cent of rape is perpetrated by a person with whom the victim is acquainted and 25 per cent is perpetrated by a current or former partner. I assume that that makes it challenging to prosecute; it also shows how important advocacy is in supporting the victims.

Detective Superintendent Capaldi: I would not disagree with those figures. From my experience, familial sexual abuse is a significant problem and is vastly underreported. [*Inaudible*.]—close relationships is also, unfortunately, too common in some of the reports that we get. Ultimately, we would encourage people to come forward; some will require more support than others, and advocacy will play a key role in ensuring that people have the confidence and faith in the police and the justice system—[*Inaudible*.]—these matters.

The Convener: I thank Detective Superintendent Capaldi very much for his evidence.

I apologise to people who have been following proceedings for the fact that, at times, the sound quality has been poor. We will check the *Official Report* when it becomes available—I am sure that both our witnesses will do the same—to make sure that there are no gaps in what has been said. However, we have certainly found the evidence of Gillian Mawdsley and Filippo Capaldi extremely helpful.

That concludes the public part of this morning's meeting. The next meeting of the committee will be next week and will be notified in the *Business Bulletin* and via the committee's social media.

10:08

Meeting continued in private until 12:00.

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