ACQUISITION AND RETENTION OF DNA AND FINGERPRINT DATA IN SCOTLAND

CONSULTATION REPORT
Ministerial Foreword

Data derived from DNA and fingerprints is a powerful tool in the investigation and prosecution of crime in Scotland. It supports the identification of suspects, and provides a means of eliminating the innocent from enquiries. When considered alongside other evidence, it can provide compelling evidence of guilt, helping to secure convictions and keep our communities safe. It also provides a means of identification in murder investigations, missing persons cases and natural disasters. It is, therefore, in the public interest that we make the most of our well established DNA and fingerprint databases.

It is essential that the public feel confident that the laws governing the acquisition and retention of DNA and fingerprint data are proportionate and that appropriate procedures are in place to manage this data. I am proud of the fact that the laws we have in Scotland ensure that only those who are found guilty in a court of law can have their data retained indefinitely.

Building on Professor Fraser’s initial review and the consultation responses received, the proposals set out in this report seek to maintain this balance, ensuring that the circumstances in which DNA and fingerprints can be taken, and the length of time they can be held, strike a proper balance between protecting the rights of the individual and protecting the public.

I would like to thank the organisations and individuals who took the time to respond to our consultation. The range of views expressed has generated proposals that I believe are firmly in keeping with our commitment to a balanced and proportionate approach to the retention and acquisition of DNA and fingerprint data.

KENNY MACASKILL MSP
CABINET SECRETARY FOR JUSTICE
INTRODUCTION

1. This report contains a summary and analysis of comments received in response to the Scottish Government’s Consultation on the Acquisition and Retention of DNA and Fingerprint Data in Scotland.

Background

2. The statutory framework for the acquisition and retention of DNA and fingerprints in Scotland is set out in sections 18 to 20 of the Criminal Procedure (Scotland) Act 1995. Section 18A of that Act has been in place in its current form since 1 January 2007. It seeks to strike a balance between the undoubted benefits of retaining DNA to support future criminal investigations and the civil liberties issues around retaining DNA samples taken from persons who are prosecuted, but not ultimately convicted of an offence. There are anomalies in the current arrangements; for example, there are limited powers for the retention of DNA samples taken from persons proceeded against but not convicted of sexual or violent offences, but none in respect of fingerprint data.

3. Against that background Professor James Fraser, Director of Strathclyde University’s Centre for Forensic Science, was asked to review and report on the operation and effectiveness of the statutory regime governing the acquisition and retention of DNA and fingerprint data. He reported back with his recommendations in July 2008.

4. A consultation paper setting out the Scottish Government’s response to the Professor Fraser’s review of the “Acquisition and Retention of DNA and Fingerprint Data in Scotland” was subsequently published in September 2008. It sought comments on options and proposals for inclusion in the forthcoming Criminal Justice and Licensing Bill.

The consultation process

5. The consultation document was published on the Scottish Government website on 23 September and a copy was placed in the Scottish Government Library. The consultation ended on Friday 21 November. However we were able to include a number of late responses in our analysis.

RESPONSES

6. A total of seventeen responses were received. We are very grateful to all those who took the time to comment. Responses from the following organisations were published on the Scottish Government website and copies have been placed in the Scottish Government library:

2. Scottish Government Library, Saughton House, Broomhouse Drive, Edinburgh, EH11 3XD
7. This report contains a summary and analysis of all the responses received. Many of the respondents also submitted comments to the earlier consultation carried out by Professor Fraser as part of his review.  

Recent developments

8. The judgement of the European Court of Human Rights in the case of S and Marper v United Kingdom was published on 4 December 2008, after our consultation closed. The judgement relates to the indefinite retention of DNA and fingerprints in England and Wales of unconvicted persons. The applicants (S and Marper) contested the retention of their DNA profiles, samples and fingerprints under Articles 8 and 14 of the ECHR because they were not convicted. The Court found, in favour of the applicants, that although the aim (prevention of crime) was legitimate, Article 8 was breached because the response was judged to be disproportionate to the aim and, therefore, unnecessary in a democratic society. This was because DNA profiles, samples and fingerprints were retained indefinitely from those who were not convicted which placed them in the same position as those who had been convicted. In addition, retaining such forensic data indefinitely from all those who were not convicted of an offence, did not take account of the seriousness of the offence with which they were suspected of committing. In short, the judgement highlighted four key issues in relation to the retention policy in England and Wales as applied to S & Marper’s cases:

- There was no conviction.
- The retention period was indefinite.
- The policy did not discriminate in terms of the seriousness of the offence.
- The policy took no account of the age of the person.

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9. Many respondents were aware of imminent publication of this judgement and highlighted that it may also have an impact on the proposals for legislation in Scotland. We have carefully considered the impact of the judgement. Indeed, the European Court of Human Rights commented favourably on the current Scottish approach to the retention of DNA of unconvicted persons (provided for in s18A of the 1995 Act).

FINDINGS

10. This section discusses comments received in response to specific proposals or options put forward in the consultation paper, and sets out the Scottish Government’s proposals for legislation, which are summarised at Annex A.

Section 3 - Retention periods for DNA samples

11. Comments were invited on the proposal to accept Professor Fraser’s recommendation that there should be no change in the present arrangements. On this basis, DNA samples would continue to be retained from all convicted persons indefinitely (in practice these records are deleted according to Scotland’s criminal records weeding policy), but would be retained from unconvicted persons only if proceedings were raised against them for a relevant sexual or violent offence. Such DNA samples would be retained for a period of 3 years, and the relevant Chief Constable would then have discretion to apply to a Sheriff for extensions of up to 2 years at the end of each period.

Responses and analysis

12. Overall, respondents broadly agreed that there should be no changes to the current retention periods for DNA.

13. Both Scotland’s Commissioner for Children and Young People and the Information Commissioner’s Office commented that the approach in Scotland is a proportionate one, balancing the rights of the individual against the rights of society. The Information Commissioner’s Office also suggested that an evaluation of the impact of this policy should be undertaken.

14. The Association of Chief Police Officers in Scotland and the Scottish Police Services Authority suggested that the list of ‘relevant’ sexual and violent offences set out in section 19A of the Criminal Procedure (Scotland) Act 1995 should be revised to ensure that the offences included are current and fit for purpose. Both bodies recommended that consideration be given to including offences related to the carrying of knives or offensive weapons and the Association of Chief Police Officers in Scotland also recommended the inclusion of Breach of the Peace where there is a clear sexual or violent element. The Scottish Police Services Authority raised the point that where a sample is lawfully taken, legislation should support retention where sufficient evidence exists rather than retention being based on the formal institution of proceedings by a Procurator Fiscal. The effect of this would be to retain DNA in cases where sufficient evidence existed, but which don’t proceed to prosecution for other reasons (e.g. public interest considerations). We believe that the current legislation provides a clear and justifiable trigger point for the retention for
DNA, that trigger being the Procurator Fiscal’s decision to proceed with the prosecution. The Association of Chief Police Officers in Scotland asked that consideration be given to allowing a Sheriff discretion to extend retention beyond the current 2 years. However it should be noted that the current legislation already allows for this, with Chief Constables having the discretion to apply to a Sheriff for repeated extensions of up to 2 years to provide a means of managing high risk cases.

15. GeneWatch UK supported the current retention periods, but qualified this by suggesting additional safeguards, including more transparent and accountable governance of the database, statutory restrictions on use of the database and samples, statutory weeding rules, and a clear and transparent procedure for people to appeal against retention of their records. These issues will be considered by a working group to be established by the Scottish Government (see paragraph 39).

16. NO2ID supported the retention of DNA samples only where there is a demonstrable benefit to public safety and an improvement in the prospect of crime detection. The Glasgow Bar Association proposed that when DNA samples are retained in respect of persons not convicted of any crime this should be restricted to acquittals for cases prosecuted on indictment.

17. The Human Genetics Commission suggested that any samples kept without conviction should include a reference to the seriousness of the offence as well as to the fact that the offence is of a sexual or violent nature. Indeed, it is currently the case that samples retained on the database are allocated an individual marker which identifies the offence for which they are retained. This means that for each sample, not only is the offence classification available (i.e. relevant sexual or violent offence), but also the actual offence in respect of which the sample is retained.

Proposal

18. The Scottish Government’s current position is based on the need to strike a balance between protecting the public from the risk of sexual and violent offending behaviour and protecting the rights of the individual. The fact that Scotland’s approach to the retention of DNA from unconvicted persons was highlighted as being proportionate in the recent European Court of Human Rights judgement in the case of S and Marper v United Kingdom supports the current position. We, therefore, propose that there should be no change to the current powers contained in s18A of the Criminal Procedure (Scotland) Act 1995, so that DNA samples and profiles will continue to be retained on the basis set out at paragraph 11, above.

Section 4 - Retention periods for Fingerprints

19. The Scottish Government proposed to bring forward provision in the forthcoming Criminal Justice and Licensing Bill to retain fingerprints of persons proceeded against but not convicted of an offence on exactly the same basis as DNA samples.
Responses and analysis

20. All respondents agreed with the proposal to put the retention of fingerprint data on an equal footing with DNA. The Human Genetics Commission expressed the view that, while this approach was acceptable for criminal justice purposes, fingerprint data and DNA samples should not be treated as equivalent in all respects, as they considered that different consequences may follow from the possession of an actual DNA sample as opposed to the possession of fingerprints and other forensic data. NO2ID were of the view that retention of fingerprint data may sometimes be justified in circumstances where retention of DNA samples may not be.

Proposal

21. We propose to bring the law on the retention of fingerprints and other relevant physical data taken from unconvicted persons into line with current law on DNA retention. Therefore, fingerprints and other relevant physical data will be retained from unconvicted persons only if proceedings have been raised against them for a relevant sexual or violent offence. Such data will be retained for a period of 3 years, and the relevant Chief Constable will then have discretion to apply to a Sheriff for extensions of up to 2 years at the end of each period.

Section 5 - Children’s Hearings

22. Three options were put forward with regard to the acquisition and retention of DNA and fingerprints from children dealt with by the Children’s Hearings System. These were:

- Option 1: No change to the present arrangements, on the basis that it is not appropriate as a matter of principle to take and retain DNA and fingerprints from children who are dealt with in a Children’s Hearing as opposed to a criminal court.

- Option 2: Accept Professor Fraser’s recommendation that there should be power to take and retain DNA and fingerprints from children who are dealt with by Children’s Hearings and are found to have committed a relevant sexual or violent offence, or accept that they have done so. Views were invited on whether assaults should be included or excluded and whether powers of retention should be confined to more serious sexual offences.

- Option 3: Accept Professor Fraser’s recommendation in part by introducing power to take and retain DNA and fingerprints from children who are dealt with by Children’s Hearings and are found to have committed a relevant sexual or violent offence, or accept that they have done so, for a period of 3 years only.

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5 Relevant physical data means any fingerprint, palm print, print or impression of an external part of the body or record of a person’s skin on an external part of the body.
Responses and analysis

23. Children 1st, the Scottish Children's Reporter Administration, the Information Commissioner's Office, Glasgow Bar Association and the Law Society of Scotland favoured the first option – no change to the present arrangements. Children 1st did not feel it was necessary to retain any child’s DNA or fingerprints for any length of time, believing that it undermined the child’s rights and the welfare basis of Children's Hearings. They also cited research reporting that children are less likely than adults to reoffend given the right treatment, supervision and support. Glasgow Bar Association and the Law Society of Scotland did not support retention, surmising that more serious sexual and violent offences would be prosecuted in court rather than being referred to a Children's Hearing. Nuffield Council on Bioethics had no specific comments on Children's Hearings, but commented more generally that they favour the destruction of samples taken from minors. Despite their support for option 1, both the Scottish Children's Reporter Administration and the Information Commissioner's Office acknowledged that option 3 struck a good balance, should a policy of retention be adopted, in that samples would be retained for a limited time period only.

24. The Association of Chief Police Officers in Scotland, the Scottish Police Services Authority, the Scottish Police Federation, the Scottish Police Authorities Conveners' Forum and ESRC Genomics Network all expressed support for the second option, agreeing that there should be new powers to take and retain DNA and fingerprints from children who are dealt with by Children's Hearings and are found to have committed a relevant sexual or violent offence, or accept that they have done so. ESRC Genomics Network suggested that samples should only be taken and retained where both the offence and the risk of reoffending are sufficiently serious. In relation to retention timescales, the Association of Chief Police Officers in Scotland and the Scottish Police Services Authority supported a power of indefinite retention, in line with current retention powers for those convicted in court.

25. Scotland's Commissioner for Children and Young People, the Human Genetics Commission, GeneWatch UK, NO2ID, and the Faculty of Advocates favoured option 3, accepting that it might be appropriate to take and retain DNA where a sexual or violent offence has been committed, but supporting a time limit on retention.

26. Option 2 also contained an invitation to comment on whether assaults should be included or excluded in their entirety; and whether powers of retention should be confined to more serious sexual offences and exclude consensual sex between children who are both under the age of 16. Of the eight organisations who commented, all agreed that consensual sex between children under 16 should be excluded from the list of relevant sexual and violent offences, although the Scottish Police Federation said that retention should not be confined only to serious sexual offences. Responses with regard to assault varied. While for the most part, there was consensus that minor assault should not be included, there was no clear view on how to distinguish between minor and serious assault. On that basis, the Scottish Children's Reporter Administration felt that the offence of assault should
be excluded entirely, where as the Law Society of Scotland and the Scottish Police Federation considered that all assaults should be included.

27. In summary, across all offences, there was broad agreement that powers of retention should be confined to sexual and violent offences; and that both consensual sex between children under the age of 16 and minor assault should be excluded. However, there was no consensus on how assaults should be categorised.

28. In addition to the questions posed, some respondents expressed views on when the decision should be taken to retain a sample from a child dealt with by Children’s Hearings. GeneWatch UK suggested that the decision should be taken in the context of the hearing itself. Scotland’s Commissioner for Children and Young People commented that this decision could be made through a separate application to the Sheriff and that the decision should be based on an assessment of the risk to public safety posed by the child. The Law Society of Scotland also felt that retention should be a matter for a Judge or Sheriff to determine. With regard to operational considerations, the Scottish Children’s Reporter Administration highlighted the need to consider the procedures around advising children that their DNA and fingerprints would be retained upon accepting the grounds of referral.

Proposal

29. Views of respondents varied widely on this issue. At one end of the scale, respondents wished to provide a power to retain DNA and fingerprints indefinitely from children who are found to have committed a relevant sexual or violent offence, or accept that they have done so; at the other, respondents believed there should be no change to the status quo (i.e. no retention in any circumstance). Our proposals seek to achieve a balance between these views. No new powers will be sought to take DNA and fingerprints on the basis that existing powers under section 18 of the Criminal Procedure (Scotland) Act 1995 are sufficient. We will seek a power to retain for three years DNA, fingerprints and other relevant physical data already taken under existing powers where a child is referred to a children’s hearing on the ground of having committing a relevant violent or sexual offence, provided the child (along and relevant adult) accepts the child has committed such an offence or is found to have done so by a sheriff. Each Chief Constable will have the discretion to apply to a Sheriff for extensions of up to 2 years at the end of each period of retention. The list of offences will be developed with interested parties and prescribed in secondary legislation. This will provide an opportunity to consult further on the offences to be included, to consider the issues around assault and to assess the operation of the list at an appropriate point.

Section 6 - Fixed Penalty notices and other conditional offers

30. In the consultation views were sought on the following options in relation to the retention of DNA and fingerprints taken from persons arrested or detained on suspicion of having committed an offence and who subsequently accept a direct measure offered by the procurator fiscal (i.e. a fiscal fine, compensation order, combined order or work order).
- Indefinite retention, mirroring retention for persons convicted of an offence; or alternatively

- retention for a period of 3 years, with discretion for a Chief Constable to apply to a Sheriff for extensions of up to 2 years at the end of each period.

Responses and analysis

31. The Scottish Police Federation, the Association of Chief Police Officers in Scotland, the Scottish Police Authorities Conveners’ Forum, and the Scottish Police Services Authority all favoured indefinite retention of DNA and fingerprints from persons accepting a fiscal disposal on the grounds that acceptance equates to a conviction.

32. A limited retention period in these circumstances was considered more appropriate by the Information Commissioner’s Office, the Faculty of Advocates, GeneWatch UK and Scotland’s Commissioner for Children and Young People.

33. The Glasgow Bar Association, the Law Society of Scotland, and the Human Genetics Commission questioned the principle of retaining DNA and fingerprints from someone whose case has not been heard in court. The remainder of the organisations did not comment on this issue, although NO2ID suggested that if it was decided that DNA samples were to be retained there should be an avenue of appeal to have them removed from the database.

34. The Scottish Government's consultation paper highlighted representations made to Professor Fraser relating to the acquisition and retention of DNA and fingerprints from persons dealt with by way of police direct measures (fixed penalties and police warnings). In its consultation, the Scottish Government proposed not to extend powers to such cases. However, in their responses, both the Association of Chief Police Officers in Scotland and the Scottish Police Services Authority have expressed the view that those accepting a police fixed penalty notice have admitted responsibility and so DNA and fingerprints should be retained for a limited period of time (at least long enough to ensure that checks can be carried out against the DNA database to maintain consistency with the treatment of fingerprints, which take less time to process and are, therefore, routinely checked in such circumstances). The Scottish Police Services Authority suggested a retention period of 2 years, in line with the current weeding policy for criminal records.

Proposal

35. We are further considering our approach to the retention of DNA and fingerprints in cases dealt with by direct measures issued by Procurators Fiscal. In particular, we will consider the nature of such disposals - which are not convictions, but where there is an acceptance of responsibility - along with the period of retention. Following the issues raised by the Association of Chief Police Officers in Scotland and the Scottish Police Services Authority, we also intend to consider the retention of DNA and fingerprints in relation to police fixed penalty notices. In both cases, we consider that any powers to retain should only apply where DNA and fingerprints have already been taken at the point when the person was initially arrested and
detained or in custody. Any proposals would seek to maintain an appropriate balance between the effective investigation and prosecution of crime and the rights of the individual.

Section 7 - Governance, accountability and transparency

36. Four proposals were put forward for consideration:
   - SPSA should publish regular data and reports on the operation of both the DNA and fingerprint databases;
   - there should be greater consistency in the use of existing powers under section 18 of the 1995 Act to take DNA and fingerprint samples;
   - SPSA should review practices and draw up guidelines on the weeding of records;
   - the purposes for which DNA and fingerprint data can be used should be set out in statute.

Responses and analysis

37. All four proposals received broad support from respondents. In relation to guidelines on the weeding of records, the responses from NO2ID, the Scottish Police Services Authority and GeneWatch UK went a step further and suggested that guidelines for should be placed on a statutory footing. The Information Commissioner’s Office, Nuffield Council on Bioethics, GeneWatch UK, and the Human Genetics Commission all sought specific restrictions on the use of the DNA and fingerprint databases for research purposes. In terms of governance, both ESRC Genomics Network and the Association of Chief Police Officers in Scotland favoured an independent governance structure, with the latter also suggesting the appointment of an independent Forensic Science Regulator for Scotland, echoing the arrangement in England and Wales. As part of the wider governance arrangements, GeneWatch UK suggested that a clear, simple and transparent procedure should be established to enable people to appeal against the retention of their DNA profile.

Proposal

38. The purposes for which DNA, fingerprint and other physical data can be used will be set out in statute in the forthcoming Criminal Justice and Licensing Bill as follows:
   - the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution, or
   - the identification of a deceased person or of the person from whom the material came

This will clarify the purposes for which these data can be used.

39. A working group will be established with a remit to progress work on governance, accountability and transparency, taking into account issues raised in
response to the consultation. This group will also oversee the development of the list of offences for the Children’s Hearings provisions, as well as reviewing the operation of existing legislation and implementing the new provisions to be included in the Criminal Justice and Licensing Bill.

Other issues

40. A number of respondents questioned why it was necessary to retain both DNA samples and profiles, rather than destroying the samples and retaining only the profiles. GeneWatch UK pointed out that in some EU countries, DNA samples are destroyed immediately following analysis. They argued that in view of the sensitive nature of the genetic information held in samples, and the high cost of storing them, DNA samples should be destroyed once the DNA profile has been loaded onto the database or after a temporary retention period specified in legislation. The Human Genetics Commission concluded that there should be a persuasive and fully articulated justification for retaining biological samples and that special safeguards should apply to them.

41. Although the sensitivities around the retention of DNA samples are understood, samples are retained by SPSA for a number of valid reasons. For example, confirming the original profile is correct, quality control, or to extract a more detailed profile, which may be necessary in order to identify skeletal remains, missing persons, or for use in criminal paternity cases. The Scottish DNA Database is already carefully managed and subject to rigorous controls, with access being strictly limited. However, there may be some merit in clarifying the procedures and controls that are in place by putting this information squarely in the public domain. This issue will be considered by the working group.

Next Steps

42. Provisions giving effect to our legislative proposals will be introduced in the forthcoming Criminal Justice and Licensing Bill. We will be writing out to key stakeholders in the Spring seeking representation on the working group.
SUMMARY OF THE SCOTTISH GOVERNMENT’S PROPOSALS

- **Retention periods for DNA samples:** No change to the current powers contained in s18A of the Criminal Procedure (Scotland) Act 1995. On that basis, DNA samples will continue to be retained from all convicted persons indefinitely (in practice these records are deleted according to Scotland’s criminal records weeding policy), but would be retained from unconvicted persons only if proceedings were raised against them for a relevant sexual or violent offence. Such DNA samples will be retained for a period of 3 years, and the relevant Chief Constable would then have discretion to apply to a Sheriff for extensions of up to 2 years at the end of each period.

- **Retention periods for Fingerprints:** Bring the law on the retention of fingerprints taken from unconvicted persons into line with DNA retention provisions. Fingerprints and other relevant physical data will be retained from unconvicted persons only if proceedings have been raised against them for a relevant sexual or violent offence. Such data will be retained for a period of 3 years, and the relevant Chief Constable will then have discretion to apply to a Sheriff for extensions of up to 2 years at the end of each period.

- **Children’s Hearings:** No new powers will be sought to take DNA and fingerprints on the basis that existing powers under section 18 of the Criminal Procedure (Scotland) Act 1995 are sufficient. We will seek a power to retain for three years DNA, fingerprints and other relevant physical data already taken under existing powers where a child is referred to a children’s hearing on a ground of committing a relevant sexual or violent offence and accepts (along with a relevant adult) that they have committed such an offence or is found to have done so by a sheriff. Each Chief Constable will have the discretion to apply to a Sheriff for extensions of up to 2 years at the end of each period of retention. The list of offences will be developed with interested parties and prescribed in secondary legislation.

- **Governance, accountability and transparency:** The purposes for which DNA, fingerprint and other physical data can lawfully be used will be set out in statute in the forthcoming Criminal Justice and Licensing Bill as follows:

  o related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution, or
  o related to the identification of a deceased person or of the person from whom the material came

This will clarify the purposes for which these data can be used. A working group will be established with a remit to progress work on governance, accountability and transparency, taking into account issues raised in response to the consultation. This group will also oversee the development of the list of offences for the Children’s Hearings provisions, as well as reviewing the operation of

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6 Relevant physical data means any fingerprint, palm print, print or impression of an external part of the body or record of a person’s skin on an external part of the body.
existing legislation and implementing the new provisions to be included in the Criminal Justice and Licensing Bill.

- **Direct measures issued by Procurators Fiscal:** We are further considering our approach to the retention of DNA and fingerprints in cases dealt with by direct measures issued by Procurators Fiscal. Following the issues raised by the Association of Chief Police Officers in Scotland and the Scottish Police Services Authority, we also intend to consider the retention of DNA and fingerprints in relation to police fixed penalty notices. In both cases, we consider that any powers to retain should only apply where DNA and fingerprints have already been taken at the point when the person was initially arrested and detained or in custody. Any proposals would seek to maintain an appropriate balance between the effective investigation and prosecution of crime and the rights of the individual.