Guidance on the Retention and Use of Forensic Data and Samples

Under the Provisions of the Criminal Procedure (Scotland) Act 1995 and the Criminal Justice (Scotland) Act 2003
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Under the Provisions of the Criminal Procedure (Scotland) Act 1995 and the Criminal Justice (Scotland) Act 2003
GUIDANCE ON THE RETENTION AND USE OF FORENSIC DATA AND SAMPLES

Under the provisions of the Criminal Procedure (Scotland) Act 1995 and the Criminal Justice (Scotland) Act 2003

INTRODUCTION

The law in Scotland on police powers to take, retain and use DNA, fingerprints and other forensic data such as palm prints is mainly set out in Part II of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”).

Sections 77 to 82 of the Criminal Justice and Licensing (Scotland) Act 2010 made changes to the 1995 Act, updating and extending the provisions in a number of areas. This included the extension of provisions for the retention of data where proceedings have been initiated in respect of relevant sexual or violent offences but end without a conviction; new provisions where a relevant offer is made and accepted, or where certain fixed penalty notices are accepted; and provisions for the retention of samples in certain children’s hearings cases.

The majority of these provisions will take effect from 28 March 2011, with the new legislation on children’s hearings coming into force on 15 April. Further provisions relating to the use of DNA and other samples will take effect on 1 August 2011.

ABOUT THIS GUIDANCE

This guidance clarifies the new changes to the legislation with regard to the retention and use of DNA, fingerprints and other forensic data. It is primarily aimed at the police, the Scottish Police Services Authority, the Scottish Court Service and the Crown Office and Procurator Fiscal Service but it also provides a guide to the legislation for other stakeholders and members of the public. Further help and information can be found at http://www.scotland.gov.uk/Topics/Justice/public-safety/Police/dna-forensics

The information and guidance in the attached Annexes seeks to provide an outline explanation of each of the new provisions. A Frequently Asked Questions section in each Annex explains the measures further, and a flowchart and timeline shows the decision process on the retention of samples, any subsequent application for an extended retention period and any consequent appeal process.
FURTHER INFORMATION

This guidance does not in any way constitute legal advice or opinion and should not be relied upon as such. It is for stakeholder organisations or individuals affected by the provisions of the legislation to seek their own independent advice if need be.

Questions about the operation of the guidance in practice should be directed to the relevant organisation. Contact details for all relevant organisations can be found on page 26 of this guidance.

Any general queries about this guidance should be directed to:

Police Powers and Public Protection Unit
Safer Communities Directorate
Scottish Government

Contact: gordon.young@scotland.gsi.gov.uk
Tel: 0131 244 2160

Scottish Government
March 2011

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Section 77 of the Criminal Justice and Licensing (Scotland) Act 2010
Retention of samples etc.

Amends sections 18 and 18A of the Criminal Procedure (Scotland) Act 1995

Commencement: 28 March 2011

Summary

Section 77 of the Criminal Justice and Licensing (Scotland) Act 2010 ("the 2010 Act") amends section 18A of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") and provides an exception to the general rule on forensic data destruction where criminal proceedings have been initiated for an offence but end without a conviction. This section only applies to criminal proceedings raised for specific relevant sexual or violent offences as set out in section 19A(6) of the 1995 Act. In such cases, DNA samples, fingerprints and other forensic data such as palm prints can be retained by the police for at least three years. The relevant Chief Constable can, within three months before the destruction date, apply to a sheriff for these samples to be kept for up to two more years and this process can be repeated before the end of each extended period. The decision of a sheriff can be appealed to the sheriff principal by either party. The sheriff principal’s decision on the application will be final.

These extended retention powers did not previously apply to fingerprints and other relevant physical data. Therefore, section 18 and 18A of the 1995 Act have been amended so as to apply these extended retention powers to relevant physical data (fingerprints, palm prints and impressions etc). The term “relevant physical data” is defined in section 18(7A) of the 1995 Act.

Frequently Asked Questions

When does section 18A apply?

Section 18A of the 1995 Act applies where forensic data has been taken under section 18 of the 1995 Act whilst a person has been arrested or detained and criminal proceedings were initiated for specific relevant sexual or violent offences set out in section 19A(6) of the 1995 Act but proceedings end without a conviction or an order of absolute discharge under section 246(3) of the 1995 Act.

To what data does section 18A refer?

DNA, fingerprint and other relevant physical data such as palm prints. Section 18(7A) of the 1995 Act sets out what is meant by “relevant physical data”.

RETENTION OF DATA

How long can forensic data be retained?

DNA samples and other records can be retained by the police for an initial period of 3 years following the conclusion of the proceedings relating to which the data was taken. The Chief Constable can then apply to a sheriff for these samples to be kept for up to two more years and this process can be repeated at the end of each extended period.

Who is responsible for ensuring that the data is stored and retained?

This is a matter for the Scottish Police Services Authority (SPSA) which maintains the Scottish forensic database.

EXTENSION OF RETENTION PERIOD

What happens at the end of the 3 year retention period?

Two years and 8 months after the data has first been retained, the respective database raises an alert that the 3 year destruction date is approaching. The SPSA then contact the police force where the original prosecution originated, notifying them that the 3 year destruction date is approaching.

What is the role of the police?

The Chief Constable considers whether it is necessary to extend the retention period for a period of up to 2 years. This will depend on the perceived risk to the public posed by the individual from whom data was taken.

A summary application for extension of the retention period must be lodged by the Chief Constable at a Sheriff Court within 3 months of the destruction date. Normal summary application rules apply. The application must be made to the Sheriff Court in the sheriffdom where the individual whose data is retained resides, where the Chief Constable believes him/her to be, or where the Chief Constable believes he or
she is intending to come. The forensic data is retained pending the outcome of the summary application.

If the Chief Constable decides not to apply for an extension, the forensic data (both samples and profiles) will be destroyed no later than the date of destruction. This might be the original 3 year destruction date or an extended destruction date set by a sheriff or sheriff principal.

**What happens with the application?**

Once the section 18A application is lodged, a hearing date is set for approximately 4 to 6 weeks ahead. Notice of the application is given by the Chief Constable to the individual whose data is being considered for further retention.

**What options are open to the sheriff?**

The sheriff can grant or refuse the application to extend the retention period. If the data is to be retained, a new destruction date will be set not more than two years from the previous destruction date.

**Is Legal Aid available?**

An application can be made for Civil Legal Aid in the normal way by the individual whose data is being considered for further retention to receive advice and representation.

**APPLICATION FOR EXTENSION IS GRANTED**

**What happens if the application is granted?**

The individual whose data is to be retained may appeal to the sheriff principal within 21 days of the decision. The sheriff principal’s decision on any such appeal is final. The forensic data is retained pending the outcome of the appeal to the sheriff principal.

**What happens if the individual's appeal is successful?**

The Chief Constable will notify the SPSA that the forensic data is to be destroyed as soon as possible.

**What happens if the individual's appeal is refused?**

The sheriff principal will inform the individual whose data is retained. The further retention period of up to two years granted by the sheriff will remain in force. The Chief Constable will inform the SPSA of the new destruction date. The respective database will be updated and an alert will be raised 4 months before the new destruction date at which point a further application for extension can be made by the Chief Constable if it is considered appropriate.
What happens if there is no appeal by the individual?

The Chief Constable will inform the SPSA of the new destruction date. The respective database will be updated and an alert will be raised 4 months before the new destruction date, at which point a further application for extension may be made by the Chief Constable if it is considered appropriate.

APPLICATION FOR EXTENSION IS NOT GRANTED

What happens if the application is not granted?

The Chief Constable may appeal to the sheriff principal within 21 days of the decision of the sheriff in relation to the application. The sheriff principal’s decision on any such appeal is final. The forensic data is retained pending the outcome of the appeal.

What happens if the appeal is successful?

The Chief Constable will inform the individual whose data is retained.

If the appeal is allowed the Sheriff Principal will make an Order amending or further amending the destruction date. The Chief Constable will inform the SPSA of the new destruction date. The respective database will be updated and an alert will be raised 4 months before the new destruction date, at which point a further application for extension may be made by the Chief Constable if that is considered appropriate.

What happens if the appeal is refused?

The Chief Constable will notify the SPSA that the forensic data is to be destroyed as soon as possible.

What happens if there is no appeal?

The Chief Constable will notify the SPSA that the forensic data is to be destroyed as soon as possible.

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FLOWCHARTS FOR SECTION 18A
Forensic Data Retention - Flow Chart of Section 18A Application Guidance

Under s18 of the Criminal Procedure (Scotland) Act 1995, an individual's forensic data was taken under arrest or detention. The individual is prosecuted for a "relevant sexual" or "relevant violent" offence but is not convicted. Their forensic data is retained on the relevant database for 3 years under s18A of the 1995 Act.

After 2 years and 9 months SPSSA raises an alert that the 3 year destruction date is approaching. SPSSA then contacts the police force where the original prosecution stemmed from notifying them that the 3 year destruction date is approaching in 4 months.

The Chief Constable considers whether making a section 18A application to extend the retention period for a period of up to 2 years is necessary.

YES

The Chief Constable decides to make a summary application to the Sheriff.

THE APPLICATION
The Sheriff Court can be the sheriffdom where:
the individual resides;
the individual is believed to be the individual is believed to be intending to come.
The normal Summary Application Rules apply.
Civil Legal Aid may be available for the individual to receive advice and representation under the normal Civil Legal Aid terms and at the discretion of the Legal Aid Board.

Once the section 18A application is lodged a hearing date is set for approximately 4 to 6 weeks' time and notice of the application is intimated on the individual.

Sheriff's Determination

If the Chief Constable decides not to make a s18A application, SPSSA will automatically destroy the sample and profile no later than the original 3 year destruction date.

Refuse the application to extend the retention period

No appeal. The Chief Constable notifies SPSSA that the sample is to be destroyed as soon as practicable.

Appeal by Chief Constable

Appeal refused; extension refused. The Chief Constable notifies SPSSA that the sample is to be destroyed as soon as practicable.

Appeal granted; retention granted. The Chief Constable notifies SPSSA of the new period of retention. SPSSA will update their system to alert them when the new destruction date is approaching when a summary application for a further two year period can be made.

Appeal by Individual

Appeal refused; retention granted. The Chief Constable notifies SPSSA of the new period of retention. SPSSA will update their system to alert them when the new destruction date is approaching when a summary application for a further two year period can be made.

Appeal granted; extension refused. The Chief Constable notifies SPSSA that the sample is to be destroyed as soon as practicable.

Appeal granted; extension refused. The Chief Constable notifies SPSSA that the sample is to be destroyed as soon as practicable.
TIMELINE FOR SECTION 18A SUMMARY APPLICATION & APPEALS PROCESS

No Summary Application

- 3 YEARS
- 2 years 9 months
- 3 MONTHS
- DATA MUST BE DESTROYED

Summary Application: Further Retention Approved

- 3 YEARS
- 2 years 9 months
- 3 MONTHS
- Summary Application made within final 3 months: FURTHER RETENTION APPROVED
- FURTHER 2 YEARS
- 1 years 9 months
- 3 MONTHS
- DECISION TO REPEAT SUMMARY APPLICATION PROCESS

Summary Application: Further Retention Denied

- 3 YEARS
- 2 years 9 months
- 3 MONTHS
- Summary Application made within final 3 months: FURTHER RETENTION DENIED
- DATA MUST BE DESTROYED

Summary Application Appealed & Further Retention Denied

- 3 YEARS
- 2 years 9 months
- 3 MONTHS
- Summary Application made within final 3 months: APPLICATION APPEALED
- 21 DAYS
- APPEAL WITHIN 21 DAYS OF DETERMINATION
- FURTHER RETENTION DENIED
- DATA MUST BE DESTROYED

Summary Application Appealed & Further Retention Approved

- 3 YEARS
- 2 years 9 months
- 3 MONTHS
- Summary Application made within final 3 months: APPLICATION APPEALED
- 21 DAYS
- APPEAL WITHIN 21 DAYS OF DETERMINATION
- FURTHER RETENTION APPROVED

ORIGINAL DESTRUCTION DATE

DATA MUST BE DESTROYED

BACK TO INDEX
Section 78 of the Criminal Justice and Licensing (Scotland) Act 2010
Retention of samples etc. where relevant offer is accepted

Inserts sections 18B and 18C into the Criminal Procedure (Scotland) Act 1995

Commencement: 28 March 2011

Summary

Section 78 of the Criminal Justice and Licensing (Scotland) Act 2010 (“the 2010 Act”) inserts section 18B into the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) and provides that DNA, fingerprints and other forensic data taken from or provided by individuals can be retained if a relevant offer is issued and is accepted. This applies if the individual is under arrest or detained in connection with an offence or offences in relation to a relevant offence under sections 302 to 303ZA of the 1995 Act. A definition of a “relevant offer” is provided at section 18B(3). An acceptance of a “relevant offer” is not a conviction but is classed as an alternative to prosecution for an offence.

Section 78 also inserts section 18C into the 1995 Act which provides for the extension of the retention period where a relevant offer was issued and accepted in relation to a relevant sexual or relevant violent offence. The police can apply to a sheriff to have the retention period extended for a further period of up to two years, on a rolling basis. The decision of a sheriff can be appealed to the sheriff principal by either party. The sheriff principal’s decision on the application will be final. The list of relevant sexual and relevant violent offences is set out in section 19A(6) of the 1995 Act.


RELEVANT OFFERS

Relevant offers are not convictions; they are alternatives to prosecution for an offence. This means that if an individual were to refuse to accept a relevant offer their forensic data can be retained in accordance with section 18(3) of the 1995 Act until the procurator fiscal decides whether or not to raise criminal proceedings against that person. If the fiscal decides not to raise criminal proceedings and does not issue a further relevant offer, the person’s forensic data must then be destroyed as soon as possible.

If the procurator fiscal decides to raise criminal proceedings following the refusal to accept a relevant offer, the person’s forensic data can be retained under section 18(3) of the 1995 Act, if they are subsequently prosecuted and convicted of the offence in court.
Frequently Asked Questions

When does section 18B apply?

Section 18B of the 1995 Act applies where an individual has had their DNA, fingerprints and other forensic data taken when under arrest or detained in connection with an offence or offences, in relation to which a relevant offer under sections 302 to 303ZA of the 1995 Act can be issued. Such forensic data can be retained if such an individual is issued with and accepts a relevant offer as an alternative to prosecution for the offence.

When does section 18C apply?

Section 18C applies where an individual has been issued with a relevant offer as an alternative to prosecution for an offence, and one or more of the offences are a relevant sexual or violent offence.

How are relevant sexual or relevant violent offences defined?

The list of relevant sexual and relevant violent offences is set out in section 19A(6) of the 1995 Act.

To what data does section 18B and 18C refer?

DNA, fingerprint and other relevant physical data such as palm prints. The term “relevant physical data” is defined in section 18(7A) of the 1995 Act.

RETENTION OF DATA

How long can forensic data are retained under Section 18B & 18C?

Where the relevant offer does not relate to offences which are relevant sexual or relevant violent offences, the destruction date for the retained forensic data is two years from the date on which the disposal was issued. That period cannot be extended.

Where the relevant offer relates to a relevant sexual and/or relevant violent offence, or to a mixture of offences including relevant sexual and/or violent offences, DNA samples, fingerprints and other forensic data such as palm prints can be retained by the police for up to three years. The relevant Chief Constable can within three months before the destruction date, apply to a sheriff for these samples to be kept for up to two more years and this process can be repeated before the end of each extended period. The decision of a sheriff can be appealed to the sheriff principal by both parties. The sheriff principal’s decision on the application will be final.

Who is responsible for ensuring that the data is stored, retained and destroyed?

This is a matter for the Scottish Police Services Authority (SPSA) which maintains the Scottish forensic database.
EXTENSION OF RETENTION PERIOD

What happens at the end of the 3 year retention period?

Two years and 8 months after the data has first been retained, the respective database raises an alert that the 3 year destruction date is approaching. The SPSA then contact the police force where the original offence originated, notifying them that the 3 year destruction date is approaching.

What is the role of the police?

The Chief Constable considers whether it is necessary to extend the retention period for a period of up to 2 years. This will depend on the perceived risk to the public posed by the individual from whom forensic data is retained was taken.

A summary application for extension of the retention period must be lodged by the Chief Constable at a Sheriff Court within 3 months of the destruction date. Normal summary application rules apply. The application must be made to the Sheriff Court in the sheriffdom where the individual whose data is retained resides, where the Chief Constable believes him/her to be, or where the Chief Constable believes he or she is intending to come. The forensic data is retained pending the outcome of the summary application.

If the Chief Constable decides not to apply for an extension, the forensic data (both samples and profiles) will be destroyed no later than the date of destruction. This might be the original 3 year destruction date or an extended destruction date set by a sheriff or sheriff principal.

What happens with the application?

Once the section 18C application is lodged, a hearing date is set for approximately 4 to 6 weeks ahead. Notice of the application is given by the Chief Constable to the individual whose data is being considered for further retention.

What options are open to the sheriff?

The sheriff can grant or refuse the application to extend the retention period. If the data is to be retained, a new destruction date will be set, not more than two years from the previous destruction date.

Is Legal Aid available?

An application for Civil Legal Aid can be made in the normal way by the individual whose data is being considered for further retention to receive advice and representation.
APPLICATION FOR EXTENSION IS GRANTED

What happens if the application is granted?

The individual whose data is to be retained may appeal to the sheriff principal within 21 days of the decision of the sheriff in relation to the application. The sheriff principal’s decision on any such appeal is final. The forensic data is retained pending the outcome of the appeal.

What happens if the individual's appeal is successful?

The Chief Constable will notify the SPSA that the forensic data is to be destroyed as soon as possible.

What happens if the individual's appeal is refused?

The sheriff principal will inform the individual whose data is retained. The further retention period of up to two years granted by the sheriff will remain in force. The Chief Constable will inform the SPSA of the new destruction date. The respective database will be updated and an alert will be raised 4 months before the new destruction date at which point a further application for extension can be made by the Chief Constable if it is considered appropriate.

What happens if there is no appeal?

The Chief Constable will inform the SPSA of the new destruction date. The respective database will be updated and an alert will be raised 4 months before the new destruction date, at which point a further application for extension may be made by the Chief Constable if it is considered appropriate.

APPLICATION FOR EXTENSION IS NOT GRANTED

What happens if the application is not granted?

The Chief Constable may appeal to the sheriff principal within 21 days of the decision. The sheriff principal’s decision on any such appeal is final. The forensic data is retained pending the outcome of the appeal.

What happens if the appeal is successful?

The Chief Constable will inform the individual whose data is retained. If the appeal is allowed the Sheriff Principal will make an Order amending or further amending the destruction date. The Chief Constable will inform the SPSA of the new destruction date. The respective database will be updated and an alert will be raised 4 months before the new destruction date, at which point a further application for extension may be made by the Chief Constable if that is considered appropriate.
What happens if the appeal is refused?

The Chief Constable will notify the SPSA that the forensic data is to be destroyed as soon as possible.

What happens if there is no appeal?

The Chief Constable will notify the SPSA that the forensic data is to be destroyed as soon as possible.

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FLOW CHARTS FOR SECTIONS 18B AND 18C
Under s18 of the Criminal Procedure (Scotland) Act 1995, an individual’s forensic data was taken under arrest or detention. The individual is issued with a relevant offer as an alternative to prosecution.

Individual accepts offer

- Offence or offences do not include a relevant sexual or violent offence
  - CHS Updated
  - Forensic data is retained for a maximum of two years from date of disposal
  - Forensic data is deleted from databases no later than two years after date of relevant offer

- Offence or offences include a relevant sexual or violent offence
  - CHS Updated
  - Forensic data is retained for a maximum of three years from date of disposal
  - Section 18C Guidance applies for possible further two years rolling retention

Individual refuses offer

- Fiscal issues further relevant offer
  - Prosecution unsuccessful
  - CHS Updated
  - Forensic data is retained under s18A for a maximum of three years from date of disposal

- Fiscal decides to prosecute
  - Prosecution successful
  - CHS Updated

- Fiscal decides not to prosecutions
  - Fiscal data is retained under s18(3) No prescribed destruction date

SPSA delete forensic data from databases
Forensic Data Retention - Flow Chart of Section 18C Application Guidance

Under s18 of the Criminal Procedure (Scotland) Act 1995, an individual's forensic data was taken under arrest or detention. The individual accepts a "relevant offer" for an offence which is a relevant violent or sexual offence and their forensic data is therefore retained on the relevant databases for 3 years.

After 2 years and 8 months SPSA raises an alert that the 3 year destruction date is approaching. SPSA then contacts the police force where the original charge stemmed from notifying them that the 3 year destruction date is approaching in 4 months.

The Chief Constable considers whether making a section 18C application to extend the retention period for a period of up to 2 years is necessary.

YES

The Chief Constable decides to make a summary application to the Sheriff

The Application

The Sheriff Court can be the sheriffdom where the individual resides, or the individual is believed to be residing or to have resided. The normal Summary Application Rules apply. Civil Legal Aid may be available for the individual to receive advice and representation under the normal Civil Legal Aid terms and at the discretion of the Legal Aid Board.

The Application Deadline - Section 18C summary application must be lodged by the Chief Constable at the Sheriff Court within 3 months of the original destruction date.

Refuse the application to extend the retention period

No appeal - The Chief Constable notifies SPSA that the sample is to be destroyed as soon as practicable.

Appeal by Chief Constable

Appeal refused - extension refused. The Chief Constable notifies SPSA that the sample is to be destroyed as soon as practicable.

Appeal granted - retention granted. The Chief Constable notifies SPSA of the new period of retention. SPSA will update their system to alert them when the new destruction date is approaching when a summary application for a further two year extension can be made.

APPEAL BY CHIEF CONSTABLE

Grant the application to extend retention

Sheriff's Determination

If the Chief Constable decides not to make a section 18C application, SPSA will automatically destroy the sample and profile on the original 3 year destruction date, and inform the individual by letter.

No appeal - retention granted. The Chief Constable notifies SPSA of the new period of retention. SPSA will update their system to alert them when the new destruction date is approaching when a summary application for a further two year extension can be made.

APPEAL BY INDIVIDUAL

Appeal refused - retention granted. The Chief Constable notifies SPSA of the new period of retention. SPSA will update their system to alert them when the new destruction date is approaching when a summary application for a further two year extension can be made.

Appeal granted - retention granted. The Chief Constable notifies SPSA of the new period of retention. SPSA will update their system to alert them when the new destruction date is approaching when a summary application for a further two year extension can be made.

Appeal granted - extension refused. The Chief Constable notifies SPSA that the sample is to be destroyed as soon as practicable.

APPEAL BY INDIVIDUAL

No appeal - retention granted. The Chief Constable notifies SPSA of the new period of retention. SPSA will update their system to alert them when the new destruction date is approaching when a summary application for a further two year extension can be made.

Appeal refused - retention granted. The Chief Constable notifies SPSA of the new period of retention. SPSA will update their system to alert them when the new destruction date is approaching when a summary application for a further two year extension can be made.

Appeal granted - extension refused. The Chief Constable notifies SPSA that the sample is to be destroyed as soon as practicable.

APPEAL BY INDIVIDUAL
ANNEX C

Section 79 of the Criminal Justice and Licensing (Scotland) Act 2010
Retention of samples etc. taken or provided in connection with certain fixed penalty offences

Inserts section 18D into the Criminal Procedure (Scotland) Act 1995

Commencement: 28 March 2011

Summary

Section 79 of the Criminal Justice and Licensing (Scotland) Act 2010 (“the 2010 Act”) inserts section 18D into the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) and provides that DNA, fingerprints and other forensic data taken from or provided by individuals who have been arrested and detained for a fixed penalty offence do not have to be destroyed if that person is issued with and subsequently accepts a fixed penalty notice issued under section 129 of the Antisocial Behaviour (Scotland) Act 2004 (“the 2004 Act”) or pays the sum which becomes due under section 131 of the 2004 Act. The period of retention for data in such cases is set at two years and this cannot be extended.


FIXED PENALTY NOTICES

Fixed penalty notices are not convictions; they are alternatives to prosecution for an offence.

When a fixed penalty notice is issued and accepted by the offender, their forensic data can be retained for up to two years. This retention period cannot be extended.

If an individual refuses to accept a fixed penalty notice, their forensic data can be retained in accordance with section 18(3) of the 1995 Act until the procurator fiscal decides whether or not to raise criminal proceedings against that person. If the fiscal decides not to raise criminal proceedings and does not issue a fiscal alternative to prosecution under section 302 to 303ZA of the 1995 Act, the person’s forensic data must then be destroyed as soon as possible.

If the procurator fiscal decides to raise criminal proceedings following the refusal to accept a fixed penalty notice under the 2004 Act, and if the individual is subsequently prosecuted and convicted of the offence in court, that person’s forensic data can be retained under section 18(3) of the 1995 Act.
Frequently Asked Questions

When does section 18D apply?

Section 18D of the 1995 Act applies where an individual is issued with a fixed penalty notice under the 2004 Act. Forensic data can only be retained under this section when an individual has been arrested or detained and had their DNA, fingerprints or other relevant physical data taken under section 18 of the 1995 Act before that individual was issued a fixed penalty notice.

How is a fixed penalty notice defined?

Fixed penalty notices are defined by sections 128(1) and 129(2) of the 2004 Act.

What if there is more than one fixed penalty notice?

If there is more than one fixed penalty notice issued in connection with other fixed penalty offences arising out of the same incident then the forensic data must be destroyed no later than two years from the date of the later notice.

To what data does section 18D refer?

DNA, fingerprint and other relevant physical data such as palm prints. A definition of "relevant physical data" is provided in section 18(7A) of the 1995 Act.

RETENTION OF DATA

How long can forensic data be retained under Section 18D?

The retention period is up to two years. The retention period cannot be extended.

Who is responsible for ensuring that the data is stored, retained and destroyed?

This is a matter for the Scottish Police Services Authority (SPSA) which maintains the Scottish forensic database.

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SECTION 18D FLOWCHART
Under s18 of the Criminal Procedure (Scotland) Act 1995, an individual’s forensic data was taken under arrest or detention. The individual is issued with a fixed penalty notice as an alternative to prosecution.

- Individual accepts FPN
  - CHS Updated
  - Forensic data is retained for a maximum of two years from date of fixed penalty notice
    - Forensic data is deleted from databases no later than two years after date of fixed penalty notice being issued
  - CHS Updated
  - Prosecution unsuccessful
    - CHS Updated
    - SPSA delete forensic data from databases
  - Prosecution successful
    - CHS Updated
    - Forensic data retained under s 18(3) of 1995 Act. No specified Destruction Date

- Individual refuses FPN
  - Fiscal issues fiscal offer
    - Fiscal decides to prosecute
      - CHS Updated
    - Fiscal decides not to prosecute
      - Forensic data is retained under Section 18(3) of the 1995 Act
  - CHS Updated
  - SPSA delete forensic data from databases
Section 80 of the Criminal Justice and Licensing (Scotland) Act 2010
Retention of samples etc. from children referred to children’s hearings

Inserts sections 18E and 18F into the Criminal Procedure (Scotland) Act 1995

Commencement: 15 April 2011

Summary

Section 80 of the Criminal Justice and Licensing (Scotland) Act 2010 (“the 2010 Act”) inserts sections 18E and 18F into the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”). Section 18E provides that any relevant physical data and samples which are taken from or provided by a child under section 18(2), (6) or (6A) of the 1995 Act do not have to be destroyed for at least 3 years if that child has been referred to a children’s hearing on grounds of having committed a relevant sexual or violent offence and the child (and relevant adult) accept that ground of referral or the matter is referred to a sheriff who deems or finds that the ground of referral has been established.

For the purposes of section 18E of the 1995 Act, the relevant sexual or violent offences are set out in the statutory instrument The Retention of Samples etc. (Children’s Hearings) (Scotland) Order 2011.

Section 80 also inserts section 18F into the 1995 Act and provides that the relevant Chief Constable can, within three months before the destruction date, apply to a sheriff for samples retained under section 18E to be kept for up to two more years and this process can be repeated before the end of each extended period. The decision of a sheriff can be appealed to the sheriff principal by either party. The sheriff principal’s decision on the application will be final.


Due to the unique nature of Scotland’s Children’s Hearings system, general guidance for these provisions has not been provided here. Both the Association of Chief Officers in Scotland (ACPOS) and the Scottish Children’s Reporter Administration (SCRA) have produced operational guidance which may be accessed via their respective websites.

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Section 81 of the Criminal Justice and Licensing (Scotland) Act 2010

Extends section 19A of the Criminal Procedure (Scotland) Act 1995

Commencement: 28 March 2011

Summary


The term “shameless indecency” is replaced with the offence of “public indecency” in the list of relevant sexual offences. The offence of public indecency is only a “relevant sexual offence” if a court makes a finding under paragraph 60 of Schedule 3 to the Sexual Offences Act 2003 that there was a significant sexual aspect to the behaviour.

Section 81 also adds offences from sections 47(1), 49(1), 49A(1) and (2) and 49C(1) of the Criminal Law (Consolidation) (Scotland) Act 1995 to section 19A(6) of the 1995 Act. Such offences involve the carrying of an offensive weapon or articles with a point or blade in a public place.


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Section 82 of the Criminal Justice and Licensing (Scotland) Act 2010
Use of samples etc.

Inserts 19C into the Criminal Procedure (Scotland) Act 1995
Amends section 56 of the Criminal Justice (Scotland) Act 2003

Commencement: 1 August 2011

Summary

Section 82 of the Criminal Justice and Licensing (Scotland) Act 2010 (“the 2010 Act”) inserts section 19C into the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) which provides for greater clarity in relation to police powers, without interfering with any existing powers. Section 19C of the 1995 Act supersedes section 20 of the 1995 Act which is repealed in schedule 7 of the Criminal Justice and Licensing (Scotland) Act 2010.

Section 19C(1) sets out the categories of forensic data to which section 19C applies and 19C(2) clarifies the purposes for which that data may be used, which is for the prevention or detection of crime, the investigation of an offence, the conduct of a prosecution or the identification of a deceased person or a person from whom the information came. These purposes apply whether the crime or incident occurs or is being investigated in Scotland, elsewhere in the UK or abroad, enabling the police to assist with investigations and prosecutions wherever they take place.

New provisions 19C(3) to (5) of the 1995 Act provides that any forensic data which is provided to a police force in Scotland, the SPSA or a person acting on behalf of such a force or the SPSA can be used for the purposes set out in section 19C(2) but also that this information can be checked against other relevant physical data, samples or information derived from samples which are held by a police force or the SPSA. Forensic data provided by other jurisdictions can also be checked against Scottish data held on the relevant databases.

Section 82(2) amends section 56 of the Criminal Justice (Scotland) Act 2003 (“the 2003 Act”) which concerns the retention of samples or relevant physical data when given voluntarily. Section 56 applies to DNA samples and information derived from samples and relevant physical data. Section 82(2) removes references to “information derived from relevant physical data” found in section 56 of the 2003 Act.

Section 82(2)(b) provides that any forensic data taken from or provided by individuals under section 56 of the 2003 Act can be held or used for the prevention or detection of crime, the investigation of an offence or conduct of a prosecution or the identification of a person or a deceased person. This includes cross-border crime.

Frequently Asked Questions

Which powers did police use prior to the introduction of section 19C?

Police have previously used a mixture of common law and statutory powers for the use of fingerprints and DNA in criminal investigations and prosecutions. The new powers under section 19C of the Criminal Procedure (Scotland) Act 1995 do not prejudice or affect any existing common law or statutory powers.

What is the intention of the new powers?

The intention of the new powers is to provide clarity on the purpose for which samples and records of forensic data can be used. These purposes are:

(a) the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution

(b) the identification of a deceased person or a person from whom the information came.

Who do the new powers apply to?

Section 19C applies to any person in Scotland who can hold the forensic data set out in section 19C(1). Section 19C(5) makes it clear that only the following may use the forensic data listed in section 19C(1) to check this against other prints and samples which they hold.

- Police Forces
- Scottish Police Services Authority (SPSA)
- A person acting on behalf of a Police Force or the SPSA

When do the new powers take effect?

The new section 19C of the 1995 Act will take effect from 1 August 2011.

Section 19C

Section 20 of the 1995 Act (the use of prints, samples etc) has been repealed, and is superseded by section 19C.

Section 18(7A) has been amended for the purpose of section 19C of the 1995 Act. This is to make it clear that when forensic data is obtained from outside Scotland a record of a person’s skin on an external body part constitutes “relevant physical data”. The modified definition is made because Law enforcement agencies outside Scotland could not take a record of a person’s skin on an external body part by a device approved by Scottish Ministers.

Section 19C allows DNA and physical data mentioned in section 19C(1) to be used as a tool to help prevent, detect, and investigate crime, including cross-border crime, and to prosecute crime in court. It also allows this information to be used to establish
the identity of a deceased person as there may be a need to identify a person where no criminal activity is suspected, for example following a natural disaster. These purposes apply whether or not the crime or incident occurs or is being investigated in Scotland, elsewhere in the UK or abroad, enabling the police to assist with investigations and prosecutions wherever they take place.

Section 19C(1)(e) makes it clear that data or samples taken from or provided by a person outwith Scotland can be used for the purposes set out in section 19C(2).

Sections 19C(4) and (5) provide that any forensic data which is provided under section 1(a) to (d) to a police force in Scotland, the SPSA or a person acting on behalf of either, can be used for the purposes set out above, and also that this information can be checked against other relevant physical data, samples or information derived from samples which are held by a police force or the SPSA. Forensic data provided by other jurisdictions can also be checked by a police force, the SPSA or a person acting on behalf of a police force against Scottish data held on the relevant databases.

**Section 56 – Voluntary Samples or Physical Data**

Section 56 of the 2003 Act is amended and is concerned with the retention of samples or relevant physical data when given voluntarily. This section applies to DNA samples, information derived from samples and relevant physical data.

Forensic data taken from people under section 56 of the 2003 Act can be held and used for the prevention or detection of crime, the investigation of an offence or conduct of a prosecution or the identification of a person or a deceased person. This includes cross-border crime.
External Contacts

Questions about the operation of the guidance in practice should be directed to the relevant organisation:

**Association of Chief Police Officers Scotland (ACPOS)**
General Secretary
ACPOS Secretariat
26 Holland St
Glasgow G2 4NH
Tel: 0141 435 1230
secretariat@acpos.pnn.police.uk

**Scottish Police Services Authority (SPSA)**
Elphinstone House
65 West Regent Street
Glasgow G2 2AF
Tel: 0141 585 8300

**Scottish Court Service (SCS)**
Chief Executive’s Office
Scottish Court Service
1a Parliament Square
Edinburgh EH1 1RF
Tel: 0131 444 3352
enquiries@scotcourts.gov.uk

**Crown Office and Procurator Fiscal Service (COPFS)**
25 Chambers Street
Edinburgh
EH1 1LA
Tel: 0131 226 2626
ps_copfs@scotland.gsi.gov.uk

**Scottish Children’s Reporter Administration (SCRA)**
Ochil House
Springkerse Business Park
Stirling
FK7 7XE
Tel: 0300 200 1555
communications@scra.gsi.gov.uk