INTRODUCTION
The Criminal Procedure (Scotland) Act 1995 allows the Scottish Police Service to collect samples (mouth swabs) for DNA profiling from persons arrested or detained under Section 14 of the legislation. A suspect’s DNA Profile may be loaded onto the Scottish DNA Database and searched against unsolved scene of crime DNA profiles. The sample and profile may be retained for as long as the case for which it was taken remains active and, should a conviction be obtained, it may be retained indefinitely. Should the decision be made not to proceed with the case, the suspect offered a non-court disposal, or the suspect cleared of the charge in court, then profiles must be removed from the database and samples destroyed.

ACPOS MOUTH SWABBING CRITERIA
Although the legislation allows police officers to obtain samples from those arrested or detained for any offence, Police officers in Scotland currently obtain mouth swabs routinely from suspects arrested or detained for sexual offences, violence and theft. Police officers are also instructed to obtain mouth swabs at their discretion during the investigation of minor offences: for instance, where police officers believe that such sampling will potentially yield further intelligence. This ‘intuitive swabbing’ has resulted in numerous crimes including some very serious cases being detected. Before collecting samples at the time of arrest, police officers check the Scottish Criminal Records Office (SCRO) database to ascertain if a suspect has been previously sampled and what further action is necessary: a DNAT marker shown on the database signifies a sample has previously been taken but remains un-convicted, officers should therefore continue to swab; a DNAC marker signifies a profile is held for a convicted individual and there is no necessity to collect a further sample. If there is no DNA record on the SCRO then officers will obtain mouth swabs where necessary.

CURRENT SITUATION FOR RETENTION AND DESTRUCTION
Each month the Scottish DNA Database receives between 3,500 and 4,000 mouth swabs submitted by the eight Scottish Police Forces. Profiles developed from these are loaded onto the database for searching against unsolved crime scene DNA profiles. The profiles are also exported for inclusion on the National DNA Database at Birmingham. Each exported profile incurs a ‘Custodian Fee’ of £2.53. During the past year 47,805 profiles were exported to the National DNA Database (an average of 3,984 profiles per month) amounting to a cost of £120,946.65. In cases where a suspect is convicted a profile is retained on the Scottish DNA Database and the National DNA Database. In cases which are not proceeded with, or where persons are subject to non-court disposals, profiles and
samples are removed and destroyed. This amounts to an average of 2,000 profiles per month being removed.

On 1st May 2004, there were 150,650 personal profiles on the Scottish DNA Database. On 31st May, 2005 there were 174,348 personal profiles on the Scottish DNA Database. During this period 47,805 profiles were produced and loaded onto the database. The actual size of the database shows an increase of 23,695. The remaining 24,107 profiles were therefore removed and destroyed under the present legislative provision.

These figures indicate approximately 50% of the total number of developed profiles are removed and destroyed following a limited period of inclusion on the Scottish DNA Database. Custodian Fees to the National DNA Database for these profiles amounted to approximately £60,990. It is also clear a large portion of database production costs are used to develop profiles which later require removal: figures for these costs have not been researched but it is not unreasonable to calculate spending at between £400,000 and £450,000.

To continue conducting exportation with the National DNA Database under the current inclusion regime in force in Scotland will result in continued levels of spending on non-retained profiles.

CURRENT OPERATIONAL SITUATION
There are two accredited DNA crime scene profiling laboratories, based in Glasgow and Dundee, which presently supply scene of crime profiles to the Scottish DNA Database. Police Forensic Laboratories in Edinburgh and Aberdeen are likely to be accredited to provide the same services towards the end of 2005.

In the period 1 May 2004 – 31 May 2005 the Glasgow and Dundee laboratories submitted 4462 scene of crime profiles to the Scottish DNA Database. When loaded onto the Database these profiles immediately matched 3003 individuals, representing a 67% first time match rate. Such a match rate compares very favourably with the National DNA Database national average of 45% (source: Chairman’s Foreword National Database Annual Report 03/04).

The match rates recorded by the Scottish DNA Database indicates the current ACPOS swabbing regime successfully supports the database in delivering effective and efficient results.

RETENTION OF NON-COURT DISPOSAL CASES
The consultation document issued by the Executive identifies the difference between those cases concluding with a suspect obtaining a 'Non Court Disposal' such as a Conditional Offer, Procurator Fiscal Fine etc. and those who are not convicted. Under the current legislative provisions those persons arrested or detained for crime who accept a Non Court Disposal and therefore, have accepted their guilt, are not subject to retention on the Scottish DNA Database. Additionally, in the case of juvenile offenders the current
legislation does not permit the retention of DNA profiles following the disposal of a case at a Juvenile Panel.

It is arguable that the retention of profiles from those suspects who are subsequently disposed of in this manner would be in the public interest.

RETENTION OF CERTAIN UNCONVICTED PROFILES
It is arguable in certain instances the retention of profiles obtained from some suspects who subsequently are not convicted would be in the public interest. Such retention, informed by assessment of the gravity of the crime in question and the possibility for deriving future intelligence from the retention of a profile, could contribute to public safety and security. This policy of selective retention could be employed in cases which do not result in conviction where, for example, a witness statement could not be corroborated, supporting evidence was not found, or a lapse of time in investigation made it difficult to proceed. Only a small number of cases would fall into this category and retention of profiles could be determined on a case-by-case basis following a detailed risk assessment. Such a process of assessment could include a judicial application by the relevant Police Force to the court. Judicial approval for case-by-case retention would strengthen public confidence by providing external oversight of the process.

It is arguable that the selective retention of profiles from those not convicted of certain offences and under certain circumstances would be in the public interest.

RETENTION OF ALL UNCONVICTED PROFILES
The consultation document published by the Executive outlines a clear argument for the general retention of all profiles taken by the police regardless of the subsequent outcome of an investigation. It cites figures provided by the National DNA Database which argue that such general retention has resulted in the detection of offenders who, under current Scottish legislation, would not have been present on the database: specifically, 7591 individuals (from a pool of 198,000 profiles taken from those not subsequently convicted) who have been matched to crime scene profiles on the National DNA Database. The remaining 190,409 profiles of those not convicted have not recorded matches. These figures show that less than 4% of profiles retained from the un-convicted on the National DNA Database have produced matches. It is important to recognize that there is no data available to show what percentage of those 4% of DNA matches were the definitive resource for detecting crime, many cases, may have been solved by other methods of detection. In addition, it is impossible to quantify the percentage of these 7591 individuals who would have been arrested during the course of other criminal conduct subsequent to the arrest from which their initial retained profile was obtained and therefore as a result, would have matched the outstanding crime scene profiles on the database.

It is arguable that the general retention of profiles from the un-convicted has not been shown to significantly enhance criminal intelligence or detection.

CONCLUSIONS
Whilst there is a strong financial case for the general retention of profiles taken from all suspects there is also clear evidence that the majority of profiles retained from those not convicted deliver no significant benefit to crime investigation. Fiscal considerations must be balanced in relation to the needs of public safety and security. Any policy of retention must also be formulated in relation to the protection of civil liberties.

The legislation in force in England & Wales has attracted wide spread criticism from various individuals and organizations. A recent report by the House of Commons Science and Technology Committee, Forensic Science on Trial, asserted that: 'The arguments for retention need to be balanced against any potential infringement of civil liberties arising from the policy'.

It must be acknowledged the existing legislation in Scotland which affords the Police powers to collect and use DNA, requires some examination. However, it must also be recognized that the current legislation, and the operational activities which it underpins, is a very effective means of assisting crime investigation and, importantly, enjoys considerable public support. It is important the Police maintain the support and consent of the public in order to effectively undertake their duty to investigate crime. Any proposed legislation to introduce blanket retention will serve to diminish this support.

Blanket retention of profiles in Scotland would be highly problematic for a number of reasons. To retain profiles taken during Section 14 detentions which do not result in any charge, is at variance with all principals of Scottish Law. It is highly likely the introduction of legislation in Scotland which permits the retention of all DNA profiles will attract the same level of criticism as in England & Wales. For this reason, it may be prudent to attempt to achieve some 'middle-ground'. This may be realized, for example, by examining the situation in relation to cases resulting in non-court disposals. Furthermore, the Executive could also consider legislating for selective retention in cases which do not result in prosecution providing an individual has been formally arrested and charged with a particular offence (sexual or violent crimes, or crimes involving significant dishonesty), the case has been submitted for the consideration of prosecution, and other corroborative evidence exists. Under such circumstances, where a clear policy existed, it could be argued that such retention was in the public interest.

It is of vital importance any proposed legislation should be formulated in a manner welcomed by both the Police and the public as a framework through which public safety can be enhanced and civil liberties protected. Precedence has been set for Scottish law to adopt or mirror effective parts of DNA legislation enacted in other parts of the UK whilst not adopting every aspect. An example of this is the distinctive Scottish position on the collection and retention of voluntary profiles.

It is suggested the Executive has an opportunity to strengthen the effective use of DNA profiling in Scotland without adopting the controversial policy of blanket retention which currently exists in England & Wales.