The Committee will meet at 2.00 pm in Committee Room 5.

1. Item in private: The Committee will consider whether to take item 5 in private.

2. Police, Public Order and Criminal Justice (Scotland) Bill: The Committee will take evidence on proposed Scottish Executive amendments to this Bill in relation to regulating orders from—

   Hugh Henry MSP, Deputy Minister for Justice, Eamon Murphy and Gill Wylie, Environment and Rural Affairs Department, and Alastair Smith, Legal and Parliamentary Services, Scottish Executive

3. Police, Public Order and Criminal Justice (Scotland) Bill: The Committee will consider the Bill at Stage 2 (Day 3).

4. Subordinate legislation: Hugh Henry MSP (Deputy Minister for Justice) to move the following motion—

   S2M-4003 That the Justice 2 Committee recommends that the draft Risk Assessment and Minimisation (Accreditation Scheme) (Scotland) Order 2006 be approved.

5. Legislative Consent Memorandum on the Police and Justice Bill: The Committee will consider a draft report on memorandum LCM (S2) 4.1 on the Police and Justice Bill, currently under consideration in the UK Parliament.

Tracey Hawe/Gillian Baxendine
Clerks to the Committee
Papers for the meeting—

**Agenda Item 2**

Text of draft Scottish Executive amendment on regulating orders  
J2/S2/06/7/1

Analysis of consultation responses on regulating orders (final version)  
J2/S2/06/7/2

SPICe briefing on regulating orders  
J2/S2/06/7/3

**Agenda Item 3**

3rd Marshalled List of Amendments for Stage 2 (Day 3) – to follow

Members are reminded to bring with them copies of the Bill, Explanatory Notes and Policy Memorandum, available from Document Supply or from the Parliament's website [http://www.scottish.parliament.uk/business/bills/46-policePublic/index.htm](http://www.scottish.parliament.uk/business/bills/46-policePublic/index.htm) together with any papers from the Stage 1 process that are considered relevant (such as the Committee’s Stage 1 Report).

**Agenda Item 4**

Note by Clerk (including SSI and Explanatory Notes)  
J2/S2/06/7/4

**Agenda Item 5**

Draft report (PRIVATE PAPER)  
J2/S2/06/7/5

Letter from Scottish Executive  
J2/S2/06/7/6

Members are reminded to bring with them previously circulated copies of the Legislative Consent Memorandum, the Bill and Explanatory Notes.

**Documents circulated for information only—**

SPICe briefing on Police Retention of Prints and Samples

**Forthcoming meetings—**

- Tuesday 21 March 2006, 2pm, Committee Room 2
- Tuesday 28 March 2006, 2pm, Committee Room 6
SCOTTISH PARLIAMENT BILL AMENDMENT

ID Number:   <ID Number>
Name of Proposer:   Hugh Henry
Name of Supporters:  <Supporter Names>

After section 88, insert—

<Enforcement of Sea Fisheries (Shellfish) Act 1967

Enforcement of Sea Fisheries (Shellfish) Act 1967

(1) After section 4 of the Sea Fisheries (Shellfish) Act 1967 (c.83) there is inserted—

“4A Powers of sea-fishery officers in relation to fishing boats to enforce regulated fishery

(1) For the purpose of enforcing restrictions imposed by, or regulations made by, an order under section 1 of this Act conferring a right of regulating a fishery, a British sea-fishery officer may exercise the powers conferred by subsections (2) to (6) of this section in relation to—

(a) a Scottish fishing boat wherever it may be;
(b) any other fishing boat in the Scottish zone.

(2) The officer may go on board the boat, with or without persons assigned to assist in the duties of that officer, and may, for that purpose or for the purpose of disembarking from the boat, require the boat to stop, and anything else to be done which will facilitate the boarding of, or as the case may be, disembarking from, the boat.

(3) The officer may require the attendance of the master and any other person on board the boat and may make any examination and inquiry which appears to the officer to be necessary for the purpose of enforcing such restrictions or regulations.

(4) In particular under subsection (3) of this section the officer may—

(a) search the boat for shellfish or fishing gear;
(b) examine any shellfish on the boat and the equipment (including the fishing gear) of the boat, and require persons on board the boat to do any thing which appears to the officer to be necessary for facilitating the examination;
(c) require any person on the boat to produce any relevant document in the person’s custody or possession;
(d) for the purpose of ascertaining whether an offence under section 3(3) of this Act has been committed, search the boat for any relevant document and may require any person on board the boat to do anything which appears to the officer to be necessary for facilitating the search;
(e) inspect, take copies of and retain possession of, while any search, examination or inspection provided for under this subsection is being carried out, any relevant document produced to the officer or found on board;

(f) require the master or any person for the time being in charge of the boat to render any relevant document on a computer system into visible and legible form and to produce it in a form in which it may be taken away; and

(g) where the boat is one in relation to which the officer has reason to suspect that an offence under section 3(3) of this Act has been committed, seize and detain any relevant document produced to the officer or found on board, for the purpose of enabling the document to be used as evidence in proceedings for the offence.

(5) But subsection (4)(g) of this section does not permit any document required by law to be carried on a boat to be seized and detained except while the boat is detained in a port.

(6) In subsection (3) of this section, “relevant document” means a document relating to—

(a) the boat; or

(b) the catching, landing, transportation, transhipment, sale or disposal of shellfish.

(7) Where it appears to a British sea-fishery officer that an offence under section 3(3) has at any time been committed the officer—

(a) may take, or require the master of any boat in relation to which the offence took place to take, the boat and its crew to the port which appears to the officer to be the nearest convenient port; and

(b) may detain, or require the master to detain, the boat in the port.

(8) Where a British sea-fishery officer detains or requires the detention of a boat under subsection (7)(b) of this section, the officer must serve notice in writing on the master stating that the boat is or, as the case may be, is required to, be detained until the time mentioned in subsection (9) of this section.

(9) That time is when the master is served with a notice in writing signed by a British sea-fishery officer stating that the previous notice ceases to have effect.

4B Powers of sea-fishery officers on land to enforce regulated fishery

(1) For the purpose of enforcing restrictions imposed by, or regulations made by, an order under section 1 of this Act conferring a right of regulating a fishery, a British sea-fishery officer may exercise the powers conferred by subsections (2) to (11) of this section in relation to—

(a) any premises (other than a dwelling-house) used for—

(i) carrying on any business in connection with the operation of fishing boats;

(ii) an activity connected with or ancillary to the operation of fishing boats; or

(iii) the treatment, storage or sale of shellfish;
(b) any vehicle which the officer has reasonable cause to believe is being used—

(i) to dredge, fish for or take shellfish; or

(ii) to transport shellfish.

(2) The officer may enter and inspect, at any reasonable time, the premises or vehicle (and, in the case of a vehicle, for that purpose require the vehicle to stop or require the operator to take the vehicle to a particular place).

(3) The officer may, in exercising the power conferred by subsection (2) of this section, take with the officer such other persons as appear to the officer to be necessary and any equipment or materials.

(4) The officer may examine any shellfish on the premises or vehicle and require persons on the premises or vehicle to do anything which appears to the officer to be necessary for facilitating the examination.

(5) The officer may on the premises or vehicle carry out such other inspections and tests as may reasonably be necessary.

(6) The officer may require any person not to remove or cause to be removed any shellfish from the premises or vehicle for such a period as may be reasonably necessary for the purposes of establishing whether an offence under section 3(3) of this Act has at any time been committed.

(7) The officer may require any person on the premises or vehicle to produce any relevant document in the person’s custody or possession.

(8) The officer may, for the purpose of establishing whether an offence under section 3(3) of this Act has been committed, search the premises or vehicle for any relevant document, and may require any person on the premises or vehicle to do anything which appears to the officer to be necessary for facilitating the search.

(9) The officer may inspect and take copies of any relevant document produced or found on the premises or vehicle.

(10) The officer may require any person to render any relevant document on a computer system into a visible and legible form and to produce it in a form in which it may be taken away.

(11) If the officer has reasonable grounds to suspect that an offence under section 3(3) of this Act has been committed, the officer may seize and detain any relevant document produced or found on the premises or vehicle, for the purpose of enabling the document to be used as evidence in proceedings for the offence.

(12) A sheriff may, if satisfied by evidence on oath as to the matters mentioned in subsection (13) of this section, grant a warrant authorising a British sea-fishery officer to enter premises (if necessary using reasonable force), accompanied by such persons as appear to the officer to be necessary.

(13) Those matters are—
DRAFT AMENDMENT

(a) that there are reasonable grounds to believe that documents or other items which a British sea-fishery officer has power under this section to inspect are on the premises and that their inspection is likely to disclose evidence of the commission of an offence under section 3(3) of this Act; and

(b) that any of the following is the case—
   (i) admission to the premises has been or is likely to be refused and that notice of intention to apply for a warrant under subsection (12) of this section has been given to the occupier;
   (ii) an application for admission, or the giving of such notice, would defeat the object of entry;
   (iii) the premises are unoccupied or the occupier is temporarily absent and it might defeat the object of entry to await the return of the occupier.

(14) A warrant under subsection (12) of this section is valid for no more than one month.

(15) In this section—
   “premises” includes “land”; and
   “relevant document” means a document relating to the catching, landing, transportation, transhipment, sale or disposal of shellfish.

4C Powers of British sea-fishery officers to seize fish and fishing gear

(1) A British sea-fishery officer may seize—
   (a) in Scotland or in the Scottish zone; or
   (b) on a Scottish fishing boat wherever it may be,
   any shellfish and any net or other fishing gear to which subsection (2) of this section applies.

(2) This subsection applies to—
   (a) any shellfish in respect of which the officer has reasonable grounds to suspect that an offence under section 3(3) of this Act has been committed;
   (b) any net or other fishing gear which the officer has reasonable grounds to suspect has been used in the commission of such an offence.

(3) In this section—
   “Scotland” has the meaning given by the Scotland Act 1998 (c.46); and
   references to shellfish include any receptacle which contains shellfish.

4D Sections 4A to 4C: supplementary

(1) A British sea-fishery officer, or a person assisting such an officer by virtue of section 4A(2) or 4B(3) or (12), is not liable in any civil or criminal proceedings for anything done in the purported exercise of a power conferred by section 4A, 4B or 4C of this Act if the court is satisfied—
DRAFT AMENDMENT

(a) that the act was done in good faith;
(b) that there were reasonable grounds for doing it; and
(c) that it was done with reasonable skill and care.

(2) A person who—

(a) fails without reasonable excuse to comply with any requirement imposed on the person by a British sea-fishery officer under a power conferred by section 4A or 4B of this Act;
(b) without reasonable excuse prevents, or attempts to prevent, any other person from complying with such a requirement; or
(c) obstructs such an officer in the exercise of any of those powers or the powers conferred by section 4C of this Act,

shall be guilty of an offence.

(3) A person who commits an offence under subsection (2) of this section is liable—

(a) on summary conviction, to a fine not exceeding the statutory maximum;
(b) on conviction on indictment, to a fine.”.

(2) In section 22 of the Sea Fisheries (Shellfish) Act 1967 (c.83) (interpretation), after the definition of “sea fishing boat” there is inserted the following definition—

“Scottish fishing boat” means a fishing vessel registered in the register maintained under section 8 of the Merchant Shipping Act 1995 (c.21) whose entry in the register specifies a port in Scotland as the port to which the vessel is to be treated as belonging;”.

(3) In section 15 of the Sea Fisheries Act 1968 (c.77) (amendment of Sea Fisheries (Shellfish) Act 1967), after subsection (2) there is inserted—

“(2A) The reference in section 3(1) of the Sea Fisheries (Shellfish) Act 1967 to an order under section 1 of that Act conferring on the grantees a right of regulating a fishery which imposes restrictions on, or makes regulations respecting, the dredging, fishing for and taking of shellfish shall be construed as including a reference to an order under section 1 of that Act conferring on the grantees such a right which enables the grantees, with the consent of the appropriate Minister, to impose such restrictions or make such regulations; and the references in sections 3(1)(a), (2) and (3) of that Act to restrictions and regulations shall be construed as including a reference to restrictions so imposed and regulations so made.

(2B) The references in sections 4A(1) and 4B(1) of the Sea Fisheries (Shellfish) Act 1967 to restrictions imposed by, or regulations made by, an order under section 1 of that Act conferring a right of regulating a fishery, shall be construed as including a reference to restrictions imposed by, or regulations made by, the grantees by virtue of an order under section 1 of that Act which enables the grantees, with the consent of the appropriate Minister, to impose such restrictions or make such regulations.”.
FINAL REPORT TO THE JUSTICE 2 COMMITTEE

PROPOSED LEGISLATION GIVING POWERS TO ENFORCE REGULATING ORDERS: KEY FINDINGS OF RESPONSES TO A PUBLIC CONSULTATION

1. Background on Regulating Orders (ROs)

Regulating Orders (ROs) are a legislative tool to enable the establishment, improvement, maintenance and regulation of local shellfisheries through the introduction of a licensing scheme and other management measures.

Partnership agreement commitment number 346 states “we will legislate to permit enforcement of Regulating Orders within the range of activities of the Scottish Fisheries Protection Agency (SFPA)”.

ROs are made under the Sea Fisheries (Shellfish) Act 1967 (the 1967 Act) and are granted to a particular person or body (referred to as a “grantee”). They cover named species of shellfish within a specific area of inshore or tidal waters. ROs remain in force for a fixed period not normally exceeding 20 years. They enable the grantee of the RO, with the consent of Scottish Ministers, to impose restrictions and regulations in relation to the dredging, fishing for and taking of shellfish of specified kinds within the defined RO area. There should be clear linkage between stock assessment, the aims of the Order and the proposed regulatory measures. In effect, an RO grants management responsibility for a local shellfishery to the grantee and allows the grantee to issue licences, and/or impose the payment of tolls or royalties before fishermen may be granted access to the regulated fishery.

The only RO currently in force is the Shetland RO, granted in 1999. The Solway Firth Regulated Fishery (Scotland) Order 2006 was laid before Parliament on Friday 10 February and is due to come into force on 13 March. It is likely that the fishery would be opened by the grantee a few days later. The proposed Highland Regulating Order is about to be subject to an independent inquiry; a process provided for in the 1967 Act.

2. Background to the Consultation

It has become clear that there is a fundamental difficulty with Regulating Orders in that there are insufficient powers under existing statute for them to be effectively enforced. Currently, a management organisation set up by a grantee to run a RO has sole responsibility for enforcement but does not have express powers of enforcement conferred upon it to enable it to do so. The Scottish Fisheries Protection Agency (SFPA), which enforces all other relevant sea fisheries legislation in Scotland, has no powers to enforce any restrictions or regulations made under a RO.

The original aim was to include proposals for the enforcement of ROs in the Aquaculture and Fisheries Bill due later this year. However, in October 2005, the Minister for Justice agreed that provisions relating to the enforcement of ROs could be included in the Police, Public Order and Criminal Justice (Scotland) Bill during the stage 2 consideration of that Bill. This would enable any new powers to be on the statute book by the autumn of 2006, which is
significantly earlier than would be the case using Aquaculture and Fisheries Bill alternative. The new powers would allow any Solway Regulating Order to be more effectively enforced by the grantee and the SFPA with support from the Police as required. The powers will help to prevent illegal fishing by licence holders and conserve stocks. Crucially, they will also help to address health and safety concerns and help to prevent loss of life in the dangerous circumstances which the Solway cockle fishery presents. The new powers will also allow the more effective enforcement of the Shetland Regulating Order and of any subsequent ROs.

3. The Consultation Process

On 18 January 2006, The Scottish Executive Environment and Rural Affairs Department published a consultation document “Proposed Legislation Giving Powers to Enforce Regulating Orders”. The aim of the consultation was to obtain views on possible approaches to improving the enforcement of Regulating Orders. The consultation paper was sent to 150 individuals and organisations. A copy of the paper was sent to the Committee.

A period of four weeks was given for consultation with the date for responses being 15 February. This period was significantly shorter than the Executive’s standard 12 week duration for consultation exercises. The decision on a shorter period was taken on the basis of exceptional circumstances which were and are being faced, in particular on the Solway where life is being endangered, and which the new powers will seek to address. The short duration has understandably elicited some criticism from some parts of the fishing industry. In response to this we agreed that responses would be accepted and considered up to 2 weeks beyond the original deadline meaning that consultees who require more time had until 1 March to submit their responses.

The consultation document set out the background to the consultation, highlighted the key topics for consideration and posed a number of questions to which responses were invited. The questions focussed on who should be empowered to enforce Regulating Orders (ROs) whether that should be both the Scottish Fisheries Protection Agency (SFPA) and the grantee of an RO jointly, the SFPA solely, the grantee solely or some other arrangement. The consultation paper also listed suggested powers (based on the SFPA’s existing powers) for enforcing ROs and asked if respondents felt that these were appropriate. A final question asked respondents if they had any additional changes that they would like to see in relation to the enforcement of ROs or fisheries legislation more generally.

The majority of the consultation papers were issued by email. The paper was also made available on the Scottish Executive website for any interested individuals. The content of the paper itself was set out as clearly and simply as possible in order to facilitate responses within the timescale.

In the consultation paper, we also offered to hold face to face meetings during the consultation period for interested parties. This offer was not taken up. The opportunity was taken, however, to highlight the main issues to key stakeholders involved in the Solway Regulating Order when we met with them on Wednesday 1 February.
4. Who Responded to the Consultation

A total of 26 responses were received. One response which was made up of a completed respondent information form but with no substantive comments or means of identifying the respondent. This response has not been included in the analysis below. The table at Annex A contains a full list of those organisations which responded and individuals who responded and are content for their response to be made public.

3 individuals and 23 organisations responded. 15 responses were made up of written comments and 11 responding to the specific questions set out in the consultation paper.

5. Summary of Responses

A summary of the responses received to the questions contained in the consultation paper is set out below:

**Question 1: Should both the grantee and the SFPA have the ability to enforce a RO thus enabling different situations and circumstances to be met?**

10 respondents said that both the SFPA and the RO grantee should have the ability to enforce a RO (3 of the 10 said that the SFPA should have a duty to enforce ROs). 9 disagreed and 7 did not address the specific question.

**Question 2: Is it your view that the grantee should have sole powers to enforce ROs?**

3 respondents agreed that the grantee should have sole powers to enforce ROs. 16 disagreed and 7 respondents did not address the specific question.

**Question 3: Is it your view that the SFPA should have sole powers to enforce ROs?**

6 respondents said that the SFPA should have sole powers to enforce ROs. 13 disagreed and 7 did not address the specific question.

**Question 4: Would you prefer another arrangement? If so, please provide details.**

4 respondents said that they would prefer another arrangement for enforcing ROs. 3 of these proposed that existing RO grantees should put forward their regulations to the local Inshore Fisheries Group (IFG) for approval before being proposed for adoption by Scottish Ministers in exactly the same way and on the same basis as other proposals for regulation would be made by an IFG. The Gangmaster Licensing Authority (GLA) proposed options to ensure that the 2 regulatory regimes (the RO and gangmaster legislation) will be mutually supportive regarding enforcement and SEERAD will discuss this point further with the GLA.

9 respondents stated definitively that they would not prefer another arrangement and 13 respondents did not address the specific question.
Question 5: Are the powers set out above appropriate powers for enforcing ROs? Alternatively, do you think that some other arrangement should be put in place? Please provide details.

7 responded that they thought the powers as set out in Section 5.2 of the consultation paper were appropriate for enforcing ROs. 7 respondents disagreed (4 specifically in relation to giving the powers set out at Section 5.2 to RO grantees and 3 respondents sought additional powers for the SFPA and grantees). 12 respondents did not address the specific question in their response.

Question 6: In addition to the proposals at 5 above, are there any additional changes that you would like to see in relation to enforcement of ROs or fisheries legislation more generally?

10 respondents suggested additional changes. 2 respondents did not have any additional changes to make and 13 did not address the specific question. The following suggestions were made:

- Status of “reporting agency” in terms of submission of reports to the Procurator Fiscal should be afforded to the grantee if this is not already in place.
- The question of any breaches of the order being a scheduled offence in relation to the Proceeds of Crime may be worthy of consideration.
- Legal liability for those engaged in unsustainable activities (whether technically permissible or not) by a general duty being imposed to fish reasonably.
- More balanced representation of all the sectors involved in SEERAD’s management.
- The incorporation of the UK biodiversity plan into fisheries administrative law.
- The establishment of statutory no take zones following the Royal Commission on Environmental Pollution report.
- Consider an offence of illegal possession of shellfish.
- Need for realistic fines to deter illegal fishing.
- Consider dovetailing GLA and RO licence conditions in order to facilitate joint enforcement
- Need for Police to have necessary powers, training and resources to be an effective enforcement partner
- Consider a power of seizure in relation to fishing gear and associated vehicles.
- Need for enforcement powers to apply outwith an RO area if there is good reason to believe that an offence has taken place within a RO area
- Consider making arrangements for licence revocation more straightforward.

Many of these issues are outwith the scope of the Police Bill at this time. However, SEERAD will be considering these issues both in relation to RO enforcement and fisheries legislation more generally and will engage with relevant stakeholders to explore some of these points further.
6. Summary of Key Themes

Overall, those responding to this consultation tended to focus on a number of distinct and often conflicting themes. These included themes which were directly relevant to this consultation including:

- Little support (12%) for the grantee having sole powers for enforcing a RO
- More support for the SFPA (23%) to have sole powers to enforce ROs
- Most support for both the SFPA and the grantee (38%) to have powers to enforce ROs
- Support for the improved enforcement of ROs
- Need for improved enforcement to prevent illegal fishing on the Solway Firth under any future RO
- Role of Inshore Fisheries Groups (IFGs) in relation to ROs

Other themes that emerged from the responses did not relate directly to this consultation but were more about respondents’ views on ROs either generally or specifically. These included:

- Support for ROs generally as a fisheries management tool (and therefore, support for improved enforcement powers generally)
- Objections to ROs generally as a fisheries management tool (and therefore, objection to any improved enforcement powers proposed)
- Objections to specific ROs
LIST OF CONSULTEE RESPONDENTS (who are either organisations or who are content for their names to be made public)

Annan Fishermen’s Association
Angus Council
Clyde Fishermen’s Association
Comhairle Nan Eilean
Community of Arran Seabed Trust
Dumfries and Galloway Constabulary
Food Standards Agency Scotland
Gangmasters Licensing Authority
Highland Council
Highland Shellfish Management Organisation
Mallaig and North West Fishermen’s Association
Mr Stanley Gray
Mr Robert Leask
Mull Aquaculture and Fisheries
Orkney Creel Fishermen’s Association
RSPB
Scallop Association
Scottish Association of Shellfish Growers
Scottish Environment Protection Agency
Scottish Natural Heritage
Shetland Shellfish Management Organisation
Shetland Fishermen’s Association
Solway Firth Partnership
Solway Shellfish Management Organisation
Mr John Tooth
COMMITTEE BRIEFING PAPER

REGULATING ORDERS

and the Police, Public Order and Criminal Justice (Scotland) Bill

This briefing has been prepared for members of the Justice 2 Committee. It provides some background information on the Scottish Executive's proposals to introduce new powers to enforce Regulating Orders through Stage 2 amendments of the Police, Public Order and Criminal Justice (Scotland) Bill. The briefing describes:

- What Regulating Orders are
- Why a change to the law is needed
- The Executive’s proposals

WHAT ARE REGULATING ORDERS?

Sea fisheries in EU waters are managed under the Common Fisheries Policy (CFP). There is a general principle of equal access by fishermen from all Member States throughout EU waters. The exception to this is in inshore waters, where waters within 12 miles of "territorial baselines" are managed by the coastal state. Scottish Ministers are responsible for managing these fisheries in the inshore waters around Scotland. The way the territorial baselines are drawn around the West coast of Scotland mean that these inshore waters include the Minches and the Sea of the Hebrides, which contain valuable fisheries. Low volume, high value catches of shellfish are particularly important for inshore fishermen.

Foreign fishermen can only fish in the 6-12 mile zone where they have done so historically, and waters within 0-6 miles are completely reserved to fishermen of the coastal state.

Scottish Ministers can make Regulating Orders under section 1 of the Sea Fisheries (Shellfish) Act 1967. A Regulating Order gives local fishermen ("the grantee") powers to manage inshore fisheries for the species of shellfish named in the order for a fixed period of up to 20 years. The grantee can make regulations with the consent of Scottish Ministers, regulating the methods of fishing for shellfish in the area covered by the order. They can also establish a licensing scheme for the shellfish fishery to limit the amount of fishing in the area, and can charge for the costs of accessing the fishery through a licensing or permit scheme.

So far only one Regulating Order has been made in Scotland, this was made in 1999 and covers the whole of the 0-6 mile zone around Shetland. The grantee is the Shetland Shellfish Management Organisation. Applications for two other orders, covering the Solway Firth and the Highlands are currently being considered by Ministers.

The Scottish Executive published an Inshore Fisheries Strategy in 2005. The Strategy had been drawn up with stakeholders in the Inshore Fisheries Advisory Group. An important element of the Strategy is to establish inshore fisheries groups covering all Scotland’s inshore waters. These groups will be responsible for managing the inshore fisheries within their areas. The Scottish Executive consultation paper on regulating orders explains that
these would be one potential management tool that inshore fisheries groups could consider.

WHY IS LEGISLATION NEEDED?
The Scottish Fisheries Protection Agency (SFPA) is an Executive Agency with responsibility for the enforcement of fisheries legislation and regulations in the seas around Scotland and in Scottish ports. It does not have any powers of enforcement under the Sea Fisheries (Shellfish) Act 1967.

The 1967 Act gives grantees of a regulating order the power to “carry into effect and enforce such restrictions and regulations” as are made under the order. However, as the Scottish Executive’s consultation paper notes “this general power – which would not extend to boarding vessels or to searching premises – is insufficient to allow enforcement to be fully effective.”

The experience on Shetland has also shown that the grantee is likely to have limited resources for enforcement and is unlikely to be able to afford e.g. a patrol boat or sophisticated surveillance equipment. They may also lack the necessary skills and experience of enforcement, especially to produce evidence to a standard required by the procurator to prosecute an offence.

WHAT ARE THE SCOTTISH EXECUTIVE’S PROPOSALS?
Recognising the difficulties of enforcing this legislation, the Scottish Executive undertook in its Partnership Agreement of 2003 to “legislate to permit enforcement of Regulating Orders within the range of activities of the SFPA”.

The Scottish Executive’s policy intention is that the grantee should be responsible for ensuring that enforcement arrangements are in place. The grantee could do this by carrying out enforcement itself, by making arrangements through a memorandum of understanding for the SFPA to carry out enforcement, or jointly enforcing the order. There could also be a role for the SFPA in the recruitment, appointment and training of officers who would be employed by or seconded to the grantee.

The Executive proposes to base the new enforcement powers on the powers the SFPA has to enforce other fisheries legislation. These are listed in the consultation paper as follows:

In relation to fishing boats:

- to require a boat to stop and to board the boat with or without persons assigned to assist
- to search the boat for any fishery products or fishing gear on board the boat
- to require persons on board the boat to do anything which appears to that officer to be necessary for facilitating the examination
- to examine fishery products, fishing gear and equipment on board the boat
- to seize fishery products and fishing gear where an offence is suspected
- to require the production of any document relating to the boat
- to inspect and take copies of and retain possession of such documents while any search, inspection or examination is being carried out
- to seize and detain documents where an offence is suspected
• to require the master or any person for the time being in charge of the boat to render documents on a computer system into visible and legible form and to produce them in a form that can be taken away
• where an offence is suspected to require the master of a boat to take the boat, or the officer himself take the boat, to the nearest convenient port and detain it

On land (land/premises/vehicles):

• to enter and inspect any land/premises/vehicles used for the treatment, storage or sale of sea fish and for carrying out business in connection with the operation of fishing boats or activities connected therewith
• when inspecting such premises to take with that officer such other persons as appear to that officer necessary and any equipment or materials
• to examine any fishery products on such land/premises/vehicles and to require any persons on the land/premises/vehicles to do anything which appears to that officer necessary for facilitating the examination
• to search for or examine fishery products in such land/premises/vehicles
• to seize fishery products where an offence is suspected
• to require any persons to produce any documents which are in the custody or possession of that person relating to the catching, landing, transportation, sale or disposal of any fishery products
• to inspect and take copies of any such document produced or found on the land/premises/vehicles
• to require any appropriate or responsible person to render documents on a computer system into visible and legible form and to produce them in a form that can be taken away
• to seize and detain documents where an offence is suspected
• to stop, and, if necessary, direct a vehicle to some other place to facilitate inspection

The Executive proposes that these powers would be available to the grantee to enforce the provisions of a regulating order within the area covered by the regulating order, and available to the SFPA to enforce regulating orders in any area. The Executive is currently consulting on these proposed powers and arrangements for the enforcement of regulating orders. The results of this consultation should be available to the Justice 2 Committee prior to any such amendments being lodged to the Police, Public Order and Criminal Justice (Scotland) Bill.

Tom Edwards
SPICe
8/02/06
SSI title and number: The draft Risk Assessment and Minimisation (Accreditation Scheme) (Scotland) Order 2006

Type of Instrument: Affirmative

Meeting: 14 March 2006

Date circulated to members: 9 March 2006

Justice 2 Committee deadline to consider SI: 20 March 2006

Motion for annulment lodged: No

SSI drawn to Parliament’s attention by Sub Leg Committee: Yes

1. The Order sets out an Accreditation Scheme for persons involved in the assessment and minimisation of the risk posed by offenders to the safety of the public and the procedure to be followed by the Risk Management Authority in the accreditation process.

2. The Subordinate Legislation Committee in its 11th Report, 2006 brought the attention of the Justice 2 Committee to the Order, on the grounds of failure to follow proper legislative practice by reason of inconsistent drafting. The relevant extract from the report is attached at Annex A.

3. If members have any queries or points of clarification on the instrument which they wish to have raised with the Scottish executive in advance of the meeting, please could these be passed to the Clerk to the Committee as soon as possible, to allow for sufficient time for a response to be received in advance of the Committee meeting.

Clerk to the Committee
9 March 2006
Annex A

The Risk Assessment and Minimisation (Accreditation Scheme) (Scotland) Order 2006, (SSI 2006/draft)

1. The Committee noted that articles 5(6) and 7(10) of the draft Order required either the Authority or an accreditation committee to notify decisions to the applicant within a prescribed time limit. In contrast to articles 5(2), 7(3) and 16(4), articles 5(6) and 7(10) do not impose an express obligation on the Authority or committee to give reasons for the decisions in question. The Committee therefore asked the Executive if it had considered whether or not the Order should be consistent and therefore be more helpful to the reader.

2. The Executive, in its response printed at Appendix 1, agrees that certain decisions mentioned in the draft Order carry an express requirement to specify reasons and others do not. However, the Executive is of the view that, as a matter of good administrative practice, the decision making powers provided for the Authority and its committees should in every case to be exercised in such a way that it is clear, amongst other things, what reasons have been relied upon in coming to the particular conclusion. Draft guidance currently being considered by the Authority will make this clear.

3. Although the Executive acknowledges that if there were a general provision to give reasons for every decision, or if this was stated at each relevant point throughout the Order, it may be helpful to the reader, this would in its opinion render the Order unduly cumbersome and therefore does not consider it necessary to do so.

4. The Committee recognises that specific provision on the giving of reasons is not strictly necessary and that guidance being considered will assist the reader. However, the Committee considers that the inconsistency in the regulations in this respect is less than desirable and may raise doubts in the mind of the reader.

5. The Committee therefore draws the attention of the lead committee and the Parliament to this instrument on the grounds of failure to follow proper legislative practice by reason of inconsistent drafting.

Appendix 1

On 21 February 2006 the Committee asked for an explanation of the following matter:-

1. The Committee notes that articles 5(6) and 7(10) of the draft Order require either the Authority or an accreditation committee to notify decisions to the applicant within a prescribed time limit. In contrast to articles 5(2), 7(3) and 16(4), articles 5(6) and 7(10) do not impose an express obligation on the Authority or committee to give reasons for the decisions in question. The Committee therefore asks whether the Order ought not to be consistent in this respect and, while acknowledging that express provision is not perhaps strictly necessary, believes it would be more helpful to the reader.
The Scottish Executive responds as follows:-

2. The Committee correctly notes that certain of the decisions mentioned in the draft Order carry an express requirement to specify reasons. (Article 15(3) can be added to this list.) No such express requirement is made in the two instances identified by the committee. Certain other decision making powers are also not accompanied by an express requirement to state reasons: for example, the power of suspension under article 8 or that of imposing a period of disqualification under article 7(9).

3. However, the Executive is of the view that, as a matter of good administrative practice, the decision making powers provided for the Authority and its committees ought in every case to be exercised in such a way that it is clear, amongst other things, what reasons have been relied upon in coming to the particular conclusion. To this extent, the “decision” should have as an integral part of it the reasons which gave rise to the conclusion at the heart of the decision.

4. Draft guidance currently being considered by the Authority will make this clear.

5. It may be that a reader may consider that consistency would be greater if there were a general provision to give reasons for every decision, or if this were stated at each relevant point throughout the Order. However, the Executive considers that this would render the Order unduly cumbersome and, for the reason given in the paragraph above, the Executive does not consider that it is necessary to do so.
Dear Gillian

**Legislative Consent Motion: Police and Justice Bill**

I am writing to provide the additional information requested by the Committee when the Deputy Minister for Justice and I gave evidence on Tuesday 7 March. In this regard I am grateful to you for providing us copies of the letters about this LCM from the Subordinate Legislation Committee, the Hon Sec of ACPOS, HM Chief Inspector of Constabulary for Scotland, and the Director of SPIS.

**NPIA: Letter from Subordinate Legislation Committee**

As notified in our memorandum, amendments are being prepared to paragraph 46 of Schedule 1. These will provide that the power conferred by sub-paragraph (1) is exercisable by the Scottish Ministers (instead of the Secretary of State) where the provision to be made amends or repeals any legislation which is within the legislative competence of the Scottish Parliament. Any such order will be subject to affirmative resolution in the Scottish Parliament.

The amendments will also provide that where the Secretary of State proposes under this paragraph to make any order which affects (or may affect) policing in Scotland, he will require to obtain the consent of the Scottish Ministers prior to making such an order.

We are grateful for the point the Subordinate Legislation Committee has raised on the ancillary powers in clause 42. An amendment has in fact already been prepared to make clear that these ancillary powers extend to Acts of the Scottish Parliament. We have also considered whether it is necessary to extend this to cover subordinate legislation made under ASPs but we do not think that this power is necessary. We are not aware of any subordinate legislation made under ASPs which will require to be amended or repealed in consequence of the Bill’s provisions. In the unlikely event that such an amendment was required this could be given effect to using the enabling powers of the parent act under which the relevant subordinate legislation has been made.
In developing the policy on this we have involved ACPOS at various stages both in discussions and by letter. In particular the Head of Police Division 2, Christie Smith, wrote to the President of ACPOS in October 2005 and in January this year to provide details of the developments and to seek ACPOS’ comments. The October letter made clear that we did not believe it was necessary or appropriate for there to be ACPOS representation on the Board of the NPIA. Our understanding then and now – for example as indicated in paragraph 6.1 of Appendix A to the ACPOS letter to the Committee - is that ACPOS accepts the logic of this conclusion albeit with some reluctance.

At no time since October have ACPOS pressed us to argue for an ACPOS seat on the NPIA Board. Rather, they have engaged in substantive discussions with us over how safeguards can be put in place in the absence of such representation. For example, following a meeting with Mr Wilson, we obtained Home Office agreement to change the consultation requirement so that consultation would be required whenever there was or was likely to be an impact on Scottish policing.

The Home Office has also agreed to include a requirement in the Management Statement which will be drafted after the Bill has been through Parliament, to the effect that, should a committee be set up to manage or develop a specific work stream which will or might have an impact in Scotland, there will be appropriate Scottish representation on it.

Notwithstanding the latest comments from ACPOS and HMCIC, we believe the approach taken in the Bill is the right one. As the NPIA will be an England and Wales only body (unlike PITO which is a cross border public authority), Scottish representation on the board would not be appropriate.

**Computer Misuse: letter from ACPOS**

We are grateful for the suggestion raised by ACPOS that the Bill’s definition of a computer might need to be broadened. We have alerted the Home Office policy leads, who have advised that they have already been considering related matters. Executive officials will continue to liaise with the Home Office to ensure that the point made by ACPOS is adequately addressed.

Yours sincerely,

Bill Barron

BILL BARRON
Police Bill team
POLICE RETENTION OF PRINTS
AND SAMPLES
FRAZER MCCALLUM

This briefing has been prepared to assist the Scottish Parliament’s Justice 2 Committee in considering proposed amendments to the Police, Public Order and Criminal Justice (Scotland) Bill, relating to the retention of samples (eg DNA samples) by the police. Paul Martin MSP has lodged an amendment on this topic, for consideration during Stage 2 of the Bill. It would allow the police to retain such samples taken from suspects arrested or detained in relation to an offence, whether or not they are later convicted of the offence. His amendment, if given legislative effect, would change the law as currently set out in section 18 of the Criminal Procedure (Scotland) Act 1995.

In 2005, the Scottish Executive consulted on proposals to give the police powers to retain both prints and samples (eg fingerprints and DNA samples) taken from suspects arrested or detained in relation to an offence, whether or not they are later convicted of the offence. Thus, the consultation proposals were similar to but wider than those underlying Paul Martin’s amendment, in that they covered prints as well as samples. The Executive has not, at the time of writing this briefing, made public any firm proposals in this area.

Although the amendment lodged by Paul Martin is only concerned with samples, this briefing considers the retention of both prints and samples. It outlines the current law (both in Scotland and in England and Wales) and looks at the Scottish Executive’s consultation proposals (including responses to those proposals). It should be noted that, even in relation to samples, there could still be significant differences between any proposals currently favoured by the Executive and the amendment lodged by Paul Martin. The amendment lodged by Paul Martin, together with the current legislative provision which it seeks to change, is reproduced at the end of the briefing.

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KEY POINTS OF THIS BRIEFING

- The police in Scotland have the power to take prints and samples (e.g., fingerprints and DNA samples) from suspects who have been arrested and are in custody; or who are detained on suspicion of committing an offence punishable by imprisonment. Such prints and samples can be checked against existing records on relevant databases, and added to such databases for future reference. Currently, these prints and samples must be deleted from databases and destroyed where suspects are not convicted.

- The legal position in England and Wales was, until 2001, similar to that in Scotland. However, the Criminal Justice and Police Act 2001 changed this, allowing the police to retain prints and samples taken from suspects, even where those suspects are not subsequently convicted.

- In relation to the law in England and Wales, a legal challenge considered by the House of Lords led to the court ruling (in 2004) that the retention of prints and samples taken from suspects who are not subsequently convicted of an offence does not contravene the European Convention on Human Rights.

- In June 2005 the Scottish Executive published a consultation paper ('Police Retention of Prints and Samples: Proposals for Legislation') seeking views on whether it should legislate to give the police the power to retain prints and samples taken from suspects, whether or not suspects are subsequently convicted (thus bringing the law more into line with that in England and Wales).

- Paul Martin MSP has, in relation to samples only, lodged an amendment to the Police, Public Order and Criminal Justice (Scotland) Bill which would bring the law in that specific area more into line with that in England and Wales.

- The main arguments advanced in response to the Scottish Executive’s consultation paper, in favour of allowing retention, include:
  - greater retention of prints and samples would, by increasing the coverage of the relevant databases, assist in the investigation and prosecution of crime
  - benefits from standardisation of retention policies across the UK
  - any concerns about human rights have been answered by the House of Lords judgement in relation to the provisions applying in England and Wales
  - cost savings for the police in not having to repeatedly take prints and samples from the same individuals only for them to be destroyed at a later date.

- The main arguments advanced in response to the Scottish Executive’s consultation paper, against allowing retention, include:
  - unjust to retain prints and samples taken from suspects who have not been convicted of any offence
  - retention proposals involve an excessive infringement of the right to privacy and thus concerns about human rights still exist
  - retention proposals create an incentive for the police to arrest more people, where this is not really necessary, in order to further expand the relevant databases
  - effectiveness of policing could be damaged if the proposals diminish public support for the police
  - currently have insufficient oversight, and other safeguards, in place to ensure that there is no misuse of information retained on the relevant databases.
INTRODUCTION

On 22 June 2005 the Scottish Executive (2005a) published ‘Police Retention of Prints and Samples: Proposals for Legislation’ (‘the Consultation Paper’), with responses sought by 13 September 2005. It invited views on whether the Executive should legislate to give the police powers to retain prints and samples (eg fingerprints and DNA samples) taken from suspects arrested or detained in relation to an offence, whether or not they are later convicted of the offence.

A total of 34 consultation responses were received. All non-confidential responses (28) are available on the Scottish Executive’s website at ‘Police Retention of Prints and Samples: the Consultation Responses’ (Scottish Executive 2005b). The Executive (2005c) has also published a short report providing some analysis of the consultation responses, see ‘Police Retention of Prints and Samples’.

The Consultation Paper stated that the proposals upon which views were sought could be taken forward as part of what later became the Police, Public Order and Criminal Justice (Scotland) Bill (‘the Bill’). The proposals did not, however, form part of the Bill as introduced on 30 September 2005 and the Scottish Executive has not, at the time of writing this briefing, made public any firm proposals in this area.

However, Paul Martin MSP has lodged an amendment on this topic, for consideration during Stage 2 of the Bill. It should be noted that it only deals with samples, rather than dealing with both prints and samples as was the case in the Scottish Executive’s consultation proposals. It seeks to give the police powers to retain samples taken from suspects arrested or detained in relation to an offence, whether or not they are later convicted of the offence. It would, in relation to samples (but not prints) bring the law in this area more into line with that currently existing in England and Wales. His amendment, if given legislative effect, would change the law as currently set out in section 18 of the Criminal Procedure (Scotland) Act 1995.

The remainder of this briefing focuses on: (a) the current legal position (both in Scotland and in England and Wales); and (b) the Scottish Executive’s consultation proposals (including responses to those proposals). The amendment lodged by Paul Martin, together with the current legislative provision which it seeks to change, is reproduced at the end of the briefing.

BACKGROUND

Scotland

Currently, the police in Scotland have the power to take prints and samples from anyone who has been arrested and is in custody; or who is detained on suspicion of committing an offence punishable by imprisonment. Such prints and samples can be checked against existing records on relevant databases, and added to such databases for future reference. They must,

\[\text{Note: See section 18 of the Criminal Procedure (Scotland) Act 1995.} \]
however, be deleted from databases and destroyed if the suspect is not convicted (or if the suspect is given an order of absolute discharge). ²

In relation to Scotland, the Consultation Paper stated that:

“On average, the police take around 3,000 – 3,500 DNA profiles every month in the course of their investigations. As the police are required to delete the DNA profiles taken from those who are not convicted, approximately 2,000 profiles (around 60% of the total) are deleted every month. The picture is similar for fingerprints. In 2004, 37,166 records were added to the fingerprint database managed by the Scottish Fingerprint Service. However, 21,493 records (58% of those added) were deleted from the database that same year because the people from whom they were taken were not convicted.

Not all of the deleted prints and samples are deleted because the people they were taken from were acquitted or charges against them were dropped. A large proportion are in fact deleted because they were taken from individuals who were given a disposal which is not a court sentence (e.g. Children’s Hearings, Fixed Penalty Notices and Procurator Fiscal fines).” (paras 2.2 – 2.3)

A consultation response submitted by the Scottish Police DNA Database (2005) describes current police practice in relation to the taking of DNA samples:

“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 (…).” (p 1)

**England and Wales**

The legal position in England and Wales was, until May 2001, similar to that described in relation to Scotland. However, section 82 of the Criminal Justice and Police Act 2001 (amending section 64 of the Police and Criminal Evidence Act 1984) changed this, allowing the police to retain prints and samples taken from a suspect, even where the suspect is not subsequently convicted. Prints and samples so retained may only be used for certain purposes, including the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution.

The Scottish Executive’s Consultation Paper included information provided by officials at the National DNA Database in relation to additional DNA profiles retained in England and Wales since the change in the law:

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² A court may make an order discharging an offender absolutely where it is of the opinion, having regard to the circumstances, including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment.
“As of 31 March 2005 it is estimated that there are around 198,000 DNA profiles on the Database which would previously have fallen to be removed. From these, approximately 7,591 profiles of individuals have been linked with crime scene stains involving 10,754 offences. These offences include 88 murders, 45 attempted murders, 116 rapes, 62 other sexual offences, 91 aggravated burglaries and 94 offences of the supply of controlled drugs.” (para 3.1)

Increases in the number of samples held on the DNA Database have led to recent debate about: the ultimate aims of such expansion; safeguards for those called on to provide samples; and the basis upon which samples are taken and retained (including discussion of whether there is a racial bias). See, for example:

- ‘DNA database continues to swell’ (BBC News 2006)
- ‘Freedom fears as the DNA database expands’ (Daily Telegraph 2006)
- ‘DNA of 37% of black men held by police’ (Guardian 2006)

In March 2005, the House of Commons Science and Technology Committee published a report entitled ‘Forensic Science on Trial’ (2005a). The report considered a wide range of matters relevant to the use of forensic science within the criminal justice system in England and Wales. Amongst its conclusions, the report highlighted the need for independent oversight, with ethical and lay input, of the National DNA Database (at para 188). The report also stated that:

“The arguments for the retention of DNA profiles of suspects who are not ultimately convicted in the interests of fighting crime need to be balanced against any potential infringement of civil liberties arising from this policy.” (para 69)

“DNA evidence now represents a vital instrument for facilitating investigations and securing convictions. We believe that the recent expansion of the database would make a review of the impact of the NDNAD [National DNA Database] on the detection and deterrence of crime timely.” (para 71)

The UK Government responded to the report in July 2005 – ‘Forensic Science on Trial: Government Response to the Committee’s Seventh Report of Session 2004-05’ (House of Commons Science and Technology Committee 2005b). It includes responses to the points highlighted above, for example:

“The Government believes firmly that the measures taken to retain the samples and fingerprints of persons who have been arrested, albeit not convicted, for a recordable offence are proportionate and justified. That view has been thoroughly tested and supported by the Law Lords in the case of R v Chief Constable of South Yorkshire ex parte S and Marper. The evidence given to the Committee of the number of samples which would previously have fallen to be destroyed but which were later found to match against stains found at the scenes of some very serious crimes bears out the value of retaining this information. Although we acknowledge that some persons who have not been convicted of an offence do sometimes feel aggrieved that this biometric information is retained, the Law Lords in the quoted case rejected the suggestion that this group of people are somehow stigmatised as a result.

3 The case is discussed later in this briefing, under the heading of ‘Human rights’.
Persons who do not go on to commit an offence have no reason to fear the retention of this information.” (p 6)

“The Government has been evaluating the impact of expanding the collection of DNA by the police, the subsequent database growth and subsequent investigative impacts. To date, evaluation data and analysis has been used in the management of the Home Office DNA Expansion Programme. It has also been used in the development of police operational good practice. The Home Office will shortly be publishing a summary of what has been achieved through the Government’s DNA Expansion Programme.” (p 6)

More recently, Baroness Scotland of Asthal delivered a Written Ministerial Statement (House of Commons 2005a) on the future of the National DNA Database, including plans for providing effective oversight of the database.

**Human rights**

In relation to the law as it now stands in England and Wales, a legal challenge considered by the House of Lords led to the court ruling (in 2004) that the retention of prints and samples, taken from suspects who are not subsequently convicted of an offence, did not contravene the European Convention on Human Rights (‘the ECHR’).  

Grounds advanced by those challenging such retention included the argument that it constituted a breach of article 8 of the ECHR (right to respect for private and family life), which states that:

“(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

The court held (by majority of 4:1) that there had been no breach of article 8(1) of the ECHR. Lord Steyn stated (with the majority of judges agreeing with both his reasons and conclusions) that:

“Looking at the matter in the round I incline to the view that in respect of retained fingerprints and samples article 8(1) is not engaged. If I am wrong in this view, I would say any interference is very modest indeed.”

The court went on to rule (unanimously) that if there is any interference with the right protected by article 8(1), this is justified under article 8(2) of the ECHR.

In reaching the above decisions, Lord Steyn noted that

“The following propositions seem to be established: (i) the fingerprints and samples are kept only for the limited purpose of the detection, investigation, and

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4 See ‘R (on the application of S) v Chief Constable of South Yorkshire’ and ‘R (on the application of Marper) v Chief Constable of South Yorkshire’ [2004] 1 WLR 2196, [2004] 4 All ER 193

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prosecution of crime; (ii) the fingerprints and samples are not of any use without a comparator fingerprint or sample from the crime scene; (iii) the fingerprints and samples will not be made public; (iv) a person is not identifiable to the untutored eye simply from the profile on the database, any interference represented by the retention being minimal; (v) and, on the other hand, the resultant expansion of the database by the retention confers enormous advantages in the fight against serious crime. Cumulatively these factors suggest that the retention of fingerprints and samples is not disproportionate in effect.”

Further consideration of the issues considered by the House of Lords is set out in the Consultation Paper (paras 4.1 – 4.12). The decision of the House of Lords has been referred to the European Court of Human Rights. As at December 2005, a decision on the admissibility of the appeal was still awaited – see House of Commons (2005b) Written Answer to question raised by David Amess (case referred to as ‘S and Marper’).

CONSULTATION PROPOSALS

Prints and samples taken from suspects

The Consultation Paper invited views on whether the Scottish Executive should legislate to give the police powers to retain prints and samples taken from suspects arrested or detained in relation to an offence, whether or not they are later convicted of the offence. It noted that such a change would bring this aspect of Scots law more or less into line with that now existing in England and Wales.

It also noted that the Executive proposed to include a safeguard in the legislation, providing that such retained prints and samples should only be used for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution (again similar to England and Wales). 5

Prints and samples taken voluntarily

The Consultation Paper also noted that the police in Scotland are, during the investigation of a crime, able to take prints and samples from people who may not be identified as suspects but who agree to this course of action (eg where the police ask people in a particular neighbourhood to offer DNA samples as a way of eliminating potential suspects). Such prints and samples can only be retained with the written consent of the person providing them. The Consultation Paper stated that the Scottish Executive currently has no plans to change the law in this area.

5 Other purposes might include the use of DNA samples for research.
CONSULTATION RESPONSES

Consultation questions

The Consultation Paper set out three questions (at paras 5.2 – 5.5):

**Question 1:** Do you agree that the police should be able to retain prints and samples taken from those who are arrested or detained on suspicion of committing an offence punishable by imprisonment whether or not they are later convicted of that offence?

**Question 2:** Do you agree that samples given voluntarily should not be retained or checked against prints and samples taken from any crime scene without written consent and that the consent can be withdrawn in writing at any time?

**Question 3:** Do you agree that the legislation should state that prints and samples retained by the police should only be used for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution?

The report analysing the consultation responses (Scottish Executive 2005c) stated that:

“There was a mixed response to the main proposal in the consultation [ie question 1], with 15 broadly in favour of the full retention policy, 16 broadly opposed and 3 who did not take a firm position.

A clear majority of respondents supported both of the secondary questions: the proposals to maintain the current position on samples given voluntarily and to legislate to ensure that prints and samples retained by the police could only be used for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution.” (paras 11 – 12)

The following discussion focuses on the main proposal (ie to allow retention whether or not a suspect is subsequently convicted). However, it is also worth noting that a number of respondents pointed out that the proposed restriction on the use of retained prints and samples would prevent their use in relation to the identification of deceased persons where there is no criminal investigation (eg following a major accident). It was pointed out that the relevant legislation for England and Wales has been amended to allow retained prints and samples to be used for such purposes.

**Retention of prints and samples taken from suspects who are not convicted**

The discussion in this area suggests a categorisation of the population into: (a) suspects who are subsequently convicted; (b) suspects who are not subsequently convicted (eg because charges are dropped or because they are found not guilty); and (c) people who are not suspected of committing an offence. However, on what basis might one seek to justify different treatment of these groups?

1. Distinction between suspects who are subsequently convicted and those who are not: does the fact that a person has been convicted of an offence provide additional justification for retaining that person’s prints and samples, thus providing a basis for different treatment? If yes, what is the basis of this? Is it, for example, that people who have been convicted of offences:
(a) are generally more likely to commit further offences (and thus it is particularly useful to retain their prints and samples); or (b) have, by breaking the law, sacrificed the right to object to greater intrusion by the State in this area?

2. Distinction between suspects who are not convicted and non-suspects: is there a good reason for retaining prints and samples taken from such suspects, whilst not also seeking to create databases which contain everyone’s prints and samples (whether or not a person has ever been suspected of committing an offence)? Is it simply a matter of doing what is reasonably feasible given available resources, or can some other distinction be made? The House of Commons Science and Technology Committee (2005, para 69) has noted that the argument, advanced in relation to suspects who are not convicted, that retaining more prints and samples leads to more matches with crime scene evidence might also be used to justify the sampling of the entire population.

Main arguments advanced in favour of allowing retention:

- greater retention of prints and samples would, by increasing the coverage of the relevant databases, assist in the investigation and prosecution of crime (including benefits in relation to quickly clearing the innocent as well as apprehending the guilty)
- benefits from standardisation of retention policies across the UK (eg avoiding complicated weeding arrangements where information from different parts of the UK is held on the same databases)\(^6\)
- any concerns about human rights have been answered by the House of Lords judgement in relation to the provisions applying in England and Wales
- cost savings for the police in not having to repeatedly take prints and samples from the same individuals only for them to be destroyed at a later date

Main arguments advanced against allowing retention:

- unjust to retain prints and samples taken from suspects who have not been convicted of any offence
- retention proposals involve an excessive infringement of the right to privacy and thus concerns about human rights still exist (disagreeing with the House of Lords judgement in relation to the provisions in England and Wales)
- retention proposals create an incentive for the police to arrest more people in order to further expand the relevant databases (related concern that discriminatory policing, when coupled with the retention of prints and samples taken from suspects who are not convicted, might result in a particularly large increase in the number of samples held in relation to people from ethnic minority groups)
- effectiveness of policing could be damaged if the proposals diminish public support for the police
- currently have insufficient oversight, and other safeguards, in place to ensure that there is no misuse of information retained on the relevant databases (including databases, outwith Scotland which receive information from Scotland, eg the National DNA Database in England)\(^7\)

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\(^6\) For example, DNA profiles obtained in Scotland are loaded onto the Scottish DNA Database and also exported for inclusion on the National DNA Database in England.

\(^7\) Some consultation responses raised concerns about the way in which samples on the National DNA Database may be used (eg using samples to undertake genetic research). As noted earlier in this briefing, a report of the House of Commons Science and Technology Committee (2005, para 188)) highlighted the need for independent oversight, with ethical and lay input, of the National DNA Database.

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Consultation responses generally indicating support for the Scottish Executive’s proposals in this particular area included those from the Association of Chief Police Officers in Scotland, the Association of Scottish Police Superintendents, the Scottish Police Federation and the Scottish Criminal Record Office. Responses opposed to the proposals (or at least significant elements of them) included ones from Genewatch UK, the Human Genetics Commission, the Information Commissioner’s Office and the Scottish Human Rights Centre.

Arguing in favour of the retention proposals, a consultation response submitted by the Association of Scottish Police Superintendents (2005) stated that:

“It is clear from the evidence contained in this consultation document that the retention of prints and samples in England and Wales has been a contributory factor in bringing hundreds of individuals to trial charged with serious (...) offences. The Association’s view is that by adopting analogous arrangements in Scotland the police will achieve similar results, improving upon an already high detection rate for serious crime. Furthermore, it is our belief that an additional benefit from retaining such samples and prints will occur when innocent individuals, on whom suspicion might fall for various crimes and offences, might be eliminated from police enquiries at an early stage of an investigation.” (p 1)

However, some respondents questioned the basis upon which the impact of retaining more prints and samples has been estimated. A consultation response submitted by GeneWatch UK (2005) argued that:

“The number of Database detections cited as justification for permanent retention is likely to significantly overestimate the benefits. This is only partly because not all detections lead to convictions (for many reasons, including that presence at the scene of a crime does not establish guilt). It is also because DNA databases are not required when there is a known group of suspects for a crime: a DNA sample can be taken from each individual and compared directly with a crime scene profile. This means that the number of detections that required the profile to be retained on the Database to solve the crime will be much lower than the numbers cited (...). The lack of a full assessment of effectiveness means that there is uncertainty about the cost-effectiveness of expanding the Database, compared to alternative approaches to tackling crime. It also makes it hard to balance the benefits against the threats to privacy and rights.” (p 3)

In relation to possible cost savings for the police, the response submitted by the Association of Scottish Police Superintendents (2005) stated that:

“The Association is also mindful of the cost implication of repeatedly taking prints and samples from the same individual only for these to be destroyed at a later date. For instance, each DNA sampling kit is valued at £2.95 and it costs a further £42 to check this sample against the existing DNA database. Considering the cost of kit and profiling alone, this means that each month approximately £100,000 will be spent processing 2,000 or so DNA samples that will eventually be disposed off. Even so these prices do not take into account staff and ancillary costs which raises substantially the final price to the public purse.” (p 1)
In arguing that it is unjust to retain prints and samples taken from suspects who have not been convicted of any offence, a consultation response submitted by the Scottish Human Rights Centre (2005) argued that:

“Following the logic of the presumption of innocence, the justification is no greater for retaining profiles and samples of those accused of crime than it is for the population at large, as both are presumed to be innocent. Retention of such data can only be justified after conviction.” (p 2)

Some of the respondents arguing against the retention proposals suggested that the Consultation Paper should have set out more options (eg allowing for the retention of some prints and samples for particular periods based on categories of suspected offence). It was also argued by some that current provisions on retention should be stricter (eg by providing that all DNA samples are destroyed once DNA profiles necessary for identification have been obtained).^8

In conclusion, the report analysing the consultation responses (Scottish Executive 2005c) stated that:

“The consultation responses demonstrate a clear split in the views of respondents. Some support the policy proposed in the consultation paper on the grounds that it would help the police to solve crimes, apprehend criminals and eliminate the innocent from suspicion and believe that the House of Lords ruling has answered the civil liberty concerns. Those who oppose the policy tend to disagree with the ruling of the House of Lords and believe that the human rights concerns outweigh the benefits involved in tackling crime. Some also dispute the effectiveness of the retention policy in England and Wales.” (para 38)

APPENDIX 1: TEXT OF AMENDMENT LODGED BY PAUL MARTIN MSP

“After section 74, insert—

Arrested and detained persons: retention of samples etc

Duty to destroy sample or information derived from sample: further provision

(1) Section 18 of the 1995 Act [the Criminal Procedure (Scotland) Act 1995] (which gives police constables certain powers in relation to arrested persons and persons detained on reasonable suspicion of having committed an offence punishable by imprisonment) is amended as follows.

(2) In subsection (3), the words—

(a) ‘Subject to subsection (4) below,’ and
(b) ‘all samples taken under subsection (6) below and all information derived from such samples’

are repealed.

(3) Subsections (4) and (5) are repealed.

(4) After subsection (6A), there is inserted—

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^8 The difference between DNA samples and DNA profiles is outlined in the report published by the Scottish Executive analysing the consultation responses, ‘Police Retention of Prints and Samples’ (2005c, para 8).
‘(6B) A sample taken from a person under subsection (6) or (6A), or any information derived therefrom, may be retained after it has fulfilled the purpose for which it was taken, or for which such information was derived, but shall not be used by any person except for purposes related to—

(a) the prevention or detection of crime;
(b) the investigation of an offence;
(c) the conduct of a prosecution; or
(d) the identification of a deceased person or of the person from whom the sample came’."

APPENDIX 2: SECTION 18 OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

“18. Prints, samples etc in criminal investigations

(1) This section applies where a person has been arrested and is in custody or is detained under section 14(1) of this Act.

(2) A constable may take from the person, or require the person to provide him with, such relevant physical data as the constable may, having regard to the circumstances of the suspected offence in respect of which the person has been arrested or detained, reasonably consider it appropriate to take from him or require him to provide, and the person so required shall comply with that requirement.

(3) Subject to subsection (4) below, all record of any relevant physical data taken from or provided by a person under subsection (2) above, all samples taken under subsection (6) below and all information derived from such samples shall be destroyed as soon as possible following a decision not to institute criminal proceedings against the person or on the conclusion of such proceedings otherwise than with a conviction or an order under section 246(3) of this Act.

(4) The duty under subsection (3) above to destroy samples taken under subsection (6) below and information derived from such samples shall not apply—

(a) where the destruction of the sample or the information could have the effect of destroying any sample, or any information derived therefrom, lawfully held in relation to a person other than the person from whom the sample was taken; or
(b) where the record, sample or information in question is of the same kind as a record, a sample or, as the case may be, information lawfully held by or on behalf of any police force in relation to the person.

(5) No sample, or information derived from a sample, retained by virtue of subsection (4) above shall be used—

(a) in evidence against the person from whom the sample was taken; or
(b) for the purposes of the investigation of any offence.

(6) A constable may, with the authority of an officer of a rank no lower than inspector, take from the person—

(a) from the hair of an external part of the body other than pubic hair, by means of cutting, combing or plucking, a sample of hair or other material;
(b) from a fingernail or toenail or from under any such nail, a sample of nail or other material;
(c) from an external part of the body, by means of swabbing or rubbing, a sample of blood or other body fluid, of body tissue or of other material.
(6A) A constable, or at a constable’s direction a police custody and security officer, may take from the inside of the person’s mouth, by means of swabbing, a sample of saliva or other material.

(7A) For the purposes of this section and sections 19 to 20 of this Act ‘relevant physical data’ means any–
(a) fingerprint;
(b) palm print;
(c) print or impression other than those mentioned in paragraph (a) and (b) above, of an external part of the body;
(d) record of a person’s skin on an external part of the body created by a device approved by the Secretary of State.

(7B) The Secretary of State by order made by statutory instrument may approve a device for the purpose of creating such records as are mentioned in paragraph (d) of subsection (7A) above.

(8) Nothing in this section shall prejudice–
(a) any power of search;
(b) any power to take possession of evidence where there is imminent danger of its being lost or destroyed; or
(c) any power to take prints, impressions or samples under the authority of a warrant.”

**SOURCES**


Guardian. (5 January 2006) *DNA of 37% of black men held by police* [Online]. Available at: [http://www.guardian.co.uk/race/story/0,11374,1678169,00.html](http://www.guardian.co.uk/race/story/0,11374,1678169,00.html) [Accessed 9 March 2006]


