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

1. **Item in private**: The Committee will consider whether to take item 7 in private.

2. **Police, Public Order and Criminal Justice (Scotland) Bill**: The Committee will take evidence on a proposed amendment to this Bill in relation to the retention of DNA samples from—
   
   Dr Helen Wallace, Genewatch UK
   
   John McLean, Director, Scottish Criminal Record Office
   
   And then from—
   
   Hugh Henry MSP, Deputy Minister for Justice, Ian Ferguson, Police Bill Team, and Carolyn Magill, Office of the Solicitor to the Scottish Executive, Scottish Executive

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

   S2M-4022 That the Justice 2 Committee recommends that the draft Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Amendment) (Scotland) Order 2006 be approved.

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

   S2M-4069 That the Justice 2 Committee recommends that the draft Community Justice Authorities (Establishment, Constitution and Proceedings) (Scotland) Order 2006 be approved.
5. **Subordinate legislation:** The Committee will consider the following negative instrument—

   The Management of Offenders etc. (Scotland) Act 2005 (Designation of Partner Bodies) Order 2006 (SSI 2006/63).

6. **Finance Committee inquiry into accountability and governance:** The Committee will consider a note by the Clerk.

7. **Legal Profession and Legal Aid (Scotland) Bill:** The Committee will consider possible candidates for appointment to the role of adviser.

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

Agenda Item 2

Written submission from Genewatch UK  J2/S2/06/8/1
Written submission from the Law Society of Scotland  J2/S2/06/8/2
Written submission from the Human Genetics Commission  J2/S2/06/8/3
Written submission from the UK Information Commissioner’s Office  J2/S2/06/8/4
Written submission from ACPOS  J2/S2/06/8/5
Written submission from Anthony Jackson  J2/S2/06/8/6
SPICe briefing on police retention of prints and samples  J2/S2/06/8/7
SPICe briefing on retention and destruction of samples taken in relation to criminal investigations  J2/S2/06/8/8
Note by Clerk (PRIVATE PAPER)  J2/S2/06/8/9

Agenda Item 3

Note by Clerk (including SSI and Explanatory Notes)  J2/S2/06/8/10

Agenda Item 4

Note by Clerk (including SSI and Explanatory Notes)  J2/S2/06/8/11

Agenda Item 5

Note by Clerk (including SSI and Explanatory Notes)  J2/S2/06/8/12

Agenda Item 6

Note by Clerk (including letter from the Finance Committee)  J2/S2/06/8/13

Agenda Item 7

Note by SPICe (PRIVATE PAPER)  J2/S2/06/8/14

Documents circulated for information only—

Letter from the Deputy Minister for Justice to the Justice 2 Committee on the Police, Public Order and Criminal Justice (Scotland) Bill, dated 15 March 2006

Forthcoming meetings—

- Tuesday 28 March 2006, 2pm, Committee Room 6
- Tuesday 18 April 2006, 2pm, Committee Room 1
Permanent retention of DNA: proposed amendment to the Police, Public Order and Criminal Justice (Scotland) Bill.

Written evidence to the Justice 2 Committee of the Scottish Parliament by GeneWatch UK.

16 March 2006

GeneWatch UK is a not-for-profit policy research group concerned with the science, ethics, policy and regulation of genetic technologies. Our aim is to ensure that genetics is used in the public interest. We appreciate the invitation to give evidence on the issue of the permanent retention of DNA by the police in Scotland.


More recently, we have analysed the report on the DNA Expansion programme published by the Home Office in January and conducted an investigation into research and non-routine operation uses of the National DNA Database (NDNAD). Since DNA profiles included in the Scottish DNA database are now routinely added to the National DNA Database (NDNAD), the governance of the NDNAD is also relevant to the proposed amendment.

GeneWatch’s position

GeneWatch UK recognises the important role played by DNA evidence in criminal investigations, but opposes the permanent retention of all DNA profiles and samples.

Blanket permanent retention of DNA profiles and samples:

- brings an increasing threat to ‘genetic privacy’ if information is revealed about health or family relationships, not just identity;
- creates a permanent ‘list of suspects’, including anyone arrested for a wide range of offences;
- increases the potential for discrimination (particularly against ethnic minorities) by permanently retaining DNA profiles and samples taken before an individual is charged, even when DNA evidence is not relevant to the investigation.

GeneWatch believes that a permanent list of everyone who has been arrested could be abused in future to limit people’s rights and freedoms (for example, to restrict access to jobs or travel documents, such as US visas). Time limits on the retention of records on the database provide an important safeguard, restricting the potential for misuse by future governments.

In addition, GeneWatch believes that additional safeguards are needed to:

- make the National DNA Database’s governing body more transparent and democratically accountable in Scotland;
- ensure the destruction of individuals’ DNA samples once an investigation is complete, after the DNA profiles used for identification have been obtained;
• end the practice of allowing controversial genetic research using the Database or samples.

The proposed amendment

The proposed amendment to the Police Bill removes an existing safeguard by allowing DNA profiles and samples to be retained permanently even if an individual is acquitted or never charged with an offence. In addition, it proposes that uses of these retained profiles and samples should be restricted to “purposes related to – (a) the prevention and 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”. Therefore, an important question is whether this safeguard is sufficient to protect privacy and rights and maintain trust in the police use of DNA.

Issues relevant to any decision on the proposed amendment are:

- The likely contribution to tackling crime of the permanent retention of DNA profiles and samples from people acquitted or not charged, including the possibility of errors;
- The potential for misuse, and the adequacy of the proposed restriction in terms of protecting privacy and rights;
- Impacts on public trust in the police use of DNA.

The current situation in England and Wales is relevant for two reasons. Firstly, DNA profiles and samples are already permanently retained in England and Wales as the result of two legislative changes (in 2001 and 2003) and the proposed amendment is intended to mirror this legislation. Second, DNA profiles from Scotland are exported to the National DNA Database (NDNAD) in England and will be permanently retained on the NDNAD if the proposed amendment is adopted.

Contribution to tackling crime

GeneWatch recognises the important role that DNA evidence can play in criminal investigations. However, we believe that it is important to distinguish between the role of DNA in a specific investigation and the role of retaining DNA profiles from individuals permanently on a database linked with the original DNA samples from which they were obtained. Provided DNA profiles are retained from crime scenes, taking an individual’s DNA sample and profile allows the profile to be checked against DNA profiles from all past crime scenes. Retaining DNA profiles from individuals allows them to be checked against DNA profiles from all future crimes but such blanket retention of all DNA profiles increases civil liberties concerns. Retention of DNA samples does not contribute to detecting crimes, because it is only the DNA profiles on the computer database that are used during an investigation.

For a number of reasons, it is impossible to quantify exactly the impact of the blanket permanent retention of DNA profiles in England and Wales on crime detections or successful prosecutions. This is partly because three major changes have occurred as part of the DNA Expansion Programme, all of which may affect the number of crimes detected using DNA:

- A change in practice in 2000 that meant that the police started collecting many more DNA samples from scenes of volume crime.
• A change in the law in England and Wales in 2001 that meant DNA profiles from people who had been charged but were subsequently acquitted or not proceeded against could be permanently retained.

• A change in the law in England and Wales in April 2003, which came into effect in April 2004, that meant DNA was collected on arrest rather than on charge. This affected both the numbers of individual profiles entered and the numbers permanently retained.

A further problem is that published figures and statements have repeatedly failed to distinguish between DNA matches and successful prosecutions and the relative merits of entering and permanently retaining people’s DNA profiles on the Database. This tends to exaggerate the contribution of the Database and its expansion to solving crime.

In the absence of a full independent assessment of impact of the DNA Expansion Programme in England and Wales, GeneWatch UK has published a detailed analysis of the January 2006 Home Office report “DNA Expansion Programme 2000-2005: Reporting achievement”. The main findings in the GeneWatch briefing are:

• The number of crimes detected using the DNA Database fell in 2004/05, when the DNA profiles of 124,347 people who had been arrested but subsequently not charged or cautioned were first retained in England and Wales.

• The success of the Database is determined largely by the number of DNA profiles collected from crime scenes, not by the number of individuals’ DNA profiles taken at police stations.

• The likelihood of matching a DNA profile from a crime scene to an individual’s DNA profile (the DNA detection rate) has not significantly increased despite the number of individuals’ DNA profiles in the Database expanding from 2 million (in 2002/03) to 3 million (in 2004/05). This appears to reflect a diminishing return from adding more people with no criminal convictions compared to retaining profiles from repeat offenders.

• Only 0.35% of crimes were detected using DNA in 2004/05 and this percentage has remained constant for the last three years. Most of these are volume crimes (such as burglaries and thefts). This number is an overestimate of the value of the Database, because only about half were new detections (i.e. had not already been made through other police work) and many detections do not lead to convictions.

Even if the Database expanded to include everybody in the population, it is unlikely to play a role in more than about 0.5% of crimes. This is because the number of cases that can be solved using DNA will always be limited by the number of crime scenes from which DNA profiles can be collected and the need for corroborating evidence. Reliance on ‘cold hits’ from the Database to introduce new suspects into an investigation is the opposite of an ‘intelligence-led’ approach to policing (which begins with other evidence and supports this evidence, where possible, with DNA). DNA matches often occur because a person has a legitimate reason to be at or near a crime scene and mistakes can also arise, as they do with fingerprints (for example, in the recent McKie case). If a full DNA profile is obtained the chances of a false match are very low. However, in 2003, the NDNAD Board stated that it expected one or two false matches to occur by chance over the next five years. If DNA at a crime scene is degraded, or only small amounts can be obtained, the likelihood of errors will increase.
Potential for misuse and impacts on privacy and rights

Keeping DNA profiles permanently is a form of ‘biosurveillance’ of the population on the Database\(^6\) which may be justified in some circumstances but could also be misused by the State. Unlike records on the National DNA Database, records on the Police National Computer are currently removed after fixed time periods, related to the seriousness of the offence and whether a person has been convicted or not.\(^7\) Therefore, a possible consequence of retaining individuals on the Database could be to produce a list of people who have been arrested, or to check whether a named individual has been arrested in the past, even if their record on the PNC has been erased. This type of information could be misused, for example to increase surveillance of people who have been arrested - potentially affecting employment, travel or other rights. DNA profiles may also be used to identify the relatives of a person on the Database.

In addition, retaining DNA samples is unnecessary for profile matching and significantly increases privacy concerns because DNA samples contain unlimited genetic information.\(^8\)

GeneWatch has recently completed an investigation of research and non-routine operational uses of the National DNA Database, which reveals that forensic scientists have used the DNA samples held in England and Wales for highly controversial research purposes. The findings were obtained through ‘Freedom of Information’ requests answered by the Board of the police National DNA Database. Our findings are relevant to the issue of whether restricting uses to “purposes related to the prevention or detection of crime” is an adequate safeguard.

Currently, DNA samples and profiles held in Scotland are not used for research. However, DNA profiles exported from Scotland to the National DNA Database may be used for research.\(^9\) There is a lack of transparency about such uses\(^10\) and GeneWatch has identified discrepancies between the response to our Freedom of Information request and the much more limited information supplied to the Scottish Parliament on 28 February 2006.\(^11\)

Previously, GeneWatch has identified one controversial research paper which attempts to link DNA profiles with ‘ethnic appearance’ as recorded on the Database.\(^12\) The Scottish DNA Database does not record the ethnic origin of people arrested or detained.\(^13\) However, there is no safeguard in the proposed amendment that would prevent records being selected using other categories, such as a person’s name.

In Scotland, only the Police Forensic Science Laboratories currently act as suppliers of DNA profiles to the Database and samples are not used for research.\(^14\) However, practices already adopted in England and Wales, such as the opening up of DNA profiling to commercial competition and the use of DNA samples for genetic research could be adopted in Scotland in the future. There is also no safeguard in the proposed amendment that would prevent this.

Impacts on public trust in police use of DNA

Until relatively recently the police use of DNA in England and Wales was viewed as largely positive. However, since April 2004, when the DNA of everyone arrested for a recordable offence began to be retained, the National DNA Database has become
increasingly controversial. Over 99,000 downloads of GeneWatch’s report on the National DNA Database have been made from our website since its publication, indicating considerable public interest in the issues raised. Recently, public concerns have been highlighted by revelations that the NDNAD now contains the DNA profiles of:

- 124,347 people who have been arrested and subsequently not been charged or cautioned with an offence;\(^\text{16}\)
- 24,000 juveniles (people under 18) who have never been charged, convicted or cautioned;\(^\text{16}\)
- more than a third of black men in the UK population.\(^\text{17}\)

As a result, there is an increase in the number of requests being made to Chief Constables for the removal of DNA and fingerprint records.\(^\text{18}\)

**Conclusions**

Important controls on DNA databases include time limits on the retention of individuals’ records (including DNA profiles) and DNA samples. The proposed amendment would remove these safeguards. In addition, the proposed restriction on uses to “purposes related to the prevention or detection of crime” is too broad to prevent misuse of retained DNA profiles and samples.

The police liaison officer for the Scottish Police DNA Database has expressed concerns that blanket retention of DNA could reduce public support and that: “It is arguable that the general retention of profiles from the un-convicted has not been shown to significantly enhance criminal intelligence or detection”.\(^\text{19}\) GeneWatch believes that this view is consistent with the available evidence from England and Wales that:

- blanket permanent retention of DNA has made little difference to crime detection rates;
- public concern about the Database has noticeably increased.

Further, the proposed amendment is premature, because:

- The English test case (the Marper case) on whether retention of DNA and fingerprints from the unconvicted breaches human rights has yet to be heard by the European Court of Human Rights;
- The 2005 recommendations of the House of Commons Science and Technology Committee have yet to be implemented (including a review of the impact of the National DNA Database on crime detection; research on public attitudes to sample retention; and the establishment of an ethics committee to oversee research).

**References**

9 Scottish Parliament Written Answer S2W-22759. 27 Feb 2006.
10 Scottish Parliament Written Answer S2W-22755. 21 Feb 2006.
11 Scottish Written Answer S2W-22758. 28 Feb 2006.
13 Scottish Parliament Written Answer S2W-22738. 6 Feb 2006.
14 Scottish Parliament Written Answer S2W-22737. 6 Feb 2006.
Dear Steven,

Police, Public Order and Criminal Justice (Scotland) Bill

Thank you for your e-mail concerning the amendments to the Police, Public Order and Criminal Justice (Scotland) Bill. I have taken the opportunity of circulating Mr Martin’s amendment to the members of the Society’s Criminal Law Committee for their consideration. Having looked at this matter it appears that the issues raised within the amendment focus on issues which were central to the Scottish Executive consultation issued during the summer of 2005. I have therefore attached to this e-mail a copy of the Committee’s response to those proposals and you will see that these cover a number of the issues raised in Mr Martin’s amendment.

Unfortunately, the Committee is not in a position to give evidence on 21st March but hopes that the information contained within this written evidence will be of assistance to the Justice 2 Committee. If there is any issue arising from the Memorandum of Comments, please do not hesitate to contact me and I will attempt to assist in whatever way I can.

Best wishes.

Yours sincerely

Mrs Anne Keenan
Depute Director
The Criminal Law Committee of the Law Society of Scotland ("the Committee") welcomes the opportunity of contributing to the Scottish Executive consultation, "Police Retention of Prints and Samples - Proposals for Legislation" and has the following comments to offer:

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?

The Committee agrees that the police should be able to retain prints and DNA samples provided that there are sufficient safeguards in place to ensure compliance with the European Convention of Human Rights ("ECHR").

The consultation document refers to the recent cases of R-v-Chief Constable of South Yorkshire Police (Respondent) ex parte LS and R-v-Chief Constable of South Yorkshire Police (Respondent) ex parte Marper (22 July 2004) decided by the House of Lords. In these cases, the House of Lords considered in detail submissions concerning the compatibility of English law authorising the retention of fingerprints and DNA samples and profiles with the ECHR. The court by a majority of 4:1 decided that the retention of
fingerprints and samples did not constitute a breach of Article 8(1) (“the right to privacy”)\(^1\) of the ECHR for the following reasons:

- A person can only be identified from a fingerprint or a sample after analysis by an expert or the use of sophisticated equipment or both;
- The person can only be so identified if there is another sample with which to compare the retained material;
- The retained material does not in itself reveal any information about the physical makeup, characteristics or life of the person to whom they belong;
- The use of the retained material is limited to purposes related to the prevention and detection of crime.

Even if it were accepted that there was a potential breach of Article 8(1), the Law Lords unanimously held that any infringement could be justified on the basis of Article 8(2)\(^2\).

Lord Steyn stated at paragraph 24 of the judgement:

“…respect for privacy of defendants is not the only value at stake. The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, victim and his or her family and the public”.

\(^1\) “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 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 House of Lords concluded that the action taken was justified on the basis of accurate and efficient law enforcement; and the increased database desirable as a proportionate response to the detection of serious crime.

The Committee agrees that the developments made in science in the areas of fingerprints and DNA represent valuable investigative tools for the prosecution authorities both in the prosecution of serious crime and in the exculpation of the innocent. However, it is important that in providing the legislative framework for retention, sufficient safeguards are also incorporated to balance the public interest in the effective investigation of crime with individual rights of privacy. Legislation should make it clear that retention of fingerprints and DNA samples will only be permitted where this is considered to be necessary for the detection, investigation and prosecution of crime.

On this basis, any legislation should be clear that the retention of such samples and prints are for the sole purpose of the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution.

In considering the issue of proportionality, the Committee has given some consideration to the situation in which an individual has been wrongly arrested or detained or has perhaps been the victim of mistaken identity. It could be argued that those individuals ought to be in no different position from those who have not been arrested or detained at all and accordingly, should not have their fingerprints or DNA retained.

The House of Lords gave some consideration to the suggestion that chief constables should have the discretion to determine which prints and samples will be retained and which will not. It was acknowledged that in practice this would mean retaining prints and samples from some suspects who were not convicted but not from others. It would also mean that cases would have to be considered in detail on an individual basis. The Law Lords concluded that such a proposal was unrealistic and impractical.
However, there may be some merit in creating a system whereby an individual who could establish that he or she had been wrongfully arrested or detained or the victim of a mistaken identity should have the power to apply to the court to have the prints or samples destroyed. The Committee would suggest that this could take place by way of summary application.

In addition, legislation could create a residual power allowing the court to make an order for destruction of prints or samples at the end of proceedings where this is considered appropriate having regard to the circumstances of the case. The discretion would lie with the trial judge to assess the issue on the basis of the evidence heard.

Such measures would ensure additional judicial protection for individual human rights whilst ensuring that the database of fingerprints and samples could be increased to promote the public interest in the detection and prosecution of serious crime. The balance of interests referred to by Lord Steyn could therefore be weighed appropriately.

The Committee notes that the decision of the House of Lords in the above cases has been referred to the European Court of Human Rights and that these cases have been communicated to the Member State. The Scottish Executive may wish to consider whether it would be appropriate to await the judgement of the European Court of Human Rights in this regard before proceeding with legislation.

1. 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?

Yes.

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?

Yes. However, if consideration is to be given to extending the use to which retained material can be put, there may be some merit in providing that the information can be used for the assistance of the police and prosecution in the investigation of sudden and serious deaths and for assisting in identifying unknown individuals. Subject to this limited extension, the Committee would agree that prints and samples should be retained for the purpose related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution.
Human Genetics Commission written submission regarding the DNA amendment to the Police, Public Order and Criminal Justice (Scotland) Bill lodged by Paul Martin MSP

I would like to begin by saying that Members of the Human Genetics Commission (HGC) are grateful for the opportunity to comment on the draft amendment to the Police, Public Order and Criminal Justice (Scotland) Bill lodged by Paul Martin MSP, which would allow for the retention of DNA on police databases where a case does not result in a conviction.

The HGC is the Government’s advisory body on current and potential developments in human genetics and the likely impact on human health and healthcare as well as the social, ethical, legal and economic implications. In considering national issues, the HGC adopts a UK perspective which includes taking account of legal and other differences between England, Scotland, Wales and Northern Ireland, and of the status of devolved and non-devolved matters. Our membership reflects UK-wide status and we also have Chief Medical Officer Representatives from England, Scotland, Wales and Northern Ireland sitting on the Commission.

The HGC set out its position in relation to the retention of samples where there is no conviction in August 2005, in its response to the Scottish Executive’s draft proposals on the collection and retention of DNA samples and fingerprints in Scotland. The first question of that consultation asked:

“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?”

In response to that question, we first made a distinction between the retention of DNA samples from the retention of DNA profiles. The HGC still holds the view set out in its report ‘Inside Information’, that there are differing privacy concerns between a DNA sample and a DNA profile. A profile contains no relevant medical or predictive genetic data. However, the stored DNA sample has the potential to be used for further, more intrusive, testing for purposes of identification, or for predictive profiling for physical, behavioural or racial characteristics. The HGC wishes to see a further discussion of the justification of the retention of samples, particularly for those not convicted of an offence. The Commission’s general view is that an assumption should be made that samples from those who are arrested and not charged or convicted should be destroyed when a successful profile has been obtained. Any proposal to routinely store such samples should be fully justified with regards to cost/benefit and to the legal and human rights concerns. If such storage is deemed to be essential, there may need to be additional safeguards to ensure that they are not used for other purposes without proper lawful reasons.

As I understand it, Mr Martin has tabled this amendment because he would like to bring Scottish legislation in this area in line with England and Wales. I would like to repeat the general point we made in August last year, in respect of key principles regarding the collection and retention of personal genetic information for forensic use. That is that we too would like the law in England and Wales and the law in Scotland to be identical so that those providing forensic services are clear about their duties in respect of retention. However, our preference would be that the unification be achieved the other way
around, that is, by changing the law in England and Wales on this issue to bring it in-line with Scotland’s position. In our response to the Scottish Executive’s consultation, I gave the example of our support of the Scottish Executive’s intention to keep the existing law relating to the collection and retention of fingerprints and samples provided voluntarily. In particular, we supported the caveat that consent to use samples and fingerprints provided voluntarily can be withdrawn at any time. Ideally, we would like the law in England and Wales to be changed so that it reflected Scottish law, not vice versa.

I enclose a copy of the HGC’s response to the Scottish Executive’s draft proposals on the collection and retention of DNA samples and fingerprints in Scotland for your interest.

I hope you find these comments useful. I would appreciate if you could let me know the findings of your Committee on this matter.

Yours sincerely,

Professor Stephen Bain
Chair, Identity Testing Monitoring Group
Human Genetics Commission
Response to Scottish Executive Consultation

I would like to begin by saying that Members of the Human Genetics Commission (HGC) were grateful for the opportunity to comment on the Scottish Executive’s draft proposals on the collection and retention of DNA samples and fingerprints in Scotland. As Chair of the HGC’s Identity Testing Monitoring Group, I have been asked to respond to the consultation on behalf of my fellow Commissioners.

The HGC strongly supports the work of the police and the existence of the National DNA database as a criminal intelligence tool. However, the Commission is of the view that robust safeguards must be in place to ensure that the collection, retention and police use of samples does not discriminate against Scottish citizens.

The HGC position in respect of the forensic use of personal genetic information is set out in our report ‘Inside Information – Balancing interests in the use of personal genetic data’ (May 2002). This report contains several recommendations to Government concerning appropriate ethical oversight of the National DNA Database and I enclose a copy for your interest.

You will see from the report that the HGC has long expounded the view that any proposals to change the law relating to the use of personal genetic information for forensic purposes should be subject to a full public debate in order to examine the ethical, consent and confidentiality issues. The Scottish public should be fully aware of any proposed legislative changes in this area.

My final general point before turning to the set questions is that, in respect of key principles regarding the collection and retention of personal genetic information for forensic use, the HGC would like the law in England and Wales and the law in Scotland to be identical so that those providing forensic services are clear about their duties in respect of retention. For example, as we make clear in our response to question 2 of this consultation, we support the Scottish Executive’s intention to keep the existing law relating to the collection and retention of fingerprints and samples provided voluntarily. In particular, we support the caveat that consent to use samples and fingerprints provided voluntarily can be withdrawn at any time. Ideally, the Commission would welcome a change in the law in England and Wales on this issue to bring it in-line with Scotland’s position.

Our thoughts on the three consultation questions follow.

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?

In order to respond to this question, the HGC would first wish to make a distinction between the retention of DNA samples from the retention of DNA profiles.

The HGC still holds the view set out in their report ‘Inside Information’, that there are differing privacy concerns between a DNA sample and a DNA profile. A profile contains no relevant medical or predictive genetic data. However, the stored DNA sample has the potential to be used for further, more intrusive, testing for purposes of
identification, or for predictive profiling for physical, behavioural or racial characteristics. The HGC wishes to see a further discussion of the justification of the retention of samples, particularly for those not convicted of an offence. The Commission’s general view is that an assumption should be made that samples from those who are arrested and not charged or convicted should be destroyed when a successful profile has been obtained. Any proposal to routinely store such samples should be fully justified with regards to cost/benefit and to the legal and human rights concerns. If such storage is deemed to be essential, there may need to be additional safeguards to ensure that they are not used for other purposes without proper lawful reasons.

**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?**

The HGC strongly support the Scottish Executive’s intention to keep the existing law relating to the collection and retention of finger prints and samples provided voluntarily. In particular, the HGC supports the caveat that consent to use samples and fingerprints provided voluntarily can be withdrawn 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 HGC welcome the Scottish Executive’s proposal to include a safeguard in the new Bill by requiring that all prints and samples retained by the police may 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 HGC views this proposal as vital, not only because it serves to safeguard individual liberties, but also because it ensures a level of public confidence in the database.

The Commission recognises that retained fingerprints and samples may be used for research and development purposes aimed at improving the detection and prevention of criminal activity. In the Commission’s view, it is conceivable that some research projects could prove valuable to this aim. However, it is essential that appropriate safeguards are in place to oversee the use of samples for this purpose. The establishment of an independent research ethics committee to approve such research would be an important measure in ensuring that samples were used appropriately and would serve to maintain public confidence in police use of personal genetic information.

We are aware that there are ongoing discussions in England and Wales concerning an amendment to the Criminal Justice Act 2004, which would allow the police to also use samples when searching for missing persons. The HGC broadly supports this proposal and responded to that effect as part of the Home Office consultation, ‘Consultation on Policing: Modernising police powers’ in November last year. A copy of that response is enclosed for your interest.
Whilst the circumstances leading to a person being missing may be related to a criminal offence, there might not necessarily be a criminal aspect to a person’s disappearance. We would then raise this as a possible reason for the police to speculatively search retained fingerprints or samples in future, which would fall outside your definition of “purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution.”

I hope you find these comments useful. We would appreciate being kept up to date on the progress of the consultation and the Police Bill.

Yours sincerely,

Professor Stephen Bain  
Chair, Identity Testing Monitoring Group  
Human Genetics Commission
Dear Alan,

Re: Consultation on Policing: Modernising police powers

Thank you for the opportunity to comment on the above document. I am replying on behalf of the Human Genetics Commission (HGC), an independent advisory body established to advise the UK Government on developments in human genetics, particularly their ethical, legal and social implications. We welcome your public consultation on plans to review police powers in order to meet community needs. Our comments on this consultation are focused on Chapter 6: Identification; and reflect discussions held at HGC’s September plenary meeting, and by the Commission’s Identity Testing Monitoring Group.

With regard to the use of speculative searches of the National DNA Database (paras. 6.14-6.15), HGC is broadly content with the development of a Missing Person’s DNA Database and the notion that police would need a separate authority to speculatively search these profiles against the National DNA database subject sample record and other profiles held by, or on behalf of, the police for identification purposes. There are however two caveats to this.

The first is that HGC would like some clarification on how the separate authority would operate and whether or not it would be lead by the ACPO Chair of the National DNA Database Board.

The second relates to the Missing Person’s DNA database and the questions around taking samples from a missing person’s genetic relatives. We would be concerned by there being any legal obligation for missing person’s genetic relatives to provide samples. The emphasis should be on requesting information and we would appreciate some clarification on this matter. In addition, as you may be aware, an area of interest to HGC is relationship testing, and the capacity of such testing to potentially reveal non-paternity. We feel that due consideration must be given to weighing up the value of the genetic information (i.e. identification of missing person) against the harm that the revelation of inadvertent information may do (e.g. revelation of non-paternity). We would suggest though that on balance, however, and with the suitable emphasis on the proper use of DNA testing, any possible harm would be outweighed by the potential benefit of such testing.
The final point we would like to make refers to the taking of DNA samples covertly (para. 6.19). In our report, Inside Information: Balancing interests in the use of personal genetic data, (May 2002; copy enclosed), we recommended that consideration be given to the creation of a criminal offence of the non-consensual or deceitful obtaining and/or analysis of personal genetic information for non-medical purposes (Chapter 3). This recommendation has now been taken on board in the new Human Tissue Act (2004). While we understand that such a law should not interfere unduly with police powers, we would like to seek some assurances of the circumstances under which such samples would be taken and clarification on what happens to samples after the completion of such an investigation. Finally, we believe that such circumstances would need to be governed via a tight set of regulatory and/or legislative controls.

We would appreciate being kept up to date on the progress of your work in this area.

Yours sincerely,

Dr Stephen Bain
Lead Member on Identity Testing
Human Genetics Commission
As the regulatory body for the Data Protection Act 1998 (DPA) throughout the UK, the Information Commissioner’s Office (ICO) is pleased to provide evidence to the Justice 2 Committee in relation to the amendment to the above Bill concerning the retention of DNA samples which was lodged by Paul Martin, MSP.

The Committee may be aware that the ICO responded to the Scottish Executive’s consultation on the Police Retention of Prints and Samples which was undertaken in the summer of 2005. Our view at that time was that we understood the need for a balance to be struck between privacy and protecting the public from crime, but we believed that the Executive’s proposals were excessive. Whilst Mr Martin’s proposed amendment may be less far-reaching than the Executive’s proposals (as it does not appear to extend to the retention of fingerprints), the concerns noted in our response to the Executive remain valid. As noted then, our view is that the retention of innocent persons’ samples would unfairly differentiate between innocent citizens who have had samples taken and those who have not. Those in the former category will be put under greater scrutiny and possibly subjected to invasions of privacy not experienced by the latter.

Notwithstanding that, it is difficult to see how DNA samples of some innocent persons (ie, those who have had samples taken) can be deemed to be more relevant to crime prevention and detection than those of other innocent persons (those who have not had samples taken). The retention of such samples would therefore appear to be excessive and our preferred position is that samples should be destroyed as soon as practical after a decision not to proceed with any charges is taken or once an accused is found not guilty. We are particularly alarmed that, as currently drafted, the amendment would allow indefinite retention of samples and believe that, at the very least, a finite retention period should be specified, perhaps varying according to the nature of the crime being investigated when the sample was originally obtained or to the age of the person whose sample has been taken (the Committee should note the concern raised in England recently about the retention of samples taken from children). Without the provision to destroy samples, and given the inter-generational links that can be established through DNA analysis, it is entirely possible that innocent people in future generations could be put under suspicion of a crime on the basis of the analysis of samples taken from innocent people in the current generation.

We also wish to note that, in the event of the amendment being passed, it is important to ensure that retained samples are not contaminated at any point and that degradation of samples does not occur. It is also necessary to ensure that any related profiling is accurate. Failure to do so may lead to “false positives” being obtained, leading to an innocent person being wrongly convicted of a crime. Recent events in Scotland have illustrated the potential for wrongly accusing innocent people through errors in fingerprint analysis and the same will be true for DNA analysis; clearly, it would be necessary to ensure that robust systems are introduced to minimise the possibility of miscarriages of justice arising.

Ken Macdonald
Asst Commissioner - Scotland
The Information Commissioner’s Office
Mr. Steven Tallach  
Assistant Clerk  
Justice 2 Committee  
Scottish Parliament  
Edinburgh  
EH99 1SP  

By email: steven.tallach@scottish.parliament.uk

Dear Mr Tallach

POLICE, PUBLIC ORDER AND CRIMINAL JUSTICE BILL  
PROPOSED AMENDMENT – DNA RETENTION

I refer to your correspondence dated 8 March 2006 in connection with the above subject which has been considered by members of the Crime Business Area and can now offer the following by way of comment.

The amendment proposed by Paul Martin MSP, is supported however, members would welcome the extension of the provisions to include all relevant physical data, including photographs and moving images, as detailed in Section 18 of the Criminal Procedure (Scotland) Act 1995.

I trust this information is of assistance to you

Yours sincerely

[Signature]

Chief Constable  
(Hon. Secretary)
Submission from Anthony Jackson on Paul Martin MSP’s proposed amendment to the Police, Public Order and Criminal Justice (Scotland) Bill on DNA

PERMANENT RETENTION OF DNA PROFILES AND SAMPLES

(in response to amendment 148 to police, public order and criminal justice bill, lodged by Paul Martin MSP)

Dear Committee Members,

The proposed amendment fundamentally changes the relationship of innocent people to the criminal justice system.

And yet, the policy was in no parties’ manifesto

It was not part of the partnership agreement

At the time of writing, it does not have Executive backing

Indeed the Executive has yet to respond to last years consultation, where there was almost total public opposition.

It also comes at a time before an appeal against the oft quoted House of Lords ruling (the Marper Case) is heard by the European Court of Human Rights.

And at a time when South of the border, public disquiet and opposition is growing to the same said policy. Instances are reported on a weekly basis of anxious parents trying to retrieve their innocent offsprings’ DNA. These have been catalogued and championed by the Conservative MP Grant Shapps, and his colleague Damien Green MP.

See http://www.grantshapps.org.uk/Remove%20DNA%20Profile.aspx

It is also worth noting that the policy in England and Wales was introduced very rapidly on the eve of the Iraq War, without proper public and parliamentary involvement, (and totally opposed by all non Government Parties), and only now are the full ramifications becoming apparent.

As I stated above, the proposed amendment fundamentally changes the relationship between innocent people and the criminal justice system. If a policeman makes a decision to arrest you, or your children, DNA will be taken and kept in perpetuity.

One would then hope that both the Executive and the Police would have full confidence in the legality and the oversight of any such scheme, and would have sought legal advice rather than proceeding on hunches;
Margaret Mitchell (Central Scotland) (Con): To ask the Scottish Executive what legal advice it has sought in respect of the Information Commissioner's response to the Executive's consultation on the retention of DNA profiles of persons arrested but not convicted of any offence.

(S2W-22725)

Cathy Jamieson:

We can confirm that we have considered the UK Information Commissioner’s consultation response and it is not thought that the policy proposals set out in the consultation paper *Police Retention of Prints and Samples: Proposals for legislation* would be in breach of the fairness requirement of the Data Protection Act 1998.

And would be leading the way in showing the general population the level of faith that they have in the database;

Margaret Mitchell (Central Scotland) (Con): To ask the Scottish Executive what proportion of serving police officers have voluntarily provided DNA samples for DNA profiles to be held in the Police Elimination Database.

(S2W-22723)

Cathy Jamieson:

As at 31 January 2006, there are a total of 1,574 personnel currently listed on the Scottish Police Elimination Database. 1,458 of these are police officers which is approximately 9% of serving police officers. The majority of these are thought to have provided their DNA sample voluntarily but precise figures are not available. The Police Elimination Database does not distinguish between samples from volunteers and samples from new recruits, who may be required to provide a sample for elimination purposes.

Thank you for your time,
Anthony Jackson
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.¹ Such prints and samples can be checked against existing records on relevant databases, and added to such databases for future reference. They must,
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 (eg 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,
violece 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:

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.

providing research and information services to the Scottish Parliament

5
“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.

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3 The case is discussed later in this briefing, under the heading of ‘Human rights’. providing research and information services to the Scottish Parliament
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
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).  

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.

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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)\(^7\)

\(^6\) 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.
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). 

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 [Accessed 9 March 2006]


COMMITTEE BRIEFING PAPER

RETENTION AND DESTRUCTION OF SAMPLES TAKEN IN RELATION TO CRIMINAL INVESTIGATIONS

INTRODUCTION

This paper has been prepared to assist the Justice 2 Committee in its consideration of provisions in section 18 of the Criminal Procedure (Scotland) Act 1995 (‘the 1995 Act’) dealing with police powers in relation to prints and samples (eg fingerprints and DNA samples). The section (in its current amended form) is reproduced at the end of this paper.

The SPICe briefing ‘Police Retention of Prints and Samples’¹ notes that, under section 18 of the 1995 Act, 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. However, section 18(3) of the 1995 Act generally provides that they must be deleted from databases and destroyed if the suspect is not convicted (or if the suspect is given an order of absolute discharge).²

DESTRUCTION OF SAMPLES

It has come to the attention of the Justice 2 Clerks and SPICe, during consideration of the issues covered by the above mentioned SPICe briefing, that there would appear to be a difference in the provisions relating to the destruction of samples, depending upon which power set out in section 18 of the 1995 Act is used to acquire such samples.

Section 18(6) of the 1995 empowers a constable, with the authority of an officer of a rank no lower than inspector, to take samples by various means. Section 18(6A) of the 1995 Act empowers a constable (or at a constable’s direction a police custody and security officer) to take samples from the inside of a person’s mouth by means of swabbing. The second provision is more limited in scope but does not require the authority of an inspector.

As noted above, section 18(3) of the 1995 Act generally provides for the destruction of prints and samples if a suspect is not convicted, etc. However, the subsection only refers to physical data (eg fingerprints) taken under section 18(2) and samples taken under section 18(6) of the 1995 Act. Thus, it may be argued that any samples

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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.
taken under powers contained in section 18(6A) of the 1995 Act are not covered by
the provisions on destruction.

Section 18(6A) of the 1995 Act was added by section 55 of the Criminal Justice
(Scotland) Act 2003. The Explanatory Notes to the 2003 Act\(^3\) state that:

“Section 55 amends the Criminal Procedure (Scotland) Act 1995 to remove the
requirement to obtain authorisation from an inspector before a police constable
can exercise compulsory powers to take a DNA sample by mouth swab, without
force. (...) Subsection (2) amends section 18 of the 1995 Act to:

- repeal subsection (6)(d) which includes mouth swabs among the methods
taking DNA samples that require the authorisation of an officer of at least
the rank of inspector; and
- insert a subsection (6A) which provides a new power for a constable or
police custody and security officer (at a constable’s direction) to take a DNA
sample by mouth swab, without the need for authorisation by a more senior
officer." (paras 293-295)

The Explanatory Notes do not indicate any intention to amend the previously existing
requirement that samples taken by means of mouth swab should be subject to the
destruction provisions applying to samples taken by other means. The Policy
Memorandum\(^4\) published along with the bill which became the Criminal Justice
(Scotland) Act 2003 states in relation to the relevant provisions of the bill\(^5\) that:

“Currently in Scotland a constable has power to take from persons detained
under section 14(1) of the Criminal Procedure (Scotland) Act 1995 or under
arrest and in custody fingerprints, palm prints or other prints and impressions
of an external part of the body as he reasonably considers it appropriate to take.
A constable can not take samples for DNA or other forensic analysis without the
authority of an inspector or above, even where the use of force is not required.
 Provision is to be made to allow such samples to be taken by mouth swab
without requiring authorisation from an inspector. More intrusive methods of
taking such samples, and the use of reasonable force to take samples by mouth
swab, will continue to require the authorisation of an inspector.

DNA samples are routinely taken on arrest, like fingerprints. This proposal
makes the relevant police powers more similar.” (paras 242-243)

Again there is no indication that it was intended that provisions on the destruction of
samples should be altered.

\(^3\) Explanatory Notes to Criminal Justice (Scotland) Act 2003 (2003 Chapter 7). Available at:

\(^4\) Criminal Justice (Scotland) Bill – Policy Memorandum. Available at:
http://www.scottish.parliament.uk/business/bills/billsPassed/b50s1pm.pdf.

\(^5\) See section 46 of the Criminal Justice (Scotland) Bill [as introduced].
SECTION 18 OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

"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.”

Frazer McCallum
SPICe Research
14 March 2006

Note: committee briefing papers are provided by SPICe for the use of Scottish Parliament committees and clerking staff. They provide focused information, or respond to specific questions of interest to committees, and are not intended to offer comprehensive coverage of a subject area.
JUSTICE 2 COMMITTEE

8th Meeting 2006 (Session 2)

Tuesday 21 March 2006

SSI title and number: The draft Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Amendment) (Scotland) Order 2006

Type of Instrument: Affirmative

Meeting: Tuesday 21 March 2006

Date circulated to members: Thursday 16 March 2006

Justice 2 Committee deadline to consider SSI: 27 March 2006

Deputy Minister for Justice to attend Justice 2 Committee meeting? Yes

SSI drawn to Parliament’s attention by Sub Leg Committee?: No

1. The Deputy Minister will attend this Committee meeting. The discussion will begin with an opportunity for members to ask any factual questions or ask for clarification, whilst officials are seated at the table with the Minister. The Deputy Minister will then be asked to move the motion to open the debate. The Committee will then formally debate the motion. Officials cannot take part in that debate. The debate is limited to a maximum of 90 minutes (Rule 10.6.3), but may be much shorter. At the end of the debate the Committee must decide whether or not to agree the motion and report to the Parliament accordingly.

2. 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.

Clerk to the Committee
15 March 2006
JUSTICE 2 COMMITTEE

8th Meeting 2006 (Session 2)

Tuesday 21 March 2006

SSI title and number: The Community Justice Authorities (Establishment, Constitution and Proceedings) (Scotland) Order 2006 (SSI 2006/draft)

Type of Instrument: Affirmative

Meeting: Tuesday 21 March 2006

Date circulated to members: Thursday 16 March 2006

Justice 2 Committee deadline to consider SSI: 27 March 2006

Deputy Minister for Justice to attend Justice 2 Committee meeting? Yes

SSI drawn to Parliament’s attention by Sub LegCommittee?: No

1. The Deputy Minister will attend this Committee meeting. The discussion will begin with an opportunity for members to ask any factual questions or ask for clarification, whilst officials are seated at the table with the Minister. The Deputy Minister will then be asked to move the motion to open the debate. The Committee will then formally debate the motion. Officials cannot take part in that debate. The debate is limited to a maximum of 90 minutes (Rule 10.6.3), but may be much shorter. At the end of the debate the Committee must decide whether or not to agree the motion and report to the Parliament accordingly.

2. 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.

Clerk to the Committee
15 March 2006
JUSTICE 2 COMMITTEE
8th Meeting 2006 (Session 2)
Tuesday 21 March 2006

SSI title and number: The Management of Offenders etc. (Scotland) Act 2005 (Designation of Partner Bodies) Order 2006 (SSI 2006/63)

Type of Instrument: Negative

Meeting: Tuesday 21 March 2006

Date circulated to members: Thursday 16 March 2006

Justice 2 Committee deadline to consider SSI: 27 March 2006

Motion for annulment lodged No

SSI drawn to Parliament’s attention by Sub Leg Committee: No

1. 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 of 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
3 March 2006
Finance Committee: Inquiry into Accountability & Governance

Note by the Clerk

Background
1. The Finance Committee Convener wrote to all Committee Conveners on 1 March inviting Committees to submit written evidence to an inquiry into accountability and governance. A copy of the letter is attached.

2. The focus of the inquiry is to examine concerns relating to the statutory independence of parliamentary commissioners and ombudsmen versus their accountability for expenditure of public funds. The Finance Committee has agreed the following broad remit for the inquiry:

- to examine the growth in the number of independent, regulatory and investigatory bodies and the associated growth in funds allocated since devolution;
- examine the adequacy of processes for setting and scrutinising the annual budgets of such bodies;
- examine the appropriateness of existing lines of accountability and how this process works in practice; and
- identify whether there are any potential overlaps in remits and responsibilities of independent, regulatory and investigatory bodies and any financial implications of such overlaps.

3. The deadline for submissions is 18 April 2006.

Possible Justice 2 Committee response

4. The Finance Committee letter sets out a number of questions. These questions are:

- Do you think there is any confusion or overlaps between the remits and responsibilities of the various commissioners and ombudsman (if appropriate, please give an example)
- The total budget for all parliamentary commissioners and ombudsman is around £6m. Do you believe this is too much, too little or just about right?
- How can we combine accountability of commissioners and ombudsman to Parliament with operational independence?
- Should Parliament or its Committees be able to influence the policy or work programme of commissioners or ombudsman or should this be a matter for the commissioners and ombudsman themselves?
- Should there be an identical model of accountability for all commissioners and ombudsmen? If so, would you favour common budgetary controls as a key feature of such a model?
- What are your views on the adequacy of existing budgetary controls on ombudsmen and commissioners? Is there any alternative to the model of having Commissioners and Ombudsman under the control of the SPCB?
• Is it possible to implement section B2 of the Paris Principles\(^1\) and retain suitable budgetary controls?
• The Executive has proposed setting up a Scottish Civil Enforcement Commission as an NDPB in the Bankruptcy and Diligence etc (Scotland) Bill to ensure its independence. Do you have any views about the establishment of Commissions by the Executive and are there alternative models that should be considered and how should budgetary control be exercised?

*The Committee may wish to work through these questions considering whether it has any comments to make under each heading.*

5. A couple of issues have arisen in recent evidence which the Committee may wish to consider in this context:

- the potential confusion identified by the Scottish Public Services Ombudsman between her office and the proposed new Police Complaints Commissioner

- the evidence which the Committee heard recently from the Scottish Prison Complaints Commissioner (SPCC) who identified the lack of a statutory basis for his office as a cause of problems, particularly in relation to securing access to SPS documentation and staff. The Commissioner also suggested that the lack of statutory footing made it less likely that the SPS would accept his formal recommendations. The Commissioner also suggested that he should be answerable solely to the Parliament and that he should not be able to be dismissed by the Scottish Executive.

**Finance Committee seminar**

6. The Finance Committee intends to hold an informal seminar on the afternoon of Monday 24 April and a representative of the Justice 2 Committee is invited to attend.

*Does the Committee wish to send a representative to this seminar?*

Clerk to the Committee
March 2006

\(^1\) Section B2 “The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the government it need not be subject to financial control which might affect this independence.”
Dear David

Finance Committee: Inquiry into Accountability and Governance

I am writing to you in your capacity as a Committee Convener to inform you of the Finance Committee's call for evidence on its inquiry into accountability and governance. The Committee would like to invite your Committee to submit evidence to this inquiry.

The Committee has previously raised concerns relating to the statutory independence of parliamentary commissioners and ombudsmen versus their accountability for expenditure of public funds including questioning whether there is a need for powers to be written into legislation that will afford the SPCB budgetary control over various commissioners.

Therefore, it wanted to undertake an inquiry which would look at these issues in more detail and would also consider other bodies which are set up to have some degree of independence to establish whether different accountability mechanisms exist and the reason for any differences.

The Committee is therefore interested not only in parliamentary-appointed commissioners but also Audit Scotland and other regulatory bodies which have a degree of independence over which the Executive has budgetary control, namely:

- The Office of the Scottish Charity Regulator
- Her Majesty’s Inspectorate of Education
- The Scottish Commission for the Regulation of Care
- The Standards Commission for Scotland and the Office of the Chief Investigating Officer
- Water Industry Commission for Scotland

Remit
The Committee agreed the following broad remit for this inquiry:
to examine the growth in the number of independent, regulatory and investigatory bodies and the associated growth in funds allocated since devolution;

• examine the adequacy of processes for setting and scrutinising the annual budgets of such bodies;

• examine the appropriateness of existing lines of accountability and how this process works in practice; and

• identify whether there are any potential overlaps in remits and responsibilities of independent, regulatory and investigatory bodies and any financial implications of such overlaps.

Written evidence
The Committee is specifically interested to hear from Committees who have had a role in establishing any of the commissioners or the SPSO, considered an annual report or oral or written evidence from any of these bodies, or has regular contact / working relations with commissioners, the SOSO or Audit Scotland.

The Committee would be grateful if you could set out the nature of your work relating to any of the commissioners, the SPSO or Audit Scotland in your submission and address the following questions:

• Do you think there is any confusion or overlaps between the remits and responsibilities of the various commissioners and ombudsman (if appropriate, please give an example)

• The total budget for all parliamentary commissioners and ombudsman is around £6m. Do you believe this is too much, too little or just about right?

• How can we combine accountability of commissioners and ombudsman to Parliament with operational independence?

• Should Parliament or its Committees be able to influence the policy or work programme of commissioners or ombudsman or should this be a matter for the commissioners and ombudsman themselves?

• Should there be an identical model of accountability for all commissioners and ombudsmen? If so, would you favour common budgetary controls as a key feature of such a model?

• What are your views on the adequacy of existing budgetary controls on ombudsmen and commissioners? Is there any alternative to the model of having Commissioners and Ombudsman under the control of the SPCB?

• Is it possible to implement section B2 of the Paris Principles and retain suitable budgetary controls?

• The Executive has proposed setting up a Scottish Civil Enforcement Commission as an NDPB in the Bankruptcy and Diligence etc

2 Section B2 “The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the government it need not be subject to financial control which might affect this independence.”
(Scotland) Bill to ensure its independence. Do you have any views about the establishment of Commissions by the Executive and are there alternative models that should be considered and how should budgetary control be exercised?

Should your Committee wish to make a submission to the inquiry, please send it in electronic format to the inquiry email address below:

accountability@scottish.parliament.uk

The deadline for submissions is 18 April 2006. For more information about the inquiry or to discuss your submission, please don’t hesitate to contact Rosalind Wheeler, Senior Assistant Clerk to the Committee, on 0131 348 5205 or at rosalind.wheeler@scottish.parliament.uk.

Written evidence submitted to the inquiry will be available to view online after the closing date for receipt of evidence.

Seminar
The Committee intends to hold an informal seminar on the afternoon of Monday 24 April at 2pm to inform the inquiry’s oral evidence sessions. The Committee would like to invite you, or a representative of your Committee, to attend this seminar. The purpose of this seminar will be to allow an informal discussion between members on how existing lines of accountability are operating in practice.

The Committee will also be inviting representatives of the Study Group on Public Officials of Parliament to attend to present information on its international studies on lines of accountability. In addition, the Committee will be inviting representatives of the House of Commons Public Administration Select Committee which has recently launched a similar inquiry covering UK ‘constitutional watchdogs’ to discuss the UK wide perspective.

The clerks to the Committee will be in touch in due course with details of the programme and practical arrangements for the seminar. In the meantime, I should be grateful if you, or the nominated member of your Committee, could confirm your availability to the clerks to the Committee by Friday 31 March 2006.

Oral Evidence
For information, the Committee intends to take oral evidence from the Executive, SCPA, SPCB and a selection of independent, regulatory and investigatory bodies towards the end of May or in early June.

Further Information
Additional information on this inquiry can be found at the Committee’s website at:

http://www.scottish.parliament.uk//business/committees/finance
I also attach a copy of the Committee’s press release on the inquiry for your information.

Yours sincerely

Des McNulty
Convener
Finance Committee