



**THE LAW SOCIETY
of SCOTLAND**
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The Scottish Government- The Acquisition and Retention of DNA and Fingerprint Data in Scotland.

The Law Society of Scotland's Response

November 2008

INTRODUCTION

The Criminal Law Committee of the Law Society of Scotland (“ The Committee “) welcomes the opportunity to comment on the Scottish Government’s Consultation entitled “The Acquisition and Retention of DNA & Fingerprint Data in Scotland” and has the following points to make.

GENERAL COMMENTS

The Criminal Law Committee responded to the Scottish Executive’s Consultation Paper entitled “Police Retention of Prints and Samples – Proposals for Legislation” in August 2005 and also responded in January 2008 to the Review commissioned by the Scottish Government and carried out by Professor James Fraser, Director of the Centre of Forensic Science at Strathclyde University and Chair of the European Academy of Forensic Science. At that time, the Committee took the view that, given the implementation of the three-year rule with regard to the retention period for fingerprint and DNA Data where proceedings had been instituted but had not resulted in a conviction (section 18A (4) of the Criminal Procedure (Scotland) Act 1995 refers) there had been insufficient period of time with in which to evaluate properly the three-year rule.

The Committee remains of the view that fingerprints and DNA samples should be retained provided always that there are sufficient safeguards in place to ensure compliance with the European Convention of Human Rights.

In this respect, the Committee notes the challenge to the European Court of Human Rights with reference to the cases of is the 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.

The Committee awaits with interest the decision of the European Court of Human Rights in these cases as they will undoubtedly have an effect upon any Scottish Government legislative proposal with regard to Fingerprint and DNA Retention.

SPECIFIC COMMENTS

Views are accordingly invited on the following proposal;

Retention Periods for DNA Samples

Comments are invited on the following proposal;

Accept Professor Fraser's recommendation that there should be no change in the present arrangements. On that basis, DNA samples would continue to be retained from all convicted persons but would be retained from unconvicted persons only if they have had DNA taken from them following an arrest or detention on suspicion of having committed an offence and if proceedings were instituted against them for a relevant sexual or violent offence. Such DNA samples would be retained for a period of three years, and the relevant chief constable would then have discretion to apply to a Sheriff for an extension for up to two years at the end of that period.

The Committee would agree with Professor Fraser's recommendation but note that there has been some ambiguity as to when proceedings are instituted. The Committee would welcome a clear definition of "instituted" as referred to in section 18 A (2) of the Criminal Procedure (Scotland) Act 1995 as there should be a clear rule as to when DNA samples should be retained in respect of unconvicted persons.

Retention Period for Fingerprints

Comments are invited on the following proposal;

The Government accordingly proposes to bring forward provision in the forthcoming Criminal Justice and Licensing Bill for the retention of fingerprint and any other forensic data in respect of persons proceeded against but not convicted on an offence on exactly the same basis as DNA samples, as set out in section 18 A of the 1995 Act

The Committee would welcome this proposal on the basis that the acquisition and retention regime for fingerprints should reflect that of DNA given that the primary purpose of both DNA and fingerprints is the same i.e. to assist the police with the investigation of an offence by identifying individuals who are connected with criminal inquiries. The Committee accordingly agrees with Professor Fraser that it is logical that legislation and procedures should also be the same.

Children's Hearings

Comments are invited on the following options;

No change in the present arrangements, on the basis that it is not appropriate as a matter of principle to take and retain DNA and fingerprints from children who are dealt with by children's hearings as opposed to the criminal courts.

Accept Professors Fraser's recommendation that there should be a new power to take and retain DNA and fingerprints from children who are dealt with by Children's Hearings and are found to have committed a relevant sexual or violent offence, or accept that

they have done so. The Government does not however believe that it would be practical or appropriate to distinguish between assaults on the basis of the Reporter's marking; there is no distinction between "grades" of assault in the existing definition of violent offences for the purposes of DNA retention and we do not think it is right or necessary to introduce such a distinction. Views are therefore also invited on whether, if this option was adopted, assaults should be included or excluded in their entirety; and whether powers of retention should be confined to more serious sexual offences such as rape or indecent assault and exclude for example, non-consensual sex between children who are both under the age of sixteen;

Accept Professor Fraser's recommendation in part by introducing power to take and retain DNA and fingerprints from children who are dealt with by Children's Hearings and are found to have committed a relevant sexual or violent offence, or accept that they have done so, for a period of three years only. The same issue would rise whether assaults should be included or excluded in their entirety; and about the definition of sexual offences for this purpose. This approach would reflect the potential gravity of sexual or violent offences but also maintain a balanced approach as powers to retain DNA and fingerprints in relation to children who are dealt with by Children's Hearings would also be subject to a strict time limit.

The Committee would favour no change to the present arrangements on the basis of the principle referred to above that it is not appropriate to take and retain DNA and fingerprints from children who are dealt with by Children's Hearings as opposed to the criminal courts. The Committee would highlight that a disposal from the Children's Hearing system is not to be regarded as a "conviction" and that this reflects the long standing principle under the Children's Hearing system that the overriding issue is the welfare of the child and that proceedings are accordingly not criminal in nature.

The Committee would also highlight paragraph 5.3 of the Consultation paper and would agree that in practice more serious sexual and violent offences would be the subject of Criminal proceedings rather than being referred to a Children's Hearing.

The Committee is of the view that should either the second or third option be adopted, then there should be sufficient judicial scrutiny in place before a decision to retain DNA and fingerprints from children is made. Accordingly, the question as to whether DNA and fingerprints from children who are dealt with by the Children's Hearings should be retained should be a matter for a Judge or Sheriff to determine having heard all parties with an interest in the matter. With particular reference to the second option the Committee agrees that it would not be appropriate for a Reporter to "grade" assaults and assaults should therefore be excluded in their entirety, powers of retention should be confined to more serious sexual offences such as rape or indecent assault (which may be subject of criminal proceedings in any event) and excluded in relation to e.g. consensual sex between children who are both under the age of consent.

Fixed Penalty Notices and other Conditional Offers

Views are invited on the following proposals.

DNA and fingerprint samples taken from persons arrested or detained on suspicion of having committed an offence and who subsequently accept an offer by the Procurator Fiscal or the Fiscal find compensation order, combined order, or work order should be retained indefinitely, in the same way that they are in respect of persons convicted of an offence; or alternatively.

DNA and fingerprint samples taken from persons arrested or detained on suspicion of having committed an offence and who subsequently accept an offer by the procurator fiscal of a fiscal fine, compensation order, combined order or work order should be retained for a period of three years, with discretion for a chief constable to apply to a Sheriff for an extension for up to two years at the end of that period.

The Committee would question the need to retain DNA and fingerprint samples from a person who has been arrested or detained on suspicion of having committed an offence and who subsequently accepts a conditional offer either indefinitely or for a period of three years on the basis that the matter has been dealt with by a conditional offer and this should not be

distinguished from situations where a person was arrested or detained in the first instance. The Committee notes that the court's authority should be sought where samples have not been taken following upon arrest or detention.

With reference to the Committee's comments above, should the Government adopt either proposal to retain indefinitely or retain for a period of three years in respect of persons arrested or detained on suspicion on having committed an offence and who subsequently accept a direct measure, the question of retention should be determined by the court having heard all interested parties.

Governance Accountability and Transparency

SPSA should publish regular data and reports on the operation of both the DNA and fingerprint data bases; and such data and the reports should be subject to independent oversight.

The Committee agrees with this proposal.

The Scottish Government should work with the Association of Chief Police Officers in Scotland (ACPOS) with a view to promoting greater consistency in the use of existing powers under section 18 of the 1995 Act to take DNA and fingerprint samples from persons who are arrested or detained on suspicion of having committed an offence:

The Committee agrees with this proposal

SPSA should review practice on the weeding of records held on the DNA and fingerprint databases with a view to drawing up and publishing clear and consistent guidelines in respect of old records or those which relate to minor offences;

The Committee agrees with this proposal on the basis that, once SPSA's practice has been reviewed, a proper system is put in place.

The purposes for which DNA and fingerprint data can lawfully be used should be set out in statute. It is envisaged that these purposes would include the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution, and the identification of a deceased person or body part.

The Committee agrees with this proposal.

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