



POLICE RETENTION OF PRINTS AND SAMPLES

PROPOSALS FOR LEGISLATION



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scotland
SCOTTISH EXECUTIVE



**POLICE RETENTION OF PRINTS AND SAMPLES
PROPOSALS FOR LEGISLATION**

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Ministerial Foreword



As Justice Minister I am committed to doing everything I can to help the police solve crimes and bring criminals to justice. We are already working to put more police on the streets and ensure they have the tools to do their job effectively. I also want to be sure that the police are using modern technology and forensic science to their full potential in the fight against crime.

In 2001, the law was changed in England and Wales to enable the police there to retain DNA and fingerprints taken from all those who were arrested. Previously they could only retain DNA and fingerprints taken from people who were convicted. This change has had some significant results. Since 2001, more than 10,000 offences have been linked to profiles on the DNA database which under the previous legislation would have been deleted. These include 88 murders, 45 attempted murders, 116 rapes, 62 other sexual offences, 91 aggravated burglaries and 94 offences of the supply of controlled drugs.

This change in the law has clearly had an impact in England and Wales. Police in Scotland are now asking for a similar change to be made here; they believe it would help them clear up more crimes.

There may be differing perspectives on this issue. On the one hand, it is important to consider the interests of everybody in our communities who want crimes solved, the innocent cleared and perpetrators brought to justice. The police say (and the evidence from England and Wales agrees) that the proposals set out in this paper would help that happen. And no law-abiding citizen should have anything to fear; as the information would only be used in the investigation of crimes. On the other hand, I recognise that some may have doubts about the civil liberty implications of police retaining prints and samples taken from people who are not then convicted of an offence. That is why I want to have a full and open debate on these proposals to ensure that the decision we take is the right one for Scotland.

I look forward to engaging in that debate and hearing your views.

A handwritten signature in black ink that reads "Cathy Jamieson". The signature is written in a cursive style with a horizontal line at the end.

CATHY JAMIESON MSP
Minister for Justice

1. Introduction

1.1 This consultation paper seeks views on proposals to enable the police to retain all 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 prints and samples would only be used for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution.

1.2 These proposals could be taken forward through the Police (Scotland) Bill.

Responding to this consultation

1.3 **Please respond by Tuesday 13 September and be sure to include the Respondent Information Form attached at Annex B (page 11) with your response.**

1.4 Responses should be sent to:

PoliceBill@scotland.gsi.gov.uk

or

Vicky French
Police Bill Team
Scottish Executive Justice Department
Area 1W
St Andrew's House
Regent Road
Edinburgh
EH1 3DG

1.5 If you have any queries contact Vicky French on 0131-244-3453. Further information about Scottish Executive consultation process is set out in Annex A (page 9).

Handling your response

1.6 We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the **Respondent Information Form** attached at Annex B (page 11) as this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential, subject to paragraph 1.7, and we will treat it accordingly.

1.7 All respondents should be aware that the Scottish Executive is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

2. Background

Prints and samples taken from suspects

2.1 It is standard practice for the Scottish police to take prints and samples (usually fingerprints and DNA samples) from people during their investigations into offences. They can take them from anybody who they have arrested or detained on suspicion of committing an imprisonable offence. Once they have taken them, the police can check the prints and samples against the databases (e.g. to see if the suspects' DNA or fingerprints had been found at another crime scene) and add them to the databases for future reference. However, if the person is not then convicted of the offence, or is given an order of absolute discharge, the prints and samples must be deleted from the databases and destroyed.

2.2 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.

2.3 Not all of the deleted prints and samples are deleted because the people they were taken from were acquitted or charges against them were dropped. A large proportion are in fact deleted because they were taken from individuals who were given a disposal which is not a court sentence (e.g. Children's Hearings, Fixed Penalty Notices and Procurator Fiscal fines). In the case of young people who exhibit offending behaviour in particular, this can mean that a series of profiles are taken from the same person, but have to be deleted each time. Police forces find this practice to be expensive and do not believe that it is cost-effective.

2.4 Until recently, the legal position in England and Wales was similar to that in Scotland. However, in 2001 the law in England and Wales was changed (through section 82 of the Police and Criminal Justice Act 2001) so that the police there could retain prints and samples taken from suspects whether or not the suspects were later convicted of an offence. Since then a significant number of DNA profiles that are only held because of the change in the law have been linked with DNA profiles recovered from crime scenes. In addition, the House of Lords has considered an English test case and ruled unanimously that the retention of DNA profiles without conviction is compatible with the European Convention on Human Rights (this point is discussed further in section 4).

2.5 In the light of these developments we set out proposals in section 5 that would reform the law on the retention of prints and samples in Scotland, to enable the police here to retain all prints and samples taken from those who are arrested or detained on suspicion of committing an imprisonable offence whether or not they are later convicted of that offence (this would be essentially the same position as the one in place in England and Wales).

Prints and samples taken voluntarily

2.6 Prints and samples can also be taken from people voluntarily during an investigation into a specific offence (e.g. a sweep of all people in a particular area to eliminate them from police enquiries). The person they were taken from may limit their consent for the use of their prints and samples to the investigation and prosecution of that specific offence only. Prints and samples taken in this way may be checked against DNA and fingerprints taken from any crime scene and may be retained by the police but only with the written consent of the person from whom they were taken. Otherwise they must be destroyed. If the person does give consent for their samples to be retained, they have the right to withdraw that consent in writing at any time. The Executive has no plans at present to amend the law on prints and samples given voluntarily.

3. Effectiveness of the retention policy in England and Wales

3.1 Officials at the National DNA Database have provided an update of the number of DNA profiles retained in England and Wales since 11 May 2001 (when the law was changed there) that would have had to have been removed from the database under the old law, and the number of offences which had been linked to these profiles:

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.

3.2 It is not possible to ascertain how many convictions were secured because of the new law on DNA retention, if for no other reason than it is impossible to know for certain why a jury makes a decision in any particular case. Police investigations and prosecutions are achieved through integrated criminal investigation, not through any one tool (such as DNA and/or other prints and samples) alone. However, although exact numbers are not available, a DNA match will have been useful in all of these investigations, substantially enhancing the efficiency of the investigations and in some cases will have been key to a successful outcome. Thus, widening DNA retention could help solve a significant number of offences committed in Scotland, including some very serious crimes. DNA retention can also be very effective in clearing the innocent from any involvement in a particular offence.

3.3 It remains the case that around 190,000 out of 198,000 DNA profiles, retained by the police under the new legislation, have not been linked with any subsequent crime scene. It could therefore be argued that the great majority of these profiles have been retained on the database for no purpose. However, there is also no evidence that the people from whom they were taken have in any way suffered or been discriminated against, as a result of their profiles being retained in this way.

4. Human Rights issues – House of Lords ruling

4.1 On 22 July 2004, the House of Lords ruled on an English test case brought by two individuals who, separately, had been arrested and charged with committing criminal offences. Neither individual was convicted and both subsequently demanded that the police destroy the DNA samples and fingerprints which had been taken from them.

4.2 The applicants argued that as they had not been convicted of a criminal offence the retention of their DNA samples and fingerprints violated their right to privacy under Article 8(1) of the European Convention on Human Rights (ECHR). The House of Lords held (by a 4:1 majority on this issue) that there had been no violation to the privacy of the appellants under the Convention. Their reasoning was that DNA samples and fingerprints do not per se provide information about the life, characteristics or about the physical make up of a person. A person can only be identified from prints or samples by an expert or with the use of sophisticated equipment.

4.3 The House of Lords went on to rule (unanimously) that even if there had been an infringement of the applicant's right to privacy, the retention of their DNA samples and fingerprints was objectively justified by the fact it was in the public interest to establish a large and wide-reaching database to prevent and detect crime and to assist in eliminating potential suspects. The Law Lords stressed that the legislation provided a safeguard by requiring that any retained DNA samples and fingerprints could only be used for the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution.

4.4 As there was no breach of the applicants' privacy, the House of Lords rejected their arguments that the retention of their DNA samples and fingerprints amounted to discrimination under Article 14 of the ECHR.

4.5 The applicants argued that retaining samples taken from people who had been arrested but not subsequently convicted is discriminatory as other people who have never been arrested (and who had therefore never had prints or samples taken from them) are no more innocent in the eyes of the law yet their prints and samples are not being retained.

4.6 The Law Lords again rejected this argument. They held that the difference in the position of people who had not been arrested and who have never had prints and samples taken from them as compared to those who had been arrested and given samples, was not one of the grounds in Article 14 which has to be engaged to constitute discrimination under the Convention.

4.7 The court also noted that the two groups were not comparable in this case because prints and samples have been lawfully taken from the first group in the course of criminal investigations and were lawfully held by the police. For the second group this had not happened. People who have been arrested and then not convicted were not in an analogous position with those who had never been arrested. The first group had already been treated differently and for that reason the Law Lords held that retention of their prints and samples was not discriminatory.

4.8 The Law Lords unanimously ruled that the retention of the DNA samples and fingerprints taken from individuals in the course of an investigation who had not subsequently been convicted of a criminal offence was lawful, proportionate and not in contravention of the European Convention on Human Rights.

Retention of profiles on a case-by-case basis

4.9 A claim was made by the lawyers representing the applicants in this case that Chief Constables should have discretion as to which prints and samples should be retained. They suggested that somebody should carry out an examination of the circumstances of each case to determine whether the prints and samples taken from the suspect should be retained. In practice, this would mean retaining prints and samples taken from some suspects who were not convicted but not others. This would presumably be based on the seriousness of the alleged offence and perhaps some assessment of the strength of the prosecution case.

4.10 However, as even those who support this alternative have admitted, it would mean that thousands of cases would have to be examined on an individual basis by a large number of decision-makers. It would most likely involve the police in interminable and invidious disputes (with individual decisions subject to judicial review) about the circumstances of offences of which a suspect has been cleared. It would in effect mean someone deciding which people who had been acquitted were more likely to be guilty than other people who had been acquitted. This is, as the Law Lords pointed out, unrealistic and impractical.

Safeguards to prevent use of prints and samples for purposes not connected to solving crime

4.11 Concern was raised in the case put to the Law Lords that the retention of prints and samples held by the police was an infringement of Article 8(1) of the ECHR because this information could be used for alternative purposes which are not connected to solving crime. The Law Lords dismissed that argument in light of the safeguards set out in the English legislation which provides that:

“the fingerprints or samples... shall not be used by any person except for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution.”

4.12 The Law Lords considered this provision to be a good and sufficient safeguard against misuse of the prints and samples. We would propose to mirror this in any Scottish legislation.

5. Proposals for Scotland

5.1 The indications from England and Wales are that retention of prints and samples taken from all those who are arrested (whether or not they are later convicted) could be a valuable tool for the police in detecting crime, prosecuting offenders and clearing the innocent. The House of Lords has ruled unanimously that

the retention of prints and samples taken from people in the investigation of an offence who are not subsequently convicted, is compatible with the European Convention on Human Rights.

5.2 In the light of these developments, we invite your views on whether the Executive should legislate in Scotland to give the police the power to retain all 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 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?

5.3 The Executive has no plans at present to make any changes to the law on prints and samples which are provided voluntarily (in the circumstances discussed in paragraph 2.6 above).

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?

5.4 We will maintain the current safeguards in place at the Scottish DNA database and the Scottish Fingerprint Service to ensure risks of errors are minimised and to keep these safeguards under review to ensure they continue to provide the best safeguards possible.

5.5 We also propose to include a safeguard in the legislation 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.

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?

Annex A – Scottish Executive Consultation Process

This consultation, and all other Scottish Executive consultation exercises, can be viewed online on the consultation web pages of the Scottish Executive website at <http://www.scotland.gov.uk/consultations>. You can telephone Freephone 0800 77 1234 to find out where your nearest public internet access point is.

The Scottish Executive now has an email alert system for consultations (SEconsult: <http://www.scotland.gov.uk/consultations/seconsult.aspx>). This system allows stakeholder individuals and organisations to register and receive a weekly email containing details of all new consultations (including web links). SEconsult complements, but in no way replaces SE distribution lists, and is designed to allow stakeholders to keep up to date with all SE consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register.

Next steps in the process

Where respondents have given permission for their response to be made public (see the attached Respondent Information Form), these will be made available to the public in the Scottish Executive Library by 11 October 2005. We will check all responses where agreement to publish has been given for any potentially defamatory material before logging them in the library or placing them on the website. You can make arrangements to view responses by contacting the SE Library on 0131 244 4552. Responses can be copied and sent to you, but a charge may be made for this service.

What happens next?

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us reach a decision on police retention of prints and samples. We aim to issue a report on this consultation process by 11 October 2005.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to Vicky French at the address in the introduction section.

General Information about Scottish Executive consultations

Consultation is an essential and important aspect of Scottish Executive working methods. Given the wide-ranging areas of work of the Scottish Executive, there are many varied types of consultation. However, in general, Scottish Executive consultation exercises aim to provide opportunities for all those who wish to express their opinions on a proposed area of work to do so in ways which will inform and enhance that work.

The Scottish Executive encourages consultation that is thorough, effective and appropriate to the issue under consideration and the nature of the target audience.

Consultation exercises take account of a wide range of factors, and no two exercises are likely to be the same.

Typically Scottish Executive consultations involve a written paper inviting answers to specific questions or more general views about the material presented. Written papers are distributed to organisations and individuals with an interest in the issue, and they are also placed on the Scottish Executive web site enabling a wider audience to access the paper and submit their responses¹. Consultation exercises may also involve seeking views in a number of different ways, such as through public meetings, focus groups or questionnaire exercises. Copies of all the written responses received to a consultation exercise (except those where the individual or organisation requested confidentiality (which will also be subject to any Freedom of Information request)) are placed in the Scottish Executive library at Saughton House, Edinburgh (K Spur, Saughton House, Broomhouse Drive, Edinburgh, EH11 3XD, telephone 0131 244 4565).

All Scottish Executive consultation papers and related publications (e.g., analysis of response reports) can be accessed at: [Scottish Executive consultations](http://www.scotland.gov.uk/consultations) (<http://www.scotland.gov.uk/consultations>)

The views and suggestions detailed in consultation responses are analysed and used as part of the decision making process, along with a range of other available information and evidence. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

Final decisions on the issues under consideration will also take account of a range of other factors, including other available information and research evidence.

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

¹ <http://www.scotland.gov.uk/consultations>

Annex B – Respondent Information Form: *Police Retention of Prints and Samples*

Please complete the details below and attach it with your response. This will help ensure we handle your response appropriately:

Name:

Postal Address:

Consultation title: *Supporting Police, Protecting Communities: Proposals for Legislation*

1. Are you responding as: (please tick one box)
- | | | |
|-------------------------------------------------|--------------------------|--------------|
| (a) an individual | <input type="checkbox"/> | (go to 2a/b) |
| (b) on behalf of a group or organisation | <input type="checkbox"/> | (go to 2c) |

2a. Individuals:

Do you agree to your response being made available to the public (in SE library and/or on SE website)?

- | | |
|----------------------|--------------------------|
| Yes (go to 2b below) | <input type="checkbox"/> |
| No, not at all | <input type="checkbox"/> |

2b. Where *confidentiality is not requested*, we will make your response available to the public on the following basis (please tick one** of the following boxes)**

- | | |
|--------------------------------------------------------------|--------------------------|
| Yes, make my response, name and address all available | <input type="checkbox"/> |
| Yes, make my response available, but not my name or address | <input type="checkbox"/> |
| Yes, make my response and name available, but not my address | <input type="checkbox"/> |

2c On behalf of groups or organisations:

Your name and address as respondees **will be** made available to the public (in the SE library and/or on SE website). Are you content for your response to be made available also?

- | | |
|-----|--------------------------|
| Yes | <input type="checkbox"/> |
| No | <input type="checkbox"/> |

3. Sharing responses/future engagement

We will share your response internally with other SE policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for the Scottish Executive to contact you again in the future in relation to this consultation response?

- | | |
|-----|--------------------------|
| Yes | <input type="checkbox"/> |
| No | <input type="checkbox"/> |



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