

ACQUISITION AND RETENTION OF DNA
AND FINGERPRINT DATA IN SCOTLAND

ACKNOWLEDGEMENTS

I wish to thank the following individuals for information and advice in preparing this report: Paul Allen, Police and Community Safety Directorate in the Scottish Government; Gordon Watt, Children, Young People and Social Care Directorate in the Scottish Government; Professor Robin Williams, University of Durham; Professor Kenneth Norrie, University of Strathclyde; Professor Nick Fyfe, Scottish Institute for Policing Research.

A special thank you is due to my Personal Assistant Lorraine Stewart.

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June 2008

TERMS OF REFERENCE

“To review the operation and effectiveness of the legislative regime governing police powers regarding the acquisition, use and destruction of forensic data in relation to:

1. individuals who are prosecuted for a relevant sexual or violent offence, but not convicted (i.e. where criminal proceedings are instituted but conclude (a) prior to a verdict, or (b) with the accused being acquitted with a verdict of not guilty or not proven; or (c) with the accused being acquitted on grounds of insanity);
2. individuals who, in being dealt with by a children’s hearing, accept that they have committed a relevant sexual or violent offence, or are found by a sheriff to have committed such an offence; and

taking account of:

- the views of relevant stakeholders; and
- available information; and
- experience elsewhere;

to identify proportionate options for reforming Scots law, by making appropriate provision for a temporary delay in the destruction of such data, in order to enhance crime prevention and detection capability;

and to report to the Scottish Government within 6 months.”

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EXECUTIVE SUMMARY

This review examines the current legislation and practices in relation to the acquisition and retention of fingerprint and DNA data in Scotland. Three main issues were under consideration:

1. Given that law and practice in relation to DNA and fingerprints differs, should these be brought into line?
2. For those who have criminal proceedings initiated against them for relevant sexual or violent offences but are not convicted; is the current regime for temporary retention of samples appropriate and effective?
3. In relation to individuals who are dealt with by Children's Hearings for relevant sexual or violent offences, is the current law (which does not provide for the sampling or retention of forensic data) appropriate?

The review took into account views, information and data from a wide range of stakeholders. Those directly consulted included the police service, police authorities, police service providers, organizations involved with Children's Hearings, legal organizations and associations, academic associations, organizations representing victims of crime and special interest groups such as the Human Genetics Commission and GeneWatch.

The following recommendations were made:

1. The current governance arrangements for DNA and Fingerprint databases in Scotland should be reviewed as a matter of urgency. Future arrangements should take into account good practice in scientific and ethical standards, efficient and effective management and independent oversight.
2. Sufficient information regarding the governance and management of forensic databases should be in the public domain to maintain transparency, accountability and public confidence in their use.
3. Given that fingerprints and DNA are used for common aims in criminal justice terms, their acquisition and retention in legal and procedural terms should be equivalent.
4. Current legislation regarding temporary retention of forensic data and samples from non convicted individuals should be retained. However, a national approach which coordinates policies and practices of police forces, SPSA, Crown Office and Procurator Fiscal Service (COPFS) and other relevant agencies, is essential to achieve the aims of the legislation.
5. With the exception of assault (but including serious assault), children who accept they have committed a relevant sexual or violent offence (or who have been found to have done so by a Sheriff) should have DNA and fingerprint samples taken and retained permanently, in line with the law governing adults who are convicted of an offence. This should be based on the offence for which the case is disposed of as opposed to the original grounds for referral to the Reporter.
6. Children who accept they have committed an assault (or who have been found to have done so by a Sheriff), which is sufficiently serious, should have their DNA and fingerprint samples taken and retained permanently, in line with the law governing adults who are convicted of an offence. As an interim indication this would include children who have committed assaults currently categorized as 'grave' by the Reporter.

7. In relation to assault, further work and cooperation is required by relevant agencies (e.g. SCRA, COPFS, and the Police Service) to develop an agreed framework for identifying children that may merit forensic sampling and retention of data on the basis of recommendation 6 above. The rationale for sampling should take into account the seriousness of the offence and issues of public protection in addition to the needs of the child.
8. The practice of taking forensic samples from children for offences other than relevant sexual or violent offences and whose samples cannot therefore be legally retained should be reviewed.

INTRODUCTION

Since the discovery of DNA profiling in the mid 80s and the implementation of the first DNA database in England & Wales (1995), the significance, influence and contribution of forensic science to criminal justice systems has grown steadily. Fingerprints as an effective means of identification have been available for over 100 years but their systematic use was limited until the full implementation of the National Fingerprint Identification System (NAFIS) in 2001. Most developed countries in the world now use DNA and fingerprint databases as major components of criminal justice policy and practice. Notwithstanding, these systems are still relatively novel and few, if any, have been subject of systematic study and evaluation. The impact of forensic databases is determined by a range of factors including the jurisdiction, the precise legal framework, operational practices, resourcing and effective management. It is also essential that public confidence in their value and use is maintained.

The identification of individuals is a fundamental aspect of the criminal justice process. It is essential that the courts are confident that those brought before them are who they purport to be. At the point of arrest and charge by the police, it is important to ensure that there are no outstanding warrants against individuals or that they are seeking to avoid identification. In cases where potential fingerprint or DNA evidence is found at the scene of an incident, it may also be necessary to eliminate individuals who may have deposited material for innocent reasons. This avoids wasteful use of resources and unfruitful lines of inquiry in the investigation of crime by the police. In homicides, terrorist incidents and civil disasters, DNA and fingerprints play a central role providing rapid, reliable, identification of bodies and body parts.

The importance of identification means that it is the subject of considerable activity and use of resources by the police and other agencies. Therefore any means by which this process can be made more efficient or effective is of value to the police and public in general, as it supports the bringing of offenders to justice and the safeguarding of innocent individuals.

THE *MODUS OPERANDI* OF DNA AND FINGERPRINT DATABASES

DNA and fingerprint databases work by storing and comparing samples from individuals and those recovered from crime scenes and incidents. Although the detailed operation of the databases varies, this is of limited importance in relation to this review. DNA differs from fingerprints in that the sample contains private genetic information which remains in storage if the sample is retained. The forensic DNA profile is produced by the analysis of a specific number of genetic sites (loci) of an individual, usually from a mouth swab. Profiles are also obtained from body fluid stains (e.g. blood, saliva) recovered from crime scenes. The loci analysed are selected on the basis of their forensic value and do not contain other genetic information about the individual. A standard means of analysis is

used and this should be distinguished from more complex analytical methods for minute traces of DNA (low template or low level DNA analysis).

Fingerprint identification is based on the number and sequence of minute characteristics (minutiae) in the ridges of the skin. Fingerprint samples from an individual are in essence an image or representation of a pattern on the skin and contain nothing more than this. The sequence and pattern of minutiae can also be stored in digital code and this forms the basis of the current UK national fingerprint data base (IDENT1). Impressions recovered from crime scenes or items involved in crime such as weapons are known as finger marks. IDENT1 stores prints from individuals, marks from scenes and from other items involved in incidents such as weapons. These differences in operation and the differences historical development of the databases in part explain the variation in legislation between DNA and fingerprints.

The DNA database in England and Wales is the largest database of its kind in the world. The DNA databases in Scotland and Northern Ireland, which are considerably smaller, are linked to the database in England and Wales but operate under separate legislation. This variation in legislation means that each of the databases is different in nature and operation and it is therefore difficult to compare them directly. The most significant differences relate to the retention of subject samples. In England and Wales, once a legally obtained sample has been placed on the database, it can be retained indefinitely. This includes individuals who are arrested on suspicion of a recordable offence (but not necessarily charged), and who have not been convicted. Voluntary samples from individuals in England & Wales are also retained permanently and there is no right to withdraw this consent. The right to retain samples indefinitely from non-convicted persons was held by the House of Lords not to infringe Articles 8 and 14 of the European Convention of Human Rights¹ but this is currently the subject of challenge in European Court of Human Rights².

In Scotland, forensic samples and data can only be permanently retained following conviction. However, the current law allows for temporary retention of samples and data from non-convicted persons for a specific range of offences. The possibility remains that the judgment by European Court of Human Rights on *Marper & S*, may have some bearing on the law in Scotland. Consent to retain samples voluntarily provided and stored on the Scottish DNA database can also be withdrawn at any time.

THE 2005 REVIEW

In 2005 the Scottish Executive carried out a consultation exercise in relation to DNA and fingerprint acquisition and retention. This was in response to changes in the law in England & Wales and the perceived potential benefits in expanding the sample range to provide the police in Scotland with equivalent opportunities in investigating and prosecuting crime. The legal position in England and Wales following the enactment of Criminal Justice and Police Act 2001 provided for the permanent retention of samples legally taken from individuals, irrespective of whether they were convicted or not. The main issue explored in this consultation, was whether the law in Scotland should

be altered to bring it line with that of England & Wales. The outcome of the consultation was summarized in a Scottish Parliament Information Centre briefing³ :

'The...responses demonstrate a clear split in the views of respondents. Some support the policy...on the grounds that it would help the police to solve crimes,...[t]hose who oppose the policy 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'

Although this issue was given further consideration, particularly by Justice 2 Committee of the Scottish Parliament, proposals to alter the law in Scotland to bring it fully in line with England and Wales were not taken further at that time. Following further deliberations, Section 18A of the Criminal Procedure (Scotland) Act 1995 was inserted by section 83 of the Police, Public Order and Criminal Justice (Scotland) Act 2006. Section 18A, of the 1995 Act was then brought into force on 1 January 2007. This amendment altered the law in relation to DNA samples (but not fingerprints). These changes allowed for the temporary retention of DNA from individuals who had criminal proceedings initiated against them for certain offences but who had not been convicted. Full details of this legislation are provided in appendix 1.

THE CURRENT REVIEW

The terms of reference for this review are given at the beginning of this report. The starting point was an overview of the previous consultation and responses from 2005. In addition to individuals, the organizations and agencies consulted was increased in number and scope. Those directly consulted included the police service, police authorities, police service providers, organizations involved with Children's Hearings, legal organizations and associations, academic associations, organizations representing victims of crime and special interest groups such as the Human Genetics Commission and GeneWatch. Correspondents were also invited to forward the consultation material to other interested parties that may be in a position to contribute. Full details of the correspondence and responses are given in sections 1 and 2 of the companion document to this report.

In some instances information and clarification was sought by further correspondence. Meetings were also held with the Scottish Police Services Authority (SPSA) and the Scottish Children's Reporter Administration (SCRA). These meetings were informative and productive and I am grateful to these agencies for their cooperation. Finally, recent publications^{4 5} of particular relevance were reviewed.

DATA ON DNA AND FINGERPRINTS IN SCOTLAND

Following the initial consultation, requests for further information and data were made of the police service via the Association of Chief Police Officers in Scotland (ACPOS) and the SPSA as the main bodies involved in the use and

provision of forensic data. Full details of the correspondence are provided in sections 3 and 4 of the companion document to this report. The following is a summary of the main questions raised in the correspondence:

1. What data are available on DNA and fingerprints that might provide general information on their potential or actual contribution to the criminal justice system?
2. Are there any data available to inform the specific issues under consideration in this review?
3. Are any data available which may inform understanding or evaluation of issues that have arisen as a consequence of the consultation process? An example of such an issue is forensic sampling of persistent young offenders.
4. What are the governance and management structures of the Scottish DNA and fingerprint databases?
5. What policies and practices are in operation in relation to storage and security of genetic material, and use of data from the databases for research purposes?

INFORMATION AND DATA RECEIVED

The following data were received in response to my requests. A total of 336,416 samples were added to the Scottish DNA database between 1 January 1999 and 31 December 2007. The number of profiles removed from the database during this period was 110,882, which is approximately 33% of the total. On 31 December 2007, the number of profiles from individuals on the DNA Database was 225,534. During the period 1 December 2006 to 30 November 2007 inclusive, 3,275 individuals were matched to outstanding crime scene profiles and the overall match rate for the DNA database is 68%. On 1 April 2008, a total of 8970 DNA profiles of persons 17 years and under were recorded on the database. Further details of data on juveniles are provided below in the relevant sections of this report.

Recent trends in the DNA database indicate falling numbers of sample submissions and intelligence¹ matches. In the calendar year 2007, the number of intelligence matches fell by 15% compared to the previous year.

Although some data was available for fingerprints it was insufficiently detailed to address the issues in this review. Virtually no data were available on detection rates for cases involving DNA or fingerprints.

In relation to DNA samples, there is an extensive range of security precautions in place and access to samples is highly restricted, subject to standard operating procedures and electronic audit.

As regards research use of data, although no formal policy is in place, any request for access to data for research purposes and therefore unconnected to the investigation of an offence would be refused.

It is clear from the above that there are very limited data collected or readily available in relation to the use of fingerprints and DNA in the investigation and prosecution of crime in Scotland. Very limited information is

¹ Matches are considered to be intelligence until they are confirmed by analysis of an evidential sample from the relevant individual

available on match rates for particular classes of offender or detection rates for particular offences following DNA or fingerprint matches. No formal evaluation of the DNA or fingerprint databases has been carried out by the Scottish Police Service or SPSA. Indeed any systematic evaluation in relation to the management of these databases and their contribution to the criminal justice system would be extremely difficult in the absence of the relevant data.

The match rate² for the DNA database in Scotland (68%) is higher than the published match rate of the database in England & Wales (52%⁶). However, given the different legal and operational frameworks these rates are not directly comparable. In the absence of other supporting data such as detection rates, the significance of this match rate is extremely difficult to establish. Relying on the overall match rate in isolation as an indication of efficiency or effectiveness of the Scottish DNA database would be over simplistic and unwise in my view.

A further consequence of this lack of data is that almost no information regarding the Scottish DNA or fingerprint databases is in the public domain. The DNA database stores private genetic information and continued public confidence in the legitimate use and adequate safeguarding of this information relies on accountability and transparency of information. This is not to say that there is any evidence of misuse as access to genetic material is highly restricted and constantly monitored. Notwithstanding, there is an urgent need in my view to review the current situation. There is a clear need for implementation of formal governance structures in order to maintain and develop the databases in a transparent and accountable manner. Any arrangements should take into account good practice in scientific and ethical standards, efficient and effective management, transparency, public accountability and independent oversight. Governance and management of the databases should support their primary aims: maximizing potential contribution to the investigation of crime and criminal justice. Understanding how this can be achieved requires extensive knowledge of the processes, effective relationships between the relevant stakeholders and shared effective policies and practices. Demonstration of this requires an effective measurement regime focused on the potential benefits and how these can be monitored. Appendix 3 provides an indication of the range of these potential benefits and performance indicators.

Following the establishment of the SPSA on 1 April 2007 there is now a separation between the police service as users of DNA and fingerprints and SPSA as a service provider. Continued development of fingerprints and DNA in the investigation and prosecution of crime in Scotland is predicated on an effective relationship between the police service and SPSA.

ACQUISITION AND RETENTION OF DNA AND FINGERPRINTS IN SCOTLAND

At present the law in relation to fingerprints and DNA is different in that DNA can be temporarily retained under section 18A of the 1995 Act. One of the main issues of this review is to consider if this is appropriate and to make

² In Scotland the match rate is the percentage of intelligence matches at the time a profile is placed on the database.

recommendations if any changes were felt to be necessary. A detailed account of the law as it stands in Scotland is provided in appendix 1. A summary of the position for individuals (adults or children) dealt with in the criminal courts is as follows:

- For any individual who is convicted of an offence, forensic data already on record may be retained indefinitely or may be acquired subsequently and retained indefinitely.
- For any individual who is not convicted following criminal proceedings for a relevant sexual or violent offence (see appendix 2), DNA samples and data already on record in relation to this prosecution may be retained for 3 years. This period of retention can be extended in increments of two years if approved by a Sheriff. Forensic samples (and therefore data) cannot be subsequently obtained from individuals who were not convicted.
- Where forensic samples and data are obtained from individuals who are the subject of proceedings for offences other than relevant sexual or violent offences and who are not convicted, the samples and data must be destroyed
- Samples and data obtained from individuals for offences that are subsequently not proceeded with must be destroyed except in relation to a relevant sexual or violent offence.

The situation is different for children dealt with by a Children's Hearings. In short, forensic samples and data taken from children who are not dealt with by the criminal courts must be destroyed irrespective of the outcome of the hearing. An important aspect of this review is to consider if in certain circumstances and for certain offences, forensic samples from children should be taken and retained.

THE ISSUES UNDER REVIEW

There are three main issues that arise from the terms of reference in relation to the effectiveness of legislation regarding forensic data. In this context 'forensic data' is information and evidence derived from fingerprints and DNA. For DNA it is important to distinguish the DNA sample which contains the genome of the individual from the data (i.e. DNA profile) which derives from the sample.

The main issues can be summarized as follows:

1. Law and practice in relation to DNA and fingerprints varies. Is this situation appropriate or should the law be changed?
2. For those who are subject of proceedings for relevant sexual or violent offences but not convicted, is the current regime for temporary retention of samples appropriate and effective?
3. In relation to individuals who are dealt with by Children's Hearings for relevant sexual or violent offences, is the current situation appropriate?

I will deal with each of these issues in turn.

FINGERPRINTS AND DNA IN GENERAL

Those who expressed a view in the consultation considered that the acquisition and retention regime for fingerprints should mirror that of DNA. There were no contrary views to this expressed. Given that the primary purpose of fingerprints and DNA, the identification of individuals connected with criminal inquiries, is the same, it is logical that legislation and procedure should be equivalent. In my view inconsistent legislation is likely to constrain the potential value of forensic data.

RETENTION OF FORENSIC DATA FROM UNCONVICTED INDIVIDUALS

The second main aspect of this review relates to the acquisition and retention of forensic samples from individuals who are not convicted. The terms of reference on this matter relate specifically to the current legislation in Scotland i.e. the temporary retention for three years with the potential for extension on application to a Sheriff. The Scottish Government has rejected the possibility of permanent retention of forensic samples from non-convicted persons and this issue was specifically excluded as a matter for consideration in the present review. The questions that arise in relation to the temporary retention are as follows:

1. Is there support for this approach in general terms?
2. Is the period of retention appropriate and justified?
3. Given that the legislation is comparatively recent, is it effective?

In relation to the first question, there was extensive support in the consultation responses received. This included the views of police organizations and associations in addition to other agencies and individuals. Responses from independent groups were very positive with the Nuffield Council on Bioethics expressing the view that this approach was 'appropriate and balanced'. GeneWatch also responded in a similarly positive manner:

'The decision of the Parliament to limit the retention of DNA of innocent persons only to samples taken in relation to investigations into serious assault and crimes of a sexual nature and to further limit such retention to a period of three years (unless extended by permission of a Sheriff) was therefore welcomed by this office.'

Those who strongly supported this approach considered it to be more balanced and proportionate than permanent retention.

In terms of objective evidence to support a three year period, data are limited and difficult to interpret. It is important to establish the numbers of potential individuals involved. The category of individuals is those who have been subject to criminal proceedings (including those terminated prior to trial) for relevant sexual or violent offences and have not been convicted (for whatever reason). This would not include individuals who have been previously convicted for an offence for which DNA or fingerprints could be sampled and retained as data will

already be stored. In other words this group mainly contains individuals coming to court for the first time and individuals who have previously been tried but not convicted for offences other than relevant sexual or violent ones. The number of individuals involved is likely to be comparatively small. For example, in 2005 around 50,000 individuals were convicted of at least one offence in Scotland. Of these individuals, just under 3000 had previously been prosecuted but not convicted, of a relevant sexual or violent offence⁷. This number is likely to contain a significant percentage of individuals who had previous convictions and may therefore already have DNA or fingerprint samples taken and retained. It is therefore an overestimate of the actual number who would have their DNA sample retained for three years under the current legislation.

Approximately 5,000 individuals were proceeded against in the courts in 2000 for a sexual or violent offence (mainly assault) but were subsequently not convicted of that offence. Of these individuals, just under half were subsequently convicted of another offence within 1 year, 60% within 3 years and about 65% within 5 years⁸. These data are also likely to contain a significant proportion of individuals with previous convictions. Notwithstanding, they are consistent with general criminological data on re-offending behaviour (irrespective of conviction) in that any repeat offending is likely to take place within a comparatively short period.

In forming a view on this issue I have taken into account the above data as a general guide, the numbers of individuals likely to be involved, that the offences are serious and that there is support from a broad range of stakeholders. In my opinion, the sampling and retention of forensic data for a three year period, from individuals subject to proceedings for relevant sexual or violent offences but not convicted, is in principle, appropriate. However, this view is subject to a caveat which is explained below.

The final question on this issue is whether this legislation is being effectively used. Data from the SPSA indicates that at 1 December 2007 there were a total of 440 personal DNA profiles held under this legislation which comprised 29 profiles for relevant sexual offences and 411 for violent crime. At that date, none of these profiles had recorded a match with any profiles from crime scenes. SPSA go on to state that only five of the eight police forces in Scotland have submitted DNA from individuals under this legislation and that the vast majority of the DNA profiles (74%) derive from a single police force with the remaining 26% spread throughout the four remaining forces. It appears therefore that at the present time, sampling of individuals under this legislation is providing no identifiable benefits to the administration of justice, despite the resources being used. It is important to note that the legislation is comparatively recent (commenced 1 January 2007). In my opinion the temporary retention of forensic samples and data supported above, can only be justified if this legislation is used effectively.

INDIVIDUALS WHO ARE DEALT WITH BY CHILDREN'S HEARINGS

The third main aspect of this review relates to sampling and retention of DNA and fingerprints from individuals dealt with by Children's Hearings. Scotland has a distinctive approach to children in criminal justice terms. Although the age of criminal responsibility (8 years) is low, considerable efforts are made to prevent children

entering the criminal justice system at an early age. The mechanism for dealing with children who come to the notice of the authorities is the Children's Hearing. The primary aim of a Children's Hearing is the welfare of the child. This system was initiated in 1968⁹ and is now incorporated in the Children (Scotland) Act 1995¹⁰. If an incident occurs, for example a child has suffered abuse or neglect, they are referred to a Children's Reporter. The role of the Reporter is to investigate the incident and form a view as to what is in the best interests of the child. Children may also be referred to the Reporter on offence grounds i.e. on the suspicion or belief that they have committed an offence. In most instances children are referred to the Reporter by the police (typically around 87%) but only a minority of these referrals is on offence grounds¹¹. In 2006/07, the majority of children (44,629) referred to the Reporter were referred for care and protection¹². Of the total number of children referred that year, 16,490 (29%) were referred on offence grounds. Although the total number of children referred has steadily increased in the past 10 years, the number referred on offence grounds has remained relatively stable, with the figure for 2006/07 being fairly typical. A child who has been referred on offence grounds but does not accept this, may be further referred to a Sheriff to determine if there is sufficient evidence to support the allegation. The legal status of this disposal is somewhat ambiguous. Strictly speaking such a finding by a Sheriff is not a criminal conviction, although in certain circumstances (e.g. disclosure) it may be treated as such. For convenience and for the purposes of this review I will use the term 'offence' and where necessary qualify this. The finding of the Sheriff is then referred back to the Children's Hearing for further consideration.

Children can also be jointly referred to the Procurator Fiscal where the alleged offence is sufficiently serious. The decision whether to proceed with a Children's Hearing or in the criminal courts is made jointly by the Reporter and Procurator Fiscal and takes into account the particular circumstances of the child, the seriousness of the offence and the nature of the evidence available. There is specific guidance from the Lord Advocate regarding such decisions¹³. I understand that an extremely small number of children are prosecuted in the criminal courts but have been unable to establish the number. In terms of forensic data sampling and retention these individuals are treated in line with other individuals who are prosecuted in the criminal courts.

CHILDREN AND 'RELEVANT SEXUAL OR VIOLENT OFFENCES'

This review focuses exclusively on the subset of children who are reported for relevant sexual or violent offences as defined by the Criminal Procedure (Scotland) Act 1995 as amended. A further qualification is that only children who accept these grounds of referral or are found by a Sheriff to have committed such offence fall under the terms of reference of this review. It is important to distinguish the number of children and the number of offences. The number of offences referred to the reporter in 2006/07 was 30, 173. The vast majority of these offences will be minor and therefore are not relevant to this review.

Information and data were provided to the review by SCRA and this is included in the companion document to this report. These data must be interpreted with care for a number of reasons. SCRA do not record information on all relevant sexual or violent offences. It is also important to distinguish the grounds for referral and the outcome of

the case. In only a proportion of cases will the offence following disposal of the case be the same as the original one. For example, a child who is reported for 'rape' may in the end be dealt with by a Children's Hearing either because there was insufficient evidence to support this allegation or because the allegation was without foundation. Alternatively, there may be a lesser offence, such as Lewd and libidinous practices that the child may accept. Data collected by the SCRA does not record this change and therefore data on disposals (as opposed to referral grounds) are not available. SCRA record data on 40 specific offences and classify all offences outside these categories as 'other'. The 'other' category accounts for around 10% of all referrals on offence grounds. Data on the number of referrals for relevant sexual or violent offences, extracted from SCRA data are shown in Table 1 below. The largest category of relevant sexual or violent offences is that of assault but it must be noted that this captures a wide range of offending behavior from minor to more serious. Assaults are categorized by Reporters in terms of their gravity in three classes: high, moderate and low. However, these data are incomplete and in over half the cases the gravity of assault is not recorded. Notwithstanding, 605 children (26% of referrals for assault) were referred for assaults that were subjectively considered to be of high gravity.

Although the vast majority of offending is minor the data for assault suggests that a significant proportion is more serious. It is also likely to be the case that many of the victims of such offences children who are in need of protection.

In summary, data on children who accept they have committed a relevant sexual or violent offence, or who have been found to have done so by a Sheriff, are not directly available. However, the indications are that that the numbers of children involved in such offences is comparatively small.

Table 1: Children referred to the Reporter for relevant sexual or violent offences in 2006-07

Offence	Number of children
Assault	5286
Assault with intent to ravish	2
Indecent assault	29
Lewd and libidinous practices	110
Attempted murder	4
Murder	1
Possession of a firearm with intent to rob	15
Rape	5
Serious assault	121
Assault with intent to rob	29
Threats/extortion	23
Wilful and malicious fireraising	580
Total	6205

ACQUISITION AND RETENTION OF DNA AND FINGERPRINTS FROM CHILDREN

A range of views was expressed in the consultation on this issue. There was general support for the sampling of children who accept that they have committed a serious sexual or violent offence or who have been found to have done so by a sheriff. A minority view opposed the extension of sampling (for any individuals) as a matter of principle. There was also acceptance that in certain circumstances (generally the seriousness of the offence and for public protection) there was justification for forensic samples to be taken and data retained from children. Furthermore, a general view was expressed that a very small proportion of children pose a risk to the public and therefore forensic sampling would be appropriate.

The following extract from the GeneWatch response to the consultation clearly summarizes this:

'...GeneWatch UK recognises that a very small number of children dealt with in the children's hearing system may pose a risk to society, and that retaining their DNA could enable them to be identified more quickly should they commit a serious future offence such as rape, for which DNA evidence may be relevant.'

Views were also expressed that any sampling regime should be proportionate, not infringe the rights of children, and not fundamentally undermine the distinctive ethos of Children's Hearings and their primary focus on welfare.

In relation to children, the following data were available from the Scottish DNA database. As at 1 April 2008, a total of 4,712 DNA profiles of persons 16 years and under were recorded on the database of which 269 (approximately 6%) were retained permanently due to conviction. An additional 4258 persons had reached 17 years, of which 934 (approximately 22%) of these persons were shown to have DNA retained due to conviction

Combining these figures indicates that the number of individuals on the database under the age of 18 years at that time was 8970 and that approximately 13% of these profiles were from convicted individuals. Although comparative data for this precise date was not provided, more recent figures (9 June 2008) show that there were profiles from 8458 individuals under the age of 18 on the Scottish DNA database, which is 3.6% of the database population¹⁴ of the total. Of these profiles, 1203 (1.9% of the database population) were permanently retained following conviction.

In addition to the desire to maintain a welfare based approach, there are other important factors that must be considered in relation to sampling and retaining forensic data and samples from children. In forming a view I have taken into account the likely numbers of children involved, the seriousness of the offences, the fact that there is either an acceptance or determination by a Sheriff, and the need for public protection.

It is my opinion that children who accept or are found by a Sheriff to have committed a relevant sexual or violent offence (excluding assault but including serious assault) should be the subject of forensic sampling and retention in line with adults. Given that most assaults committed by children are minor it would not be appropriate to sample all children in this category. However, further work is needed to identify children where the assaults may be

sufficiently serious to merit forensic samples being taken and retained. As an initial guide those assaults categorized by the Reporter as high gravity would be appropriate in my view.

From the data provided by SPSA it is clear that large numbers of samples of DNA and (and possibly fingerprints) are taken from children but these will never be retained since individuals dealt with by Children's Hearing are not convicted. It is unclear what offences these samples are being taken in relation to and what benefits if any are being derived from this practice. This sampling practice should be reviewed in light of the other recommendations in this report.

OTHER MATTERS

It is inevitable that additional issues are raised which are matters of public interest but are outside the terms of reference of a review of this type. Two such issues are discussed below.

PERSISTENT YOUNG OFFENDERS

Views were expressed that forensic sampling should be extended to persistent young offenders who are (by definition) disproportionately involved in criminal activity. This is a complex issue and given the lack of comprehensive data available to this review, is not a matter on which a determination could be made at the present time. Recent research within the DNA database examined the 12 month period from 1 December 2006 to 30 November 2007 inclusive. At the end of this period the database then held 4,769 profiles of persons 16 years and under which represents 2% of the total database population. During the same period 3,275 individuals were matched to outstanding crime scene profiles, 298 of which were persons 16 years and under. This accounts for just over 9% of Intelligence matches during the period. An additional 194 of these matches involved offenders who had reached the age of 17. When these additional matches are taken into consideration, 15% of intelligence matches recorded over the period involved were from persons 17 years and under.

Care is needed in interpreting the above data as they derive from different collection periods. Furthermore, there is no information on offence types or the number of multiple matches. It is also important to distinguish match rates from detection rates. In some instances, it is likely that the DNA match may not be incriminating.

Notwithstanding, these data do provide some support for the views expressed by some respondents, that juveniles were disproportionately active offenders and therefore sampling such individuals would provide significant benefits. It is a matter for the Scottish Government to determine if this should be subject to a review at some time in the future.

DISPOSAL BY POLICE DIRECT MEASURES

Views were expressed that individuals dealt with by way of police direct measures (fixed penalty notices) should be considered for forensic sampling. Such procedures aim to provide speedy and effective sanctions for minor infringements of the law. Given this, sampling of DNA and fingerprints does not appear to be appropriate. The effect that introduction and use of police direct measures has had on the DNA and fingerprint databases cannot be established at present due to lack of available data. Any further consideration of this issue is a matter for the Scottish Government.

RECOMMENDATIONS

1. The current governance arrangements for DNA and Fingerprint databases in Scotland should be reviewed as a matter of urgency. Future arrangements should take into account good practice in scientific and ethical standards, efficient and effective management and independent oversight.
2. Sufficient information regarding the governance and management of forensic databases should be in the public domain to maintain transparency, accountability and public confidence in their use.
3. Given that fingerprints and DNA have common aims in criminal justice terms, their acquisition and retention in legal and procedural terms should be equivalent.
4. Current legislation regarding temporary retention of forensic data and samples, from individuals subject to proceedings for a relevant sexual or violent offence but not convicted, should be retained. However, a national approach which coordinates policies and practices of police forces, SPSA, Crown Office and Procurator Fiscal Service (COPFS) and other relevant agencies, is essential to achieve the aims of the legislation.
5. With the exception of assault (but including serious assault), children who accept they have committed a relevant sexual or violent offence (or who have been found to have done so by a Sheriff) should have DNA and fingerprint samples taken and retained in line with the procedures for adults who are convicted of an offence. This should be based on the offence for which the case is disposed of as opposed to the original grounds for referral to the Reporter.
6. Children who accept they have committed an assault (or who have been found to have done so by a Sheriff), which is sufficiently serious, should have their DNA and fingerprints sampled and retained in line with the procedure for adults who are convicted of an offence. As an interim indication this would include children who have committed assaults which would be categorized as 'grave' by the Reporter.
7. In relation to assault, further work and cooperation is required by relevant agencies (e.g. SCRA, COPFS, and the Police Service) to develop an agreed framework for identifying children that may merit forensic sampling and retention of forensic data on the basis of recommendation 5 above. The rationale for

sampling should take into account the seriousness of the offence and issues of public protection in addition to the needs of the child.

8. The practice of taking forensic samples from children for offences other than relevant sexual or violent offences and whose samples cannot therefore be legally retained should be reviewed.

APPENDICES

APPENDIX 1: LAW AND PROCEDURE

Section 18A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 83 of the Police, Public Order and Criminal Justice (Scotland) Act 2006 which was commenced on 1 January 2007

- (1) This section applies to any sample, or any information derived from a sample, taken under subsection (6) or (6A) of section 18 of this Act, where the condition in subsection (2) below is satisfied.
- (2) That condition is that criminal proceedings in respect of a relevant sexual offence or a relevant violent offence were instituted against the person from whom the sample was taken but those proceedings concluded otherwise than with a conviction or an order under section 246(3) of this Act.
- (3) Subject to subsections (9) and (10) below, the sample or information shall be destroyed no later than the destruction date.
- (4) The destruction date is—
 - (a) the date of expiry of the period of 3 years following the conclusion of the proceedings; or
 - (b) such later date as an order under subsection (5) below may specify.
- (5) On a summary application made by the relevant chief constable within the period of 3 months before the destruction date the sheriff may, if satisfied that there are reasonable grounds for doing so, make an order amending, or further amending, the destruction date.
- (6) An application under subsection (5) above may be made to any sheriff—
 - (a) in whose sheriffdom the person referred to in subsection (2) above resides;
 - (b) in whose sheriffdom that person is believed by the applicant to be; or
 - (c) to whose sheriffdom the person is believed by the applicant to be intending to come.
- (7) An order under subsection (5) above shall not specify a destruction date more than 2 years later than the previous destruction date.
- (8) The decision of the sheriff on an application under subsection (5) above may be appealed to the sheriff principal within 21 days of the decision; and the sheriff principal's decision on any such appeal is final.
- (9) Subsection (3) above does not apply where—
 - (a) an application under subsection (5) above has been made but has not been determined;
 - (b) the period within which an appeal may be brought under subsection (8) above against a decision to refuse an application has not elapsed; or
 - (c) such an appeal has been brought but has not been withdrawn or finally determined.
- (10) Where—
 - (a) the period within which an appeal referred to in subsection (9) (b) above may be brought has elapsed without such an appeal being brought;
 - (b) such an appeal is brought and is withdrawn or finally determined against the appellant; or

(c) an appeal brought under subsection (8) above against a decision to grant an application is determined in favour of the appellant, the sample or information shall be destroyed as soon as possible thereafter.

(11) In this section—

“the relevant chief constable” means—

- (a) the chief constable of the police force of which the constable who took or directed the taking of the sample was a member;
- (b) the chief constable of the police force in the area of which the person referred to in subsection (2) above resides; or
- (c) a chief constable who believes that that person is or is intending to come to the area of the chief constable’s police force; and

“relevant sexual offence” and “relevant violent offence” have the same meanings as in section 19A(6) of this Act and include any attempt, conspiracy or incitement to commit such an offence.”

APPENDIX 2: RELEVANT SEXUAL AND VIOLENT OFFENCES

Section 19A(6) of the Criminal Procedure (Scotland) Act 1995

“relevant sexual offence” means any of the following offences—

- (a) rape;
- (b) clandestine injury to women;
- (c) abduction of a woman with intent to rape;
- (d) assault with intent to rape or ravish;
- (e) indecent assault;
- (f) lewd, indecent or libidinous behaviour or practices;
- (g) shameless indecency;
- (h) sodomy; and
- (i) any offence which consists of a contravention of any of the following statutory provisions—
 - (i) section 52 of the Civic Government (Scotland) Act 1982 (taking and distribution of indecent images of children);
 - (ii) section 52A of that Act (possession of indecent images of children);
 - (iii) section 106 of the Mental Health (Scotland) Act 1984 (protection of mentally handicapped females);
 - (iv) section 107 of that Act (protection of patients);
 - (v) section 1 of the Criminal Law (Consolidation)(Scotland) Act 1995 (incest);
 - (vi) section 2 of that Act (intercourse with step-child);
 - (vii) section 3 of that Act (intercourse with child under 16 years by person in position of trust);
 - (viii) section 5(1) or (2) of that Act (unlawful intercourse with girl under 13 years);
 - (ix) section 5(3) of that Act (unlawful intercourse with girl aged between 13 and 16 years);
 - (x) section 6 of that Act (indecent behaviour towards girl between 12 and 16 years);

- (xi) section 7 of that Act (procuring);
- (xii) section 8 of that Act (abduction and unlawful detention of women and girls);
- (xiii) section 9 of that Act (permitting use of premises for unlawful sexual intercourse);
- (xiv) section 10 of that Act (liability of parents etc in respect of offences against girls under 16 years);
- (xv) section 11(1)(b) of that Act (soliciting for immoral purpose);
- (xvi) section 13(5)(b) and (c) of that Act (homosexual offences);

“relevant violent offence” means any of the following offences—

- (a) murder or culpable homicide;
- (b) uttering a threat to the life of another person;
- (c) perverting the course of justice in connection with an offence of murder;
- (d) fire raising;
- (e) assault;
- (f) reckless conduct causing actual injury;
- (g) abduction; and
- (h) any offence which consists of a contravention of any of the following statutory provisions—
 - (i) sections 2 (causing explosion likely to endanger life) or 3 (attempting to cause such an explosion) of the Explosive Substances Act 1883;
 - (ii) section 12 of the Children and Young Persons (Scotland) Act 1937 (cruelty to children);
 - (iii) sections 16 (possession of firearm with intent to endanger life or cause serious injury), 17 (use of firearm to resist arrest) or 18 (having a firearm for purpose of committing an offence listed in Schedule 2) of the Firearms Act 1968;
 - (iv) section 6 of the Child Abduction Act 1984 (taking or sending child out of the United Kingdom)

APPENDIX 3: THE BENEFITS OF DNA AND FINGERPRINTS

Fingerprints and DNA are the most reliable means available to identify individuals and the use of such evidence in databases provides valuable potential benefits to the police and other agencies in the criminal justice process.

These include:

- Identification of individuals with a high degree of confidence
- Identifying hitherto unknown individuals
- Inclusion or elimination of individuals from a criminal inquiry
- identification or elimination of individuals more speedily than by other means
- Increased numbers of offenders identified
- Increased numbers of individuals eliminated
- Linking serial offences and those which cross police force administrative boundaries
- Increased detection rates

- Increased detection rates for crimes which cross police force administrative boundaries
- Increased Cross jurisdictional detection in UK (England, Wales, Northern Ireland)
- Speedier more effective prosecutions
- An increase in the number of guilty pleas

The effectiveness of forensic databases relies on adequate sampling of the relevant individuals and crime scenes both of which require to be monitored. It is also essential that an elimination database of personnel (police and police staff) who are likely to be present at crime scenes or handle productions is maintained.

REFERENCES

- ¹ *R v Marper & S* (2002b) UKHL 39 House of Lords (Appellant Committee)
- ² *S & Marper v the United Kingdom*
- ³ (2006). Police Retention of Prints and Samples -updated. SPICe briefing, Scottish Parliament. 06/44.
- ⁴ The forensic use of bioinformation: ethical issues. Cambridge, Nuffield Council on Bioethics. (2007).
- ⁵ Genetic Policing, Williams, R. and P. Johnson (2008).
The use of DNA in criminal investigations. Cullompton, Willan Publishing.
- ⁶ The forensic use of bioinformation: ethical issues. Cambridge, Nuffield Council on Bioethics. (2007).
- ⁷ Unpublished data from Scottish Government
- ⁸ *ibid*
- ⁹ Social Work (Scotland) Act 1968
- ¹⁰ <http://www.childrens-hearings.co.uk/background.asp> (accessed April 2008)
- ¹¹ SCRA, Scottish Government Review Forensics Legislation (Destruction provision), March 2006
- ¹² SCRA (2007). Annual Report 2006-07, Scottish Children's Reporter Administration
- ¹³ (2006). Lord Advocate's Guidelines to Chief Constables- reporting to Procurators Fiscal offences alleged to have been committed by children.
- ¹⁴ Data provided by SPSA