EXECUTIVE NOTE

THE RETENTION OF SAMPLES ETC. (CHILDREN'S HEARINGS) (SCOTLAND) ORDER 2011

SSI 2011/[Draft]

1. The above instrument is brought forward by the Scottish Ministers in exercise of the powers conferred by section 18E(6) and (7) of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act"). Section 18E was inserted into the 1995 Act by section 80 of the Criminal Justice and Licensing (Scotland) Act 2010 ("the 2010 Act"). The instrument is subject to the affirmative procedure in the Scottish Parliament.

2. This instrument prescribes the "relevant offences" for the purposes of section 18E of the 1995 Act which provides for the retention of DNA samples, fingerprint data and other relevant physical data from children who are referred to a children's hearing and accept that they have committed that offence, or the matter is referred to a sheriff who makes such a finding. Section 18E(6) and (11) provide that a "relevant offence" can be prescribed from the list of "relevant sexual offences" or "relevant violent offences" listed in section 19A(6) of the 1995 Act.

Policy Objectives

3. This instrument forms part of an implementation package to give effect to sections 77 to 82 of the 2010 Act, which amend and add to the provisions of the Criminal Procedure (Scotland) Act 1995 with regard to the retention and use of DNA, fingerprint data, etc in criminal proceedings.

4. During the passage of the 2010 Act, the inclusion of the order making power in section 18E(6) was approved as it was recognised that it may not be appropriate for DNA and fingerprints etc to be retained in relation to all of the sexual and violent offences listed in section 19A(6) of the 1995 Act. The Scottish Ministers accept that the vast majority of children referred to hearings can be properly and appropriately dealt with without any requirement to retain forensic data or samples. There are, however, a small number of children who commit serious sexual or violent offences and it is important to achieve an appropriate balance between the needs and rights of the individual child, and the need to protect the public.

<u>List of offences</u>

5. Articles 2 and 3 of the instrument set out the list of relevant sexual and violent offences which will trigger the retention of samples. As noted above, this list is drawn directly from section 19A(6) of the 1995 Act. The list of offences in Articles 2 and 3 reflects those serious offences where the Scottish Ministers believe, on balance, that retention is justified in relation to children who are referred to a children's hearing.

6. There are two general points worth noting:

- the common law offence of public indecency is included at Article 2(g), but only insofar as it is apparent from the ground of referral to the children's hearing that there was a sexual aspect to the behaviour of the child referred; and
- Articles 2(j) and 3(h) make it clear that an attempt, conspiracy or incitement to commit an offence listed elsewhere in the instrument would also trigger the retention of samples.

Assault

7. The Scottish Ministers are clear that the retention of samples should only apply in serious cases. Section 18E(7) of the 1995 Act enables relevant violent offences of differing severity to be specified. The order provides that the provisions of section 18E of the 1995 Act should apply to cases of "serious assault" and will not apply to minor "assault" or "assault to injury". A serious assault is defined as an assault which is listed in a ground of a referral to a children's hearing as:

- assault to severe injury;
- assault to severe injury and permanent disfigurement;
- assault to severe injury and permanent impairment;
- assault to severe injury, permanent disfigurement and permanent impairment.

8. Samples and fingerprint data etc for a relevant offence will be retained if the grounds of referral are accepted or established. Guidance is being developed by the Scottish Government and major stakeholders which will, amongst other things, ensure that it is made clear to the child at the hearing, and the relevant adult accompanying the child, whether or not the assault for which the child is referred is one which would trigger retention under section 18E.

Conditions to be met

9. Section 18E of the 1995 Act provides that the retention of DNA and fingerprints etc will only be triggered where certain conditions are satisfied. Those conditions are that:

- a child has had DNA, fingerprint or other relevant physical data taken from them under section 18 of the 1995 Act, upon arrest or detention;
- the child is referred to a children's hearing on the ground that they have committed at least one relevant offence (i.e. one of the list of specified serious sexual or violent offences prescribed in the order); and
- the child and their relevant adult(s), usually their parents or carers, accept that he or she has committed this offence, or a sheriff finds the grounds established (if an application is made to the sheriff for a finding).

10. Where these conditions are met, any DNA and fingerprints etc which have been taken from the child can be retained and do not have to be destroyed for up to 3 years. That period may be extended for a further period or periods of up to 2 years on the successful application of the relevant Chief Constable to a Sheriff.

Timing

11. The provisions of the instrument will, if approved, come into force on 15 April 2011. It is the intention that the retention of DNA and fingerprints etc at children's hearings would apply to any relevant offence taking place on or after that date.

Consultation

12. While there has been no specific public consultation on the details of the instrument, there has been significant consultation and debate on the principles of the provisions. This is summarised below:

12.1 In 2007, the Scottish Government asked forensics expert Professor James Fraser, Director of Forensic Science, Strathclyde University to review the operation and effectiveness of the legislative regime governing police powers in relation to the acquisition, use and destruction of fingerprint and DNA data ('the Fraser Review'). This review included powers relating to individuals who, in being dealt with by a children's hearing, accept that they have committed sexual or violent offences, or are found by a sheriff to have committed such offences.

12.2 In September 2008 the Scottish Government published the review report – Acquisition and Retention of DNA and Fingerprint Data in Scotland (Fraser 2008) ('the Fraser Report' - http://www.scotland.gov.uk/Publications/2008/09/22154244/15).

12.3 At the same time, the Scottish Government issued its own consultation paper in relation to the issues raised by the report – Fraser Report on Retention of DNA and Fingerprint Data – Government's Response http://www.scotland.gov.uk/Publications/2008/09/22154244/3.

12.4 Responses to that Consultation Paper are also available online at http://www.scotland.gov.uk/Publications/2009/02/10141304/0.

13. The outcomes of the Fraser Review, and of the Scottish Government consultation informed the preparation of the Criminal Justice and Licensing (Scotland) Bill.

Justice Committee and the Parliament

14. There was discussion around these issues in the Scottish Parliament's Justice Committee, and in plenary debate, during scrutiny of the Criminal Justice and Licensing (Scotland) Bill. Amongst other things, the Cabinet Secretary for Justice wrote to the Committee Convener on 8 April 2010 setting out proposals for the offences to be included in the order.

Forensic Data Working Group

15. In July 2009 the Scottish Government set up a Forensic Data Working Group (FDWG) to progress the proposals published following the Fraser Review, and to link into work being progressed by other forums with forensic science and criminal records remits. The Group, which has met 8 times to date (end January 2011), is chaired by the Scottish Government Safer Communities Directorate. Membership includes:

- Scottish Government Children, Young People and Social Care Directorate
- Crown Office and Procurator Fiscal Service (COPFS)
- Association of Chief Police Officers Scotland (ACPOS)
- Scottish Police Services Authority (SPSA)
- Director of the Centre for Forensic Science, Strathclyde University (Professor James Fraser)
- Human Genetics Commission
- Scottish Children's Reporter Administration (SCRA)
- Skills for Justice
- Scotland's Commissioner for Children and Young People (SCCYP)
- Scottish Human Rights Commission (SHRC)
- Scottish Information Commissioner

16. One of the specific tasks assigned to the Group was to develop the list of relevant sexual and violent offences in respect of which DNA and fingerprints etc can be retained for inclusion in this order.

17. Although some stakeholders took an in principle stance against the proposals during the passage of the provisions in the 2010 Act, all key stakeholders were involved in discussions on the range of offences that should trigger retention. These discussions resulted in the list of offences which the Cabinet Secretary for Justice provided to the Justice Committee to aid its consideration of the relevant provisions in the 2010 Act (see paragraph 14, above). Given some of the issues raised, the Scottish Ministers have followed the principle that there should be a presumption against retention except in the case of serious offences. Ministers consider that the proposed list of offences provides a fair and proportionate response, balancing individual rights with the need to protect the public. The FDWG has provided helpful advice and guidance on these issues. The Group continues to work on the development of guidance on the operation of the provisions set out in the 2010 Act and in this instrument, and other issues around the retention of DNA, fingerprint data etc.

Impact Assessments

18. An Equality Impact Assessment on the retention and use of samples etc was carried out in support of the Criminal Justice and Licensing (Scotland) Bill and published in March 2009. The full Assessment can be found at http://www.scotland.gov.uk/Topics/People/Equality/18507/EQIADetails/Q/Id/395 .

19. The policy aims and broad impacts remain the same and no further formal Assessment has been carried out alongside this instrument. At the time of the original Assessment it was estimated that these provisions would be likely to affect up to 100 children in any year; this was based on a figure of more than 15,000 children referred to the children's hearings system on offence grounds (2006-07 figures). The Scottish Ministers believe that this estimate of 100 children remains a reasonable assumption, and provides a realistic estimate upon which to assess impacts, costs, etc

20. In line with the original Assessment, samples may only be retained under strict criteria. The policy is not predicated on the grounds of disability, gender, sexuality, race, religion or belief.

Financial Effects

21. A Business and Regulatory Impact Assessment (BRIA) has not been completed in relation to this instrument. The Cabinet Secretary for Justice does not consider that a BRIA is necessary as the primary additional costs arising from these provisions will fall on the Scottish Police Services Authority (SPSA) and are likely to be very small. There are also one-off training and IT costs for SCRA, but these will also be very small and will be met from within existing budgets. There are no additional costs to local authorities or to other bodies, individuals or organisations.

22. The estimated costs of the changes to the retention and use of samples etc were set out at paragraphs 878 - 885 of the Financial Memorandum accompanying the Criminal Justice and Licensing (Scotland) Bill
http://www.scottish.parliament.uk/s3/bills/24-CrimJustLc/b24s3-introd-en.pdf .

23. The specific estimates of costs associated with the retention of samples arising from the children's hearings system noted that set up costs would be included along with the wider costs arising from changes to the retention and use of samples under sections 77 to 82 of the Act. The recurring costs to the SPSA of storing additional samples and records from children was estimated at some £4,000 per annum.

Scottish Government
Safer Communities Directorate

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