

CRIMINAL JUSTICE AND LICENSING (SCOTLAND) ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3 - Criminal Procedure

Sections 77-82 - Retention and use of samples etc.

372. [Sections 77 to 82](#) contain provisions on the retention and use of samples.
373. The law on police powers to take, retain and use DNA, fingerprints and other forensic data (such as palm prints) is predominantly set out in sections 18-20 of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”). In general, samples and records of forensic data must be destroyed once the decision is taken not to prosecute an individual for the offence the samples and records were collected in connection with, or, if the individual is prosecuted, when the proceedings end without a conviction. If the individual is found guilty of the offence, the samples and records of their forensic data can be retained indefinitely.
374. Section 18A of the 1995 Act allows an exception to this general rule where criminal proceedings have been instituted against an individual for an offence, but end without a conviction. This only applies to criminal proceedings for a list of serious sexual or violent offences set out in section 19A(6) of the 1995 Act. In these circumstances, DNA samples and records can be retained by the police for at least three years. At the end of that time, the Chief Constable can apply to a sheriff for these samples and records to be kept for up to a further two years and this process can be repeated at the end of each extended period.
375. [Section 77](#) amends sections 18 and 18A of the 1995 Act, extending this exception to cover the retention of “relevant physical data” (which is defined in section 18(7A) of the 1995 Act as fingerprints, palm prints, prints or impressions of another external part of the body, and records of skin on an external part of the body) as well as DNA records.
376. [Section 77\(2\)\(a\)](#) amends section 18(3) of the 1995 Act which concerns the destruction of forensic data taken from people who are not convicted or against whom no criminal proceedings are raised. Section 77(2)(a) inserts a reference to the new sections 18B to 18F of the 1995 Act introduced by sections 78 to 80. It means that forensic data taken under section 18 of the 1995 Act does not have to be destroyed following a decision not to raise criminal proceedings if the criteria in section 18B or 18C (provisions relating to the retention of forensic data where fiscal offers under sections 302 to 303ZA of the 1995 Act are accepted), section 18D (provisions relating to the retention of forensic data taken or provided in connection with certain fixed penalty offences) and section 18E or 18F (provisions relating to the retention of forensic data from children who are referred to a children’s hearing) are met.
377. The definition of “relevant physical data” in section 18(7A) of the 1995 Act (mainly fingerprints and palm prints) applies throughout sections 18A to 19C of the 1995

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Act. Section 77(2)(b) and (c) modifies the definition of “relevant physical data” in section 18(7A)(d) for the purpose of section 19C of the 1995 (inserted by section 82). This is to make it clear that when forensic data is obtained from outside Scotland a record of a person’s skin on an external body part constitutes “relevant physical data”. This modification is made because law enforcement agencies outside Scotland could not take a record of a person’s skin on an external body part by a device approved by Scottish Ministers.

378. [Section 77\(3\)\(a\),\(b\)\(c\)](#) and (e) amends section 18A of the 1995 Act so that this section applies to relevant physical data, as well as to samples and information derived from samples which are taken under section 18 of the Act.
379. [Section 77\(3\)\(d\)](#) amends section 18A of the 1995 Act, providing for the sheriff principal to have the specific power to grant an order amending or further amending the destruction date of a DNA sample, profile or other types of forensic data (fingerprints etc) if he overturns the decision of a sheriff to refuse an application by a chief constable to extend the period of retention.
380. [Section 77\(3\)\(f\)](#) modifies the definitions of terms used in section 18A. [Section 77\(3\)\(f\)](#) and (g) modify the definition of a relevant sexual offence in section 18A of the 1995 Act to replace the offence “shameless indecency” with “public indecency”. The change provides that public indecency is only a relevant sexual offence if it is apparent from the charge in the criminal proceedings which are raised that there was a sexual element to the behaviour.
381. [Section 78](#) inserts new sections 18B and 18C into the 1995 Act. New section 18B provides that DNA samples, relevant physical data and information derived from a sample taken from individuals who are arrested or detained for an offence do not have to be destroyed for a specified time if that person is issued with and subsequently accepts a relevant offer issued under sections 302 to 303ZA of the 1995 Act. A definition of “relevant offer” is found in section 18B(3). An acceptance of a “relevant offer” is not a conviction but is classed as an alternative to prosecution for an offence.
382. New section 18B(5) sets out what the date of destruction is and is dependent on the type of offences for which a relevant offer is issued. A relevant offer can be issued in relation to more than one offence. Where the procurator fiscal disposal only relates to offences which are not relevant sexual or relevant violent offences, the data must be destroyed within two years of the date on which the disposal was issued. That period cannot be extended.
383. Where the procurator fiscal disposal relates only to a relevant sexual or relevant violent offence, as defined by reference to the list of sexual and violent offences set out in section 19A(6) of the 1995 Act, the forensic data can be retained for at least three years from the date on which the offer was issued. A fiscal disposal can be issued in relation to a number of offences. Where a disposal is issued in respect of a mixture of offences (i.e. some of the offences are relevant sexual or relevant violent offences and some are not), the forensic data can be retained for at least three years from the date on which the measure was issued.
384. Relevant offers are not convictions; they are alternatives to prosecution for an offence. This means that if an individual were to refuse to accept a relevant offer their forensic data can be retained in accordance with section 18(3) of the 1995 Act until the procurator fiscal decides whether or not to raise criminal proceedings against that person. If the procurator fiscal decides not to raise criminal proceedings and does not issue a further relevant offer, the person’s forensic data must then be destroyed as soon as possible. If however, the procurator fiscal decided to raise criminal proceedings following the refusal to accept a fixed penalty notice under the 2004 Act, that person’s forensic data can be retained indefinitely under section 18(3) of the 1995 Act if they are subsequently prosecuted and convicted of the offence in court.

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385. New section 18C provides for the extension of the retention period beyond three years where the procurator fiscal offer was issued, and accepted, in relation to a relevant sexual or relevant violent offence. The police can apply to a sheriff to have the retention period extended for a further period of two years, on a rolling basis. The decision of a sheriff can be appealed to the sheriff principal by both parties. The sheriff principal's decision on the application will be final.
386. [Section 79](#) inserts new section 18D into the 1995 Act. This section provides that DNA samples, relevant physical data and information derived from a sample taken from individuals who are arrested or detained for a fixed penalty offence (as defined by section 18D(6)) do not have to be destroyed if that person is issued with and subsequently accepts a fixed penalty notice issued under section 129 of the Antisocial Behaviour "etc" (Scotland) Act 2004 ("the 2004 Act") or pays the sum which become due under section 131(5) of the 2004 Act. Forensic data can only be retained under new section 18D of the 1995 Act when a police constable has arrested or detained a person under section 14(1) of the 1995 Act before he or she issued a fixed penalty notice. The forensic data must be destroyed no later than two years from the date on which the fixed penalty notice was issued. Unlike the provisions in sections 18B and 18C of the 1995 Act, in section 18D there is no provision for an extension of the retention period.
387. Section 18D(3) provides that if there is more than one fixed penalty notice issued in connection with other fixed penalty offences arising out of the same incident then the data must be destroyed no later than two years from the date of the later notice.
388. Fixed penalty notices are not convictions; they are alternatives to prosecution for an offence. This means that if an individual were to refuse to accept a fixed penalty notice, their forensic data can be retained in accordance with section 18(3) of the 1995 Act until the fiscal decides whether or not to raise criminal proceedings against that person. If the procurator fiscal decides not to raise criminal proceedings and does not issue a fiscal alternative to prosecution under section 302 to 303ZA of the 1995 Act, the person's forensic data must then be destroyed as soon as possible. If however, the procurator fiscal decided to raise criminal proceedings following the refusal to accept a fixed penalty notice under the 2004 Act, that person's forensic data can be retained indefinitely under section 18(3) of the 1995 Act if they are subsequently prosecuted and convicted of the offence in court.
389. [Section 80](#) inserts new sections 18E and 18F into the 1995 Act. These introduce a similar exception to the normal rules governing retention of DNA, fingerprint and other physical data to that described above in relation to section 77, covering certain cases dealt with by the children's hearings System. This applies where a child is referred to a children's hearing on the grounds that they have committed one of a list of specified serious violent or sexual offences and has had DNA, fingerprint or other physical data taken from them under section 18 of the 1995 (upon his/her arrest or detention). The list of relevant offences will be drawn from the lists of sexual or violent offences in section 19A(6) of the 1995 Act, and set out in secondary legislation, which will need to be approved by the Scottish Parliament. The secondary legislation can specify relevant violent offences by reference to differing levels of severity. The definition of "relevant sexual offence" is modified by section 80(12) to include public indecency if 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.
390. If the child and relevant person (a parent or person with control over the child) accepts that he or she has committed one of the relevant offences, or a sheriff establishes that they have done so, DNA, fingerprint or other physical data does not have to be destroyed for at least three years.
391. Section 18F of the 1995 Act provides that the Chief Constable can apply to a sheriff for an extension of up to two years at the end of this time, and this process can be repeated at the end of each extended period. The decision of the sheriff can be appealed to the sheriff principal by both the chief constable (if the application is refused by the sheriff)

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or by the person whose forensic data is retained (if the sheriff grants the application). Section 18F(5) provides that if the sheriff principal allows the appeal, he or she may make an order amending or further amending the destruction date. The decision of the sheriff principal is final. The sheriff principal must not specify a destruction date more than 2 years later than the previous date.

392. Section 18F(9) provides for forensic data to be destroyed as soon as possible after the period in which an appeal may be brought has elapsed or after an appeal is withdrawn or determined and results in no further extension.
393. If a child is referred to a children’s hearing on the grounds of having committed a relevant offence and refuses to accept that such an offence was committed, any DNA, fingerprints and other physical data which has been taken from that child under section 18 of the 1995 Act must be destroyed. This also applies where the commission of a relevant offence by the child is not established by a sheriff, to whom a children’s hearing refers the case to establish the facts or who reviews the case under section 85 of the Children (Scotland) Act 1995.
394. [Section 81](#) amends and extends the list of relevant sexual and relevant violent offences in section 19A(6) of the 1995 Act. The term “shameless indecency” is replaced with the offence of “public indecency” in the list of relevant sexual offences. The offence of public indecency will only be a “relevant sexual offence” if a court makes a finding under paragraph 60 of Schedule 3 to the Sexual Offences Act 2003 that there was a significant sexual aspect to the behaviour. Section 81 also adds sections 47(1), 49(1), 49A(1) and (2) and 49C(1) of the Criminal Law (Consolidation) (Scotland) Act 1995 (offences involving the carrying of an offensive weapon or articles with a point or blade in a public place) to the list of “relevant violent offences” in section 19A(6) of the 1995 Act.
395. The police have the power to take forensic data in section 19A(2) of the 1995 Act from any person who has been convicted of a relevant sexual or a relevant violent offence. They will therefore be able to exercise these powers in relation to a person who has been convicted of these additional offences. Section 18A of the 1995 Act provides that any forensic data which is taken from a person under section 18 does not have to be destroyed for at least 3 years if a person is proceeded against for a relevant sexual or relevant violent offence as set out in section 19A(6) of the 1995 Act. Provided the criteria of section 18A are met, a person may have their forensic data retained for at least 3 years if they are proceeded against for one of these additional offences.
396. [Section 82](#) inserts a new section 19C into the 1995 Act, setting out the general purposes for which DNA and fingerprint information can be used. This makes it clear that the police can use the DNA and fingerprint information – including data taken from, or provided by, a person from outwith Scotland, provided it is held by a police force in Scotland, the Scottish Police Services Authority (SPSA) or a person acting on behalf of a police force in Scotland or the SPSA - as a tool to help prevent, detect and investigate crime, including cross-border crime, and prosecute crime in court. It also allows the information to be used to establish the identity of a deceased person and also a person from whom DNA samples, relevant physical data and information from samples comes from, as there may be a need to identify a person from a body or body part where no criminal activity is suspected: for example, following a natural disaster. These purposes apply whether the crime or incident occurs or is being investigated in Scotland, elsewhere in the UK or abroad, enabling the police to assist with investigations and prosecutions wherever they take place.
397. New section 19C(4) and (5) of the 1995 Act provides that any forensic data which is provided to a police force in Scotland, the SPSA or a person acting on behalf of such a force or the SPSA can be used for the purposes set out in section 19C(2) but also that this information can be checked against other relevant physical data, samples or information derived from samples which are held by a police force or the SPSA.

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Forensic data provided by other jurisdictions can also be checked against Scottish data held on the relevant databases.

398. The terms of section 19C(6) of the 1995 Act introduced by section 82 mean that forensic data collected in Scotland can be used for the investigation of a crime or suspected crime and the conduct of a prosecution in a country or territory outside Scotland including England, Wales and Northern Ireland.
399. Section 20 of the 1995 Act (use of prints, samples etc) is superseded by new section 19C. The repeal of section 20 is provided for in schedule 7 of the Bill.
400. At present, police use common law powers in relation to the use of fingerprints and DNA in criminal investigations and prosecutions. The powers in new section 19C aim to provide clarity on the purpose for which samples and records of forensic data can be used. They are without prejudice to existing powers at common law. New section 19C(2) contains safeguards in relation to the use of the data.
401. [Section 82\(2\)](#) amends section 56 of the Criminal Justice (Scotland) Act 2003 (“the 2003 Act”) which concerns the retention of samples or relevant physical data when given voluntarily. Section 56 applies to DNA samples, information derived from samples and relevant physical data. Section 82(2) removes references to “information derived from relevant physical data” found in section 56 of the 2003 Act. As there is no identifiable information which is classed as “information derived from relevant physical data”, removing this phrase removes any doubt as to what it is intended to catch.
402. [Section 82\(2\)\(b\)](#) provides that any forensic data taken from people under section 56 of the 2003 Act can be held or used for the prevention or detection of crime, the investigation of an offence or conduct of a prosecution or the identification of a person or a deceased person. This includes cross-border crime.