



# Criminal Justice and Licensing (Scotland) Act 2010

2010 asp 13

## PART 3

### CRIMINAL PROCEDURE

#### *Retention and use of samples etc.*

#### 77      **Retention of samples etc.**

- (1) The 1995 Act is amended as follows.
- (2) In section 18 (prints, samples etc. in criminal investigations)—
  - (a) in subsection (3), for “section 18A” substitute “sections 18A to 18F”,
  - (b) in subsection (7A), for “sections 19 to 20” substitute “, subject to the modification in subsection (7AA), sections 18A to 19C”, and
  - (c) after subsection (7A) insert—

“(7AA) The modification is that for the purposes of section 19C as it applies in relation to relevant physical data taken from or provided by a person outwith Scotland, subsection (7A) is to be read as if in paragraph (d) the words from “created” to the end were omitted.”.
- (3) In section 18A (retention of samples)—
  - (a) for subsection (1) substitute—

“(1) This section applies to—

    - (a) relevant physical data taken or provided under section 18(2), and
    - (b) any sample, or any information derived from a sample, taken under section 18(6) or (6A),

where the condition in subsection (2) is satisfied.”,
  - (b) in subsection (2), after “whom” insert “the relevant physical data was taken or by whom it was provided or, as the case may be, from whom”,

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- (c) in subsection (3), for “sample or information” substitute “relevant physical data, sample or information derived from a sample”,
- (d) after subsection (8) insert—
  - “(8A) If the sheriff principal allows an appeal against the refusal of an application under subsection (5), the sheriff principal may make an order amending, or further amending, the destruction date.
  - (8B) An order under subsection (8A) must not specify a destruction date more than 2 years later than the previous destruction date.”,
- (e) in subsection (10), for “sample or information” substitute “relevant physical data, sample or information derived from a sample”,
- (f) in subsection (11)—
  - (i) in paragraph (a) of the definition of “the relevant chief constable”, after “who” insert “took the relevant physical data or to whom it was provided or who”, and
  - (ii) in the definition of “relevant sexual offence” and “relevant violent offence”, after “have” insert “, subject to the modification in subsection (12),”, and
- (g) after subsection (11) insert—
  - “(12) The modification is that the definition of “relevant sexual offence” in section 19A(6) is to be read as if for paragraph (g) there were substituted—
    - “(g) public indecency if it is apparent from the offence as charged in the indictment or complaint that there was a sexual aspect to the behaviour of the person charged;””

**78 Retention of samples etc. where offer under sections 302 to 303ZA of 1995 Act accepted**

After section 18A of the 1995 Act insert—

**“18B Retention of samples etc. where offer under sections 302 to 303ZA accepted**

- (1) This section applies to—
  - (a) relevant physical data taken from or provided by a person under section 18(2), and
  - (b) any sample, or any information derived from a sample, taken from a person under section 18(6) or (6A),
 where the conditions in subsection (2) are satisfied.
- (2) The conditions are—
  - (a) the relevant physical data or sample was taken from or provided by the person while the person was under arrest or being detained in connection with the offence or offences in relation to which a relevant offer is issued to the person, and
  - (b) the person—
    - (i) accepts a relevant offer, or

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- (ii) in the case of a relevant offer other than one of the type mentioned in paragraph (d) of subsection (3), is deemed to accept a relevant offer.
- (3) In this section “relevant offer” means—
- (a) a conditional offer under section 302,
  - (b) a compensation offer under section 302A,
  - (c) a combined offer under section 302B, or
  - (d) a work offer under section 303ZA.
- (4) Subject to subsections (6) and (7) and section 18C(9) and (10), the relevant physical data, sample or information derived from a sample must be destroyed no later than the destruction date.
- (5) In subsection (4), “destruction date” means—
- (a) in relation to a relevant offer that relates only to—
    - (i) a relevant sexual offence,
    - (ii) a relevant violent offence, or
    - (iii) both a relevant sexual offence and a relevant violent offence,the date of expiry of the period of 3 years beginning with the date on which the relevant offer is issued or such later date as an order under section 18C(2) or (6) may specify,
  - (b) in relation to a relevant offer that relates to—
    - (i) an offence or offences falling within paragraph (a), and
    - (ii) any other offence,the date of expiry of the period of 3 years beginning with the date on which the relevant offer is issued or such later date as an order under section 18C(2) or (6) may specify,
  - (c) in relation to a relevant offer that does not relate to an offence falling within paragraph (a), the date of expiry of the period of 2 years beginning with the date on which the relevant offer is issued.
- (6) If a relevant offer is recalled by virtue of section 302C(5) or a decision to uphold it is quashed under section 302C(7)(a), all record of the relevant physical data, sample and information derived from a sample must be destroyed as soon as possible after—
- (a) the prosecutor decides not to issue a further relevant offer to the person,
  - (b) the prosecutor decides not to institute criminal proceedings against the person, or
  - (c) the prosecutor institutes criminal proceedings against the person and those proceedings conclude otherwise than with a conviction or an order under section 246(3).
- (7) If a relevant offer is set aside by virtue of section 303ZB, all record of the relevant physical data, sample and information derived from a sample must be destroyed as soon as possible after the setting aside.
- (8) In this section, “relevant sexual offence” and “relevant violent offence” have, subject to the modification in subsection (9), the same meanings as in section 19A(6) and include any attempt, conspiracy or incitement to commit such an offence.

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- (9) The modification is that the definition of “relevant sexual offence” in section 19A(6) is to be read as if for paragraph (g) there were substituted—
- “(g) public indecency if it is apparent from the relevant offer (as defined in section 18B(3)) relating to the offence that there was a sexual aspect to the behaviour of the person to whom the relevant offer is issued;”.

**18C Section 18B: extension of retention period where relevant offer relates to certain sexual or violent offences**

- (1) This section applies where the destruction date for relevant physical data, a sample or information derived from a sample falls within section 18B(5)(a) or (b).
- (2) 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.
- (3) An application under subsection (2) may be made to any sheriff—
- in whose sheriffdom the appropriate person resides,
  - in whose sheriffdom that person is believed by the applicant to be, or
  - to whose sheriffdom the person is believed by the applicant to be intending to come.
- (4) An order under subsection (2) must not specify a destruction date more than 2 years later than the previous destruction date.
- (5) The decision of the sheriff on an application under subsection (2) may be appealed to the sheriff principal within 21 days of the decision.
- (6) If the sheriff principal allows an appeal against the refusal of an application under subsection (2), the sheriff principal may make an order amending, or further amending, the destruction date.
- (7) An order under subsection (6) must not specify a destruction date more than 2 years later than the previous destruction date.
- (8) The sheriff principal’s decision on an appeal under subsection (5) is final.
- (9) Section 18B(4) does not apply where—
- an application under subsection (2) has been made but has not been determined,
  - the period within which an appeal may be brought under subsection (5) against a decision to refuse an application has not elapsed, or
  - such an appeal has been brought but has not been withdrawn or finally determined.
- (10) Where—
- the period within which an appeal referred to in subsection (9)(b) may be brought has elapsed without such an appeal being brought,
  - such an appeal is brought and is withdrawn or finally determined against the appellant, or

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(c) an appeal brought under subsection (5) against a decision to grant an application is determined in favour of the appellant,  
the relevant physical data, sample or information derived from a sample must be destroyed as soon as possible after the period has elapsed, or, as the case may be, the appeal is withdrawn or determined.

(11) In this section—

“appropriate person” means the person from whom the relevant physical data was taken or by whom it was provided or from whom the sample was taken,

“destruction date” has the meaning given by section 18B(5),

“the relevant chief constable” has the same meaning as in subsection (11) of section 18A, with the modification that references to the person referred to in subsection (2) of that section are references to the appropriate person.”.

## **79 Retention of samples etc. taken or provided in connection with certain fixed penalty offences**

After section 18C of the 1995 Act insert—

### **“18D Retention of samples etc. taken or provided in connection with certain fixed penalty offences**

(1) This section applies to—

- (a) relevant physical data taken from or provided by a person under section 18(2), and
- (b) any sample, or any information derived from a sample, taken from a person under section 18(6) or (6A),

where the conditions in subsection (2) are satisfied.

(2) The conditions are—

- (a) the person was arrested or detained in connection with a fixed penalty offence,
- (b) the relevant physical data or sample was taken from or provided by the person while the person was under arrest or being detained in connection with that offence,
- (c) after the relevant physical data or sample was taken from or provided by the person, a constable gave the person under section 129(1) of the 2004 Act—
  - (i) a fixed penalty notice in respect of that offence (the “main FPN”), or
  - (ii) the main FPN and one or more other fixed penalty notices in respect of fixed penalty offences arising out of the same circumstances as the offence to which the main FPN relates, and
- (d) the person, in relation to the main FPN and any other fixed penalty notice of the type mentioned in paragraph (c)(ii)—
  - (i) pays the fixed penalty, or

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- (ii) pays any sum that the person is liable to pay by virtue of section 131(5) of the 2004 Act.
- (3) Subject to subsections (4) and (5), the relevant physical data, sample or information derived from a sample must be destroyed before the end of the period of 2 years beginning with—
  - (a) where subsection (2)(c)(i) applies, the day on which the main FPN is given to the person,
  - (b) where subsection (2)(c)(ii) applies and—
    - (i) the main FPN and any other fixed penalty notice are given to the person on the same day, that day,
    - (ii) the main FPN and any other fixed penalty notice are given to the person on different days, the later day.
- (4) Where—
  - (a) subsection (2)(c)(i) applies, and
  - (b) the main FPN is revoked under section 133(1) of the 2004 Act,
 the relevant physical data, sample or information derived from a sample must be destroyed as soon as possible after the revocation.
- (5) Where—
  - (a) subsection (2)(c)(ii) applies, and
  - (b) the main FPN and any other fixed penalty notices are revoked under section 133(1) of the 2004 Act,
 the relevant physical data, sample or information derived from a sample must be destroyed as soon as possible after the revocations.
- (6) In this section—
  - “the 2004 Act” means the Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8),
  - “fixed penalty notice” has the meaning given by section 129(2) of the 2004 Act,
  - “fixed penalty offence” has the meaning given by section 128(1) of the 2004 Act.”.

## **80 Retention of samples etc. from children referred to children’s hearings**

After section 18D of the 1995 Act insert—

### **“18E Retention of samples etc.: children referred to children’s hearings**

- (1) This section applies to—
  - (a) relevant physical data taken from or provided by a child under section 18(2); and
  - (b) any sample, or any information derived from a sample, taken from a child under section 18(6) or (6A),
 where the first condition, and the second, third or fourth condition, are satisfied.
- (2) The first condition is that the child’s case has been referred to a children’s hearing under section 65(1) of the Children (Scotland) Act 1995 (c.36) (the “Children Act”).

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- (3) The second condition is that—
- (a) a ground of the referral is that the child has committed an offence mentioned in subsection (6) (a “relevant offence”);
  - (b) both the child and the relevant person in relation to the child accept, under section 65(5) or (6) of the Children Act, the ground of referral; and
  - (c) no application to the sheriff under section 65(7) or (9) of that Act is made in relation to that ground.
- (4) The third condition is that—
- (a) a ground of the referral is that the child has committed a relevant offence;
  - (b) the sheriff, on an application under section 65(7) or (9) of the Children Act—
    - (i) deems, under section 68(8) of the Children Act; or
    - (ii) finds, under section 68(10) of that Act,the ground of referral to be established; and
  - (c) no application to the sheriff under section 85(1) of that Act is made in relation to that ground.
- (5) The fourth condition is that the sheriff, on an application under section 85(1) of the Children Act—
- (a) is satisfied, under section 85(6)(b) of that Act, that a ground of referral which constitutes a relevant offence is established; or
  - (b) finds, under section 85(7)(b) of that Act, that—
    - (i) a ground of referral, which was not stated in the original application under section 65(7) or (9) of that Act, is established; and
    - (ii) that ground constitutes a relevant offence.
- (6) A relevant offence is such relevant sexual offence or relevant violent offence as the Scottish Ministers may by order made by statutory instrument prescribe.
- (7) An order under subsection (6) may prescribe a relevant violent offence by reference to a particular degree of seriousness.
- (8) Subject to section 18F(8) and (9), the relevant physical data, sample or information derived from a sample must be destroyed no later than the destruction date.
- (9) The destruction date is—
- (a) the date of expiry of the period of 3 years following—
    - (i) where the second condition is satisfied, the date on which the ground of referral was accepted as mentioned in that condition;
    - (ii) where the third condition is satisfied, the date on which the ground of referral was established as mentioned in that condition;
    - (iii) where the ground of referral is established as mentioned in paragraph (a) of the fourth condition, the date on which that ground was established under section 68(8) or, as the case may be, (10) of the Children Act; or

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- (iv) where the ground of referral is established as mentioned in paragraph (b) of the fourth condition, the date on which that ground was established as mentioned in that paragraph; or
  - (b) such later date as an order under section 18F(1) may specify.
- (10) No statutory instrument containing an order under subsection (6) may be made unless a draft of the instrument has been laid before, and approved by resolution of, the Scottish Parliament.
- (11) In this section—
- “relevant person” has the same meaning as in section 93(2) of the Children Act;
  - “relevant sexual offence” and “relevant violent offence” have, subject to the modification in subsection (12), the same meanings as in section 19A(6) and include any attempt, conspiracy or incitement to commit such an offence.
- (12) The modification is that the definition of “relevant sexual offence” in section 19A(6) is to be read as if for paragraph (g) there were substituted—
- “(g) public indecency if it is apparent from the ground of referral relating to the offence that there was a sexual aspect to the behaviour of the child;”.

### **18F Retention of samples etc. relating to children: appeals**

- (1) 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.
- (2) An application under subsection (1) may be made to any sheriff—
- (a) in whose sheriffdom the child mentioned in section 18E(1) resides;
  - (b) in whose sheriffdom that child is believed by the applicant to be; or
  - (c) to whose sheriffdom that child is believed by the applicant to be intending to come.
- (3) An order under subsection (1) must not specify a destruction date more than 2 years later than the previous destruction date.
- (4) The decision of the sheriff on an application under subsection (1) may be appealed to the sheriff principal within 21 days of the decision.
- (5) If the sheriff principal allows an appeal against the refusal of an application under subsection (1), the sheriff principal may make an order amending, or further amending, the destruction date.
- (6) An order under subsection (5) must not specify a destruction date more than 2 years later than the previous destruction date.
- (7) The sheriff principal’s decision on an appeal under subsection (4) is final.
- (8) Section 18E(8) does not apply where—
- (a) an application under subsection (1) has been made but has not been determined;



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- (b) the period within which an appeal may be brought under subsection (4) 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.

(9) Where—

- (a) the period within which an appeal referred to in subsection (8)(b) 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 (4) against a decision to grant an application is determined in favour of the appellant,

the relevant physical data, sample or information derived from a sample must be destroyed as soon as possible after the period has elapsed or, as the case may be, the appeal is withdrawn or determined.

(10) In this section—

“destruction date” has the meaning given by section 18E(9); and  
“relevant chief constable” has the same meaning as in subsection (11) of section 18A, with the modification that references to the person referred to in subsection (2) of that section are references to the child referred to in section 18E(1).”.

## **81 Extension of section 19A of 1995 Act**

In section 19A(6) of the 1995 Act (definitions of certain expressions for purposes of section 19A)—

- (a) in the definition of “relevant sexual offence”, for paragraph (g) substitute—
  - “(g) public indecency if the court, in imposing sentence or otherwise disposing of the case, determined for the purposes of paragraph 60 of Schedule 3 to the Sexual Offences Act 2003 (c.42) that there was a significant sexual aspect to the offender’s behaviour in committing the offence;”, and
- (b) in paragraph (h) of the definition of “relevant violent offence”, after subparagraph (iv), insert—
  - “(v) section 47(1) (possession of offensive weapon in public place), 49(1) (possession of article with blade or point in public place), 49A(1) or (2) (possession of article with blade or point or offensive weapon on school premises) or 49C(1) (possession of offensive weapon or article with blade or point in prison) of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39);”.

## **82 Use of samples etc.**

(1) After section 19B of the 1995 Act insert—

### **“19C Sections 18 and 19 to 19AA: use of samples etc.**

- (1) Subsection (2) applies to—
  - (a) relevant physical data taken or provided under section 18(2), 19(2)(a), 19A(2)(a) or 19AA(3)(a),

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- (b) a sample, or any information derived from a sample, taken under section 18(6) or (6A), 19(2)(b) or (c), 19A(2)(b) or (c) or 19AA(3)(b) or (c),
  - (c) relevant physical data or a sample taken from a person—
    - (i) by virtue of any power of search,
    - (ii) by virtue of any power to take possession of evidence where there is immediate danger of its being lost or destroyed, or
    - (iii) under the authority of a warrant,
  - (d) information derived from a sample falling within paragraph (c), and
  - (e) relevant physical data, a sample or information derived from a sample taken from, or provided by, a person outwith Scotland which is given by any person to—
    - (i) a police force,
    - (ii) the Scottish Police Services Authority, or
    - (iii) a person acting on behalf of a police force.
- (2) The relevant physical data, sample or information derived from a sample may be used—
- (a) for the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution, or
  - (b) for the identification of a deceased person or a person from whom the relevant physical data or sample came.
- (3) Subsections (4) and (5) apply to relevant physical data, a sample or information derived from a sample falling within any of paragraphs (a) to (d) of subsection (1) (“relevant material”).
- (4) If the relevant material is held by a police force, the Scottish Police Services Authority or a person acting on behalf of a police force, the police force or, as the case may be, the Authority or person may give the relevant material to another person for use by that person in accordance with subsection (2).
- (5) A police force, the Scottish Police Services Authority or a person acting on behalf of a police force may, in using the relevant material in accordance with subsection (2), check it against other relevant physical data, samples and information derived from samples received from another person.
- (6) In subsection (2)—
- (a) the reference to crime includes a reference to—
    - (i) conduct which constitutes a criminal offence or two or more criminal offences (whether under the law of a part of the United Kingdom or a country or territory outside the United Kingdom), or
    - (ii) conduct which is, or corresponds to, conduct which, if it all took place in any one part of the United Kingdom would constitute a criminal offence or two or more criminal offences,
  - (b) the reference to an investigation includes a reference to an investigation outside Scotland of a crime or suspected crime, and
  - (c) the reference to a prosecution includes a reference to a prosecution brought in respect of a crime in a country or territory outside Scotland.

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- (7) This section is without prejudice to any other power relating to the use of relevant physical data, samples or information derived from a sample.”.
- (2) In section 56 of the Criminal Justice (Scotland) Act 2003 (asp 7) (use of samples etc. voluntarily given)—
- (a) in subsection (1), after “from,” insert “or provided by”,
  - (b) in subsection (2), for the words from “may” where it first occurs to the end substitute “, or information derived from that sample may be held and used—
    - (a) for the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution, or
    - (b) for the identification of a deceased person or a person from whom the sample or relevant physical data came.”,
  - (c) in subsection (3), after “information” insert “derived from a sample”,
  - (d) in subsection (5)(b), the words “with all information derived from them” are repealed,
  - (e) in subsection (6)(a), for “it or them” substitute “the sample”,
  - (f) in subsection (7)(a), the words “or relevant physical data”, in the second place where they occur, are repealed, and
  - (g) after subsection (7) insert—
    - “(7A) In subsection (2)—
      - (a) the reference to crime includes a reference to—
        - (i) conduct which constitutes a criminal offence or two or more criminal offences (whether under the law of a part of the United Kingdom or a country or territory outside the United Kingdom), or
        - (ii) conduct which is, or corresponds to, conduct which, if it all took place in any one part of the United Kingdom would constitute a criminal offence or two or more criminal offences,
      - (b) the reference to an investigation includes a reference to an investigation outside the United Kingdom of a crime or suspected crime, and
      - (c) the reference to a prosecution includes a reference to a prosecution brought in respect of a crime in a country or territory outside the United Kingdom.”.