

# CONSULTATION ON THE ACQUISITION AND RETENTION OF DNA AND FINGERPRINT DATA IN SCOTLAND

## SCOTTISH CHILDREN'S REPORTER ADMINISTRATION: RESPONSE

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### Introduction

SCRA welcomes the opportunity to respond to the Scottish Government's consultation on the acquisition and retention of forensic and DNA evidence. SCRA was fully engaged with Professor Fraser's review and provided a significant amount of information on the operation of the Children's Hearings System in order to better inform his deliberations.

SCRA recognises that there is a small group of children and young people who commit serious violent and sexual offences, and that the impact of this behaviour on their victims can be severe and long-lasting. In 2006-07, 883 children were referred to the Reporter for committing violent or sexual offences<sup>1</sup>. This was from a total of 15,728 children referred to the Reporter on offence grounds that year.

SCRA's response to this consultation is focused on the section of Professor Fraser's report which recommends that there should be a new power to take and retain DNA and fingerprint data from children who are dealt with by Children's Hearings rather than the criminal courts.

In response, the Scottish Government's consultation paper puts forward three possible options as follows:

1. *"No change in the present arrangements, on the basis that it is not appropriate as a matter of principle to take and retain DNA and fingerprints from children who are dealt with by Children's Hearings as opposed to the criminal courts;*
2. *"Accept Professor Fraser's recommendation that there should be a new power to take and retain DNA and fingerprints from children who are dealt with by Children's Hearings and are found to have committed a relevant sexual or violent offence, or accept that they have done so. The Government does not however believe that it would be practical or appropriate to distinguish between assaults on the basis of a Reporter's marking: there is no distinction between 'grades' of assault in the existing definition of violent offences for the purposes of DNA retention and we do not think it right or necessary to introduce such a distinction. Views are therefore also invited on whether, if this option was adopted, assaults should be included or excluded in their entirety; and whether powers of retention should be confined to more serious sexual offences such as rape or indecent assault and exclude for example, consensual sex between children who are both under the age of 16;*

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<sup>1</sup> Defined as; Assault with attempt to ravish, Assault with intent to rob, Attempted murder, Bodily injury, Culpable homicide, Indecent assault, Lewd and libidinous practices, Murder, Possession of a firearm with intent to injure or to rob, Rape, Serious assault and Wilful and malicious fireraising. Of this number, 580 of the offences committed comprised wilful and malicious fireraising.

3. *“Accept Professor Fraser’s recommendation in part by introducing power to take and retain DNA and fingerprints from children who are dealt with by Children’s Hearings and are found to have committed a relevant sexual or violent offence, or accept that they have done so, for a period of 3 years only. The same issue would arise about whether assaults should be included or excluded in their entirety; and about the definition of sexual offences for this purpose. This approach would reflect the potential gravity of sexual or violent offences but also maintain a balanced approach as powers to retain DNA and fingerprints in relation to children who are dealt with by Children’s Hearings would always be subject to a strict time limit.”*

## **SCRA Response**

SCRA’s response presents comments on all three of the Scottish Government’s identified options.

### **Option one**

In reading this response, reference should be made to SCRA’s submission to Professor Fraser’s Review, on 8 February 2008, which explains in more detail the background, principles and legal context which make the Children’s Hearings System unique. It highlights how and why the position of children dealt within the System on offence grounds is distinct and different from the position of adults in the criminal justice system. A brief summary is provided below.

### **The Children’s Hearings System**

- The Children’s Hearings System is designed to be welfare-based and focused on the needs of the child.
- When dealing with offence grounds for referral, a Children’s Hearing is not determining a criminal charge.<sup>2</sup>
- There is an absence of a penal sanction and the proceedings are not penal in their aim. The criminal law proceeds on the basis that crimes and offences carry a liability to prosecution, and, if proved before a court of law, a liability to certain penalties. Criminal proceedings, by their nature, focus attention on the specific act alleged. However, in the Children’s Hearings System “...the offence, while the essential basis of judicial action, has significance only as a pointer to the need for intervention”.<sup>3</sup>
- It is a process determining civil rights and, in so doing, some of the general protections of Article 6 of the ECHR have to be considered and implemented. For example, currently children only have legal representation in Children’s Hearings if specific conditions apply. If children’s DNA is to be retained through Children’s Hearings proceedings, there may be a need for consideration of the extension of legal representation or a different legal process to ensure provisions of Article 6 are met.
- When deciding whether to refer a child to a Hearing, the Reporter considers other factors as well as the reason for the referral (e.g. offence incident). Offending behaviour by a child is not a prosecution and the public interest is not part of the consideration by the Reporter in relation to the need for compulsory measures of supervision.

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<sup>2</sup> *S v Miller 2001 SLT*

<sup>3</sup> *The Kilbrandon Report, 1964, para 71*

- The UN Convention on the Rights of the Child (UNCRC), to which the UK is party, states at Article 3(1) that: "...in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

### **Differentiation of children and adults**

Children who offend are treated differently from adults who offend, because of their vulnerability, lack of maturity and experience, and other factors related to their youth. The child's welfare is the paramount consideration [unless the *risk of serious harm principle* in section 16(5) of the Children (Scotland) Act 1995 applies].

The taking and retention of a DNA sample could be considered to constitute a serious intrusion on a person's right to privacy. The UNCRC states the need to provide children with special legal protections. This is found in the Convention's preamble, which states: "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection."

Furthermore, Article 10 of the UNCRC requires juvenile offenders to be treated in an age-appropriate manner, while Article 3 of the Convention provides that in all actions concerning children, public and private institutions, courts, administrative bodies and legislative bodies shall make the best interests of the child a primary consideration.

Therefore, when considering the balance of the rights and interests of the child on one hand and the public interest on the other, it is consistent with both domestic and international law<sup>4</sup> to give children's interests particular weight and to provide additional protections to them, simply by virtue of their status as a child.

The operation of Scotland's Children's Hearings System is consistent with these principles and SCRA is concerned that they may be infringed by any proposal to retain DNA or forensic evidence from children whose behaviour is addressed within the system.

### **Options two and three**

The comments above apply equally to consideration of Options two and three. Should the Scottish Government decide to accept Professor Fraser's recommendations, either in whole or in part, SCRA has the following additional comments.

### **Assaults**

SCRA agrees with the Scottish Government that it would not be appropriate to distinguish between seriousness of assaults on the basis of the Reporter's assessment of the "gravity" of an incident.

SCRA further considers that the offence of assault should be excluded entirely from any consideration of taking and retention of DNA evidence from children in the Hearings System. This is because the category covers a broad range of behaviour, much of which may be minor in nature. For example, a playground 'scuffle' between two children might be recorded as an assault. In the absence of any means of

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<sup>4</sup> *The UN Convention on the Rights of the Child and European Convention on Human Rights*

distinguishing between this minor and more serious behaviour, SCRA believes that taking and retaining DNA and forensic evidence from children in these circumstances could be considered a disproportionate response.

### **Children who may pose a future risk to others**

One of the reasons given for considering the retention of DNA samples from children who have committed a “relevant offence” is one of public safety, in that they “...may therefore pose a future risk to others and perhaps themselves”.<sup>5</sup> The difficulties of determining whether a child may pose a future risk is explained in SCRA’s submission to Professor Fraser’s Review.

### **Consensual sexual offences**

SCRA considers that any offence created, for example by means of the Sexual Offences (Scotland) Bill, in relation to consensual sex between under-16s should be exempted from these provisions if they are introduced.

### **Proposed three year time limit (option three)**

If the Scottish Government were to choose to allow DNA and forensic evidence to be taken and retained from children in the Hearings System, a three year limit would seem to represent a more proportionate response. SCRA has no further specific comment to make on this part of the proposals.

### **Additional safeguards**

SCRA considers that any change to the current operation of the Hearings System may require enhanced procedural protection to ensure that children are treated fairly and that their rights, including their right to privacy, are adequately protected. For example, much wider access to legal representation might be required, with consequent potential impacts on the flexibility and informality of the system.

### **Wider issues**

It is possible that a consequence of the introduction of options two or three is that more children will decide, or be advised, not to accept the relevant grounds of referral at a Children’s Hearing because the consequence of acceptance would result in the ability of the State to retain the child’s DNA samples on a database. If this was the case, it could result in a number of practical implications, not least of which is likely to be a larger number of proof hearings before the Sheriff than at present.

The effect of the Rehabilitation of Offenders Act 1974<sup>6</sup>, in so far as it applies to children referred to a Children’s Hearing on section 52(2)(i) grounds should also be considered as a part of this debate.

A significant and related issue is the current age of criminal responsibility in Scotland<sup>7</sup>. When this has been challenged in the past, in particular by the United Nations Committee on the Rights of the Child, the response has been that the Children’s Hearings System is welfare-based and that criminal consequences do not

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<sup>5</sup> Kenny MacAskill MSP, Cabinet Secretary for Justice, 24<sup>th</sup> September 2007

<sup>6</sup> This was considered in the case of *S v Miller* and referred to in SCRA’s submission to Professor Fraser’s Review

<sup>7</sup> Currently 8 years

flow from its decisions, or from the decisions made by children within the system (for example to accept grounds for referral<sup>8</sup>). Allowing the retention of DNA evidence from some children dealt with by the Hearings System could seriously undermine this position.

### **Conclusion**

On balance, for all of the reasons outlined above, SCRA is of the opinion that Option one is the best of the three options presented in the Scottish Government's consultation paper. We would be happy to engage in further discussion with the Scottish Government on these issues.

**SCRA**  
**26 November 2008**

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<sup>8</sup> However, please note that application of the Rehabilitation of Offenders Act to the Children's Hearings System.