These notes refer to the Criminal Justice and Police Act 2001 (c.16) which received Royal Assent on 11th May 2001

CRIMINAL JUSTICE AND POLICE ACT 2001

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Schedule 2: Provisions supplementary to Part 2

Part 3: Police and Criminal Evidence and the Terrorism Act

Arrestable Offences

192. The Act amends section 24(2) of the Police and Criminal Evidence Act 1984 to include two new offences in the list of offences for which a power of summary arrest exists. At present, unless the general arrest conditions under section 25 of PACE apply, the police cannot take offenders into custody and question them. Questioning can only take place at the scene of the offence and the offenders may only be summoned to appear at a magistrates' court to answer the charge. The offences concerned are:

- kerb-crawling which is currently an offence under section 1 of the Sexual Offences Act 1985; and
- failure to stop after an accident where personal injury is caused. Section 170 of the Road Traffic Act 1988 places certain requirements on a driver involved in an accident within the categories specified to stop, report the accident and provide information or documents. It is an offence under section 170(4) to fail to comply with these requirements. Part 3 would not provide a power of arrest in the case of a damage only accident, although the general arrest conditions may apply in that case.

Importation of indecent or obscene material

193. The aim of this section of the Act is to make the customs offence of 'importing indecent and obscene material' a serious arrestable offence under Schedule 5 to the Police and Criminal Evidence Act 1984 and the Police and Criminal Evidence (Northern Ireland) Order 1989.

194. The effect of making this offence a serious arrestable offence will be to give customs officers greater powers in relation to their investigation of such offences. The proposal builds on the existing domestic legislation, as child pornography offences under section 1 of the Protection of Children Act 1978 are already listed in those Schedules as serious arrestable offences.

Detention and arrest

195. The Act adds new sections 40A and 45A to the Police and Criminal Evidence Act 1984 (PACE) to allow for the use, in certain circumstances, of telephone reviews of detention, video reviews of detention and video links for other custody decisions where the review officer is at different station from the person detained. Section 40 of PACE provides for reviews of the detention of persons detained in police custody in connection with the investigation of an offence. The first review must take place no later than six hours after the detention was first authorised. The second review must take place no later than

nine hours after the first and subsequent reviews must be at intervals of no longer than nine hours. In relation to those who have been arrested and charged, the responsibility for carrying out the reviews lies with the custody officer (section 40 (1) (a)).

196. Section 36 (3) of PACE provides that no officer may be appointed a custody officer unless he is of at least the rank of sergeant. Subsection 4 provides that an officer of any rank may perform the functions of a custody officer at a designated police station if a custody officer is not readily available to perform them.

197. In relation to those who have been arrested but not yet charged, the responsibility to undertake the review lies with an officer of at least inspector rank not directly involved in the investigation (section 40 (1)(b)).

198. An attempt was made to introduce reviews of detention by video link in the area of Kent Constabulary within the existing law. However, in a judicial review in November 1999 (R v Chief Constable of Kent ex parte Kent Police Federation Joint Branch Board and Another [2000] 2 Cr.App.R. 196) the Lord Chief Justice held that section 40 of PACE did not permit review by video link and that the practice of section 40 telephone reviews approved by note C:15C of the Codes of Practice to PACE was of dubious legality. The Lord Chief Justice held that it was implicit in Section 40 and explicit in section 37(5) read in accordance with section 40(8) that the detainee should be in the physical presence of the review officer.

199. The Act allows for pre-charge reviews under Section 40 (1)(b) to be carried out both by video link, where the review officer is at a different police station to the detained person, and by telephone, but only where it is impracticable to carry out the review in person or by video link within the required time-scale. It is not envisaged that the duties of the review officer should be performed by video link as a matter of course. It is envisaged that a review by telephone might be used, for example, where a review officer is unable to travel to the police station to carry out a review because the road is flooded. The Act also provides a regulation-making power to allow custody officers to make certain decisions about charging, detention and bail using video conferencing facilities where the custody officer is at a different police station to the detainee.

200. The Government proposes to pilot the use of video conferencing facilities for Section 40 reviews of detention and other custody decisions. The Act provides for regulations to be drawn up specifying which police stations are to be piloted and, if so required, which functions should be piloted. The option of remote decision making for detainees in non-designated stations will only be available where the necessary technology and administrative arrangements are in place. Even in areas within the pilot scheme, the option will remain for an officer at the non-designated station to carry out the custody officer functions as in existing law. In practice, the decision as to who should carry out the functions is likely to be taken in consultation with the custody officer at the nearest designated police station

Authorisation for delay in notifying arrest

201. The Act amends Section 56(2) (b) of PACE to provide for a reduction from superintendent to inspector of the rank of officer needed to authorise a delay in allowing an arrested person to notify someone of his arrest and detention.

Use of video links for proceedings for extending Terrorism Act detention

202. The Act amends paragraph 33 of Schedule 8 to the Terrorism Act 2000 to enable judicial extensions of detention proceedings to be conducted by video link. Part 3 of Schedule 8 to the Terrorism Act 2000 makes provision for extensions of detention of terrorist suspects to be considered and authorised by a judicial authority. At present, such extensions are considered by the Secretary of State. The judicial authority will hear applications by the police for extensions of detention beyond the 48 hour period during which the police can detain an individual arrested under section 41 of the Terrorism

Act. The maximum time a person may be held on judicial authority is seven days from the time of arrest or of detention under Schedule 7 if the person was being examined under this power initially.

Visual recording of interviews

203. The Act will allow for the visual recording of interviews with suspects.

204. At present it is doubtful whether the law permits the video recording of the interview with a person suspected of a criminal offence to proceed where the suspect objects - unlike audio recording which can proceed even when the suspect objects. A number of police forces have been piloting video recording of interviews with the consent of the suspect. The Government proposes to evaluate the effectiveness of video taping in these pilot areas initially, but a change in law is necessary in order to proceed with the evaluation.

Codes of Practice

205. Codes of Practice are issued under PACE covering:

- stop and search,
- searching of premises and seizure of property,
- detention, treatment and questioning,
- identification procedures and
- tape recording of interviews with suspects.

206. At the moment, ***any*** changes to these Codes have to be subject to full public consultation and a process of debate in each House of Parliament.

207. The Act allows proposals for limited amendments to the Codes for trial purposes to be made subject to the negative resolution procedure. Such changes could be for fixed periods of up to two years and could relate to defined areas and classes of offences or offenders. Permanent amendments to the codes which would apply generally would still need to be made using the existing procedures and thus be subject to full consultation and the affirmative resolution procedure.

Fingerprints and DNA

208. The Act amends those parts of PACE dealing with the taking, storage and retrieval of fingerprints, footprints and DNA, to take account of developments in a number of new technologies. It also addresses the need to reflect new practices and procedures. It makes provision for electronic capture and storage of fingerprints, and type approval of the equipment used. It further provides for officers of the level of inspector or above to give authorisation to the taking of fingerprints and non-intimate samples without consent and for the taking of intimate samples with consent.

209. In July 1999 the Home Office published "Proposals for Revising Legislative Measures on Fingerprints, Footprints and DNA samples" (This was published by Home Office Communication Directorate and is available on the Home Office website at http://www.homeoffice.gov.uk.). This consultation document formed the basis for some of the measures included in this Act. The responses received represented a broad range of interests. The majority of the respondents welcomed the proposals which have now been taken forward in this Act.

210. An additional measure has been included to allow all fingerprints and DNA samples lawfully taken from suspects during the course of an investigation to be retained and used for the purposes of prevention and detection of crime and the prosecution of offences. This arises from the decisions of the Court of Appeal (Criminal Division)

in R v Weir and R v B (Attorney General's reference No 3/199) May 2000. These raised the issue of whether the law relating to the retention and use of DNA samples on acquittal should be changed. In these two cases compelling DNA evidence that linked one suspect to a rape and the other to a murder could not be used and neither could be convicted. This was because at the time the matches were made both defendants had either been acquitted or a decision made not to proceed with the offences for which the DNA profiles were taken. Currently section 64 of PACE specifies that where a person is not prosecuted or is acquitted of the offence the sample must be destroyed and the information derived from it can not be used. The subsequent decision of the House of Lords overturned the ruling of the Court of Appeal. The House of Lords ruled that where a DNA sample fell to be destroyed but had not been, although section 64 of PACE prohibited its use in the investigation of any other offence, it did not make evidence obtained as a failure to comply with that prohibition inadmissible, but left it to the discretion of the trial judge. The Act removes the requirement of destruction and provides that fingerprints and samples lawfully taken on suspicion of involvement in an offence or under the Terrorism Act can be used in the investigation of other offences. This new measure will bring the provisions of PACE for dealing with fingerprint and DNA evidence in line with other forms of evidence.

211. The Act also amends the Police and Criminal Evidence (NI) Order 1989 so that restrictions on the use and destruction of fingerprints and samples are consistent with the new provisions for England and Wales, as detailed above.

Authority for intimate searches

212. The Act amends section 55(1) and (5) of PACE to provide for a reduction from superintendent to inspector of the rank of officer who is required to authorise an intimate search or to authorise an intimate search to be carried out by someone other than a suitably qualified person.

Samples

213. Section 62(9) provides that intimate samples other than urine samples or dental impressions may only be taken by a registered medical practitioner and that a dental impression may only be taken by a registered dentist.

214. The Act amends that section so that registered nurses may also take samples which are currently required to be taken by a registered medical practitioner.

Power to apply 1984 Act Provisions

215. The Act fills a gap in the powers available to officers of the Secretary of State for Trade and Industry when investigating criminal offences. It amends the Police and Criminal Evidence Act to give the Secretary of State the power to make an order applying the provisions of Schedule 1 to that Act so far as they relate to “special procedure” (e.g. material subject to confidentiality such as bank accounts) material for the purposes of investigations of “serious arrestable offences” (e.g. offences carrying a sentence of five years imprisonment or more such, as theft) by officers of the Secretary of State for Trade and Industry. At present, such officers have no statutory powers when carrying out criminal investigations and so are unable to gain access to material held in confidence such as bank accounts.

Execution of process in other domestic jurisdictions

216. The Act fills a gap in the law relating to the execution in Scotland of search warrants issued or production orders made in England & Wales in respect of ‘special procedure’ and ‘excluded’ material as defined in the Police and Criminal Evidence Act 1984. It amends the Police and Criminal Evidence Act 1984 to apply section 4 of the Summary Jurisdiction (Process) Act 1881 to orders and warrants for special procedure and excluded material. The 1881 Act currently enables process issued by a court of summary

jurisdiction in England & Wales to be endorsed for execution in Scotland and *vice versa*. However these arrangements do not apply to search warrants and production orders in respect of 'special procedure' material (e.g. bank details) or excluded material, since such warrants and orders can be issued and made only by a circuit judge, i.e. not by a court of summary jurisdiction. The Act makes comparable provision for Northern Ireland.

Section 71: Arrestable offences

217. This section adds the offences of kerb crawling and failure to stop and report an accident (in which personal injury is caused) to the list of offences in section 24 (2) of the Police and Criminal Evidence Act 1984 for which a power of summary arrest exists. Making these offences arrestable enables the police to take offenders into custody and question them rather than having to summons them to appear at a magistrates' court to answer the charge.

Section 72: Importation of indecent or obscene material

218. Section 170(2)(b) of the Customs and Excise Management Act 1979 makes it an offence knowingly to evade any prohibition or restriction for the time being in force. Section 42 of the Customs Consolidation Act 1876 prohibits the importation into the United Kingdom of indecent or obscene articles. Together these sections make it an offence to import or bring into the United Kingdom indecent or obscene articles. Existing legislation provides that this offence is one to which the summary arrest powers of the Police and Criminal Evidence Act 1989 and the Police and Criminal Evidence (Northern Ireland) Order 1989 apply. The effect of section 72 will be to make this offence a serious arrestable offence in England and Wales and Northern Ireland by adding it to the list of such offences set out in Schedule 5 to the Police and Criminal Evidence Act 1984 and the Police and Criminal Evidence (Northern Ireland) Order 1989.

219. Making this offence a serious arrestable offence will, whilst retaining the existing powers of summary arrest, allow an officer of Customs and Excise to exercise greater powers than would be available in relation to the investigation of an offence which was not a serious arrestable offence, in relation to the investigation of that offence. It will allow applications to be made for access to certain material and for warrants to enter and search premises during the course of an investigation. It will also give officers of Customs and Excise greater powers in relation to the detention of a person who has been arrested for this offence.

Section 73: Use of video and telephone links for decisions about detention

220. This section inserts a new section 40A into PACE which allows for an officer of at least the rank of inspector to conduct a review of detention before charge, by telephone. *Subsection (1)* of section 40A prescribes the situations in which a telephone review is to be used: where it is not reasonably practicable for the review officer to be present at the police station where the person is held and where the review is not one which is authorised by regulations in section 45A to be carried out using video conferencing facilities, or where in the circumstances it is not reasonably practicable to use such facilities. The effect of this is that telephone reviews will be used in very limited circumstances.

221. *Subsection (3)* of section 40A alters some of the obligations of the review officer where he is not in the same police station as the detainee. PACE contains several references to functions which imply that the review officer and detainee should be in the same police station. For example, section 37(4) and (5), (duty to make a written record and written record to be made in the presence of person arrested) and sections 40 (12) to (14) (opportunity to make representations orally or in writing). Where the review officer is

not in the same police station as the detainee, the obligation is to cause another officer to make a written record in the presence of the detainee.

222. *Subsection (4)* of section 40A authorises the means by which representations are to be made to the review officer. Subsection (4) (a) allows for the use of email or fax where those facilities exist and (4)(b) for use of the telephone.

223. *Subsection (3)* of section 73 inserts a new section 45A after section 45 of PACE to enable the Secretary of State to make regulations to allow a police officer to perform certain functions where he is not present in the same police station as the arrested person but where he has access to the use of video conferencing facilities to communicate with persons in that station.

224. Section 30(2) of PACE sets out the normal rule that those arrested should be taken to a designated police station, that is one which is designated for the detention of arrested persons. Section 30(3) to (6) sets out the circumstances in which an arrested person may be taken to a non-designated police station for a maximum of six hours. For example, where it appears to a constable that he will be unable to take an arrested person to a designated police station without the arrested person injuring himself, the constable or some other person. Section 36(7) sets out how the functions of the custody officer should be carried out at a non-designated police station. The Act provides that as an alternative to an officer at the non-designated police station having all the powers and duties of a custody officer, a custody officer at a designated police station should be able to carry out some of those functions by means of video conferencing facilities.

225. *Subsections (2)(a) and (b)* of new section 45A set out the functions as those of a custody officer under sections 37, 38 and 40 of PACE in relation to an arrested person who is taken to a non-designated police station; and the function of carrying out a pre charge review of detention under Section 40(1) (b) of PACE by an officer of at least the rank of inspector. *Subsections (3) and (8)* are regulation making powers enabling the regulations to specify how the facilities should be used and in which police stations. *Subsection (4)* provides that the regulations shall only authorise a custody officer at a designated police station to perform any of the functions in subsection (2) (a). *Subsections (5) to (7)* of section 45A make provision similar to *subsections (3)* and *(4)* of section 40A except that the oral representations may be made by video conferencing facilities.

Section 75: Video links for proceedings about Terrorism Act detention

226. This section amends paragraph 33 of Schedule 8 to the Terrorism Act to enable the judicial authority proceedings to be conducted by video links. This is in line with similar arrangements for immigration and bail hearings. The decision whether the hearing will be conducted by video link is at the discretion of the judicial authority who must first hear any representations the detainee wishes to make as to venue. The judicial authority must be satisfied that the detainee can see and hear proceedings and be seen and be heard. Section 75 applies to England, Wales and Northern Ireland only.

Section 76: Visual recording of interviews

227. By inserting a new section 60A to the Police and Criminal Evidence Act, this section will allow for the visual recording of interviews with suspects. The section allows the Secretary of State to issue a code of practice on video recording (similar to section 60 (1) (a) of PACE on tape recording) and enables the Secretary of State to make an order requiring that certain interviews, in certain police force areas be videoed in accordance with the code. The order will be subject to the negative resolution procedure.

Section 77: Codes of practice

228. This section allows proposals for limited modifications to the Codes of Practice under PACE for trial purposes to be made subject to the negative resolution procedure.

Such modifications may have effect in relation to particular areas, offences or classes of offenders and may only have effect for a maximum of two years. Permanent amendments to the Codes of general application would still be subject to the existing requirements for public consultation and subject to the affirmative resolution procedure in parliament.

Section 78: Taking fingerprints

229. *Subsection (1)* allows the police to retake fingerprints where an individual has been convicted of a recordable offence when the initial set of prints they took were incomplete or of poor quality or there were errors in the data capture process. This will also apply to cautions for recordable offences and warnings or reprimands for recordable offences under section 65 of the Crime and Disorder Act 1998.

230. *Subsection (2)* allows officers of the rank of inspector or above to authorise the compulsory taking of fingerprints.

231. *Subsection (3)* allows the police to retake fingerprints where an individual has been charged with a recordable offence, when the initial set of prints they took were incomplete or of poor quality or there were errors in the data capture process.

232. *Subsections (4)* and *(5)* allow for the compulsory fingerprinting of a person who has been arrested, fingerprinted and bailed to reappear at a police station or a court, if at the time of answering bail there is dispute over the identity of the individual.

233. *Subsection (6)* allows for compulsory fingerprinting of those cautioned for recordable offences or warned or reprimanded for recordable offences under section 65 of the Crime and Disorder Act 1998. This will enable the details of these offences which are held in national police records to be supported by fingerprints.

234. *Subsection (7)* provides that where fingerprints are taken electronically, the device used must have type approval from the Secretary of State. This is to ensure that the device will produce images of the appropriate quality and integrity to be used for evidential purposes.

235. *Subsection (8)* extends the definition of fingerprints to include records of fingers, palms and other parts of the hand where there are characteristic skin patterns and makes it clear that a fingerprint does not have to be produced as a print but may be recorded by other means.

236. *Subsection (9)* repeals Section 39 of the Criminal Justice Act 1948. This was used to give proof of previous convictions but has largely fallen into disuse because it could only be used to prove identity if the individual concerned had received a custodial sentence and was fingerprinted during their term of imprisonment.

Section 80: Samples

237. *Subsection (1)* allows officers of the rank of inspector or above to authorise the taking of intimate samples and the compulsory taking of non-intimate samples

238. *Subsection (2)* provides that intimate samples which may at present only be taken by a registered medical practitioner (samples of blood, semen or other tissue fluid, pubic hair; or a swab taken from a body orifice other than the mouth) may also be taken by a registered nurse.

239. *Subsection (3)* permits the retaking of impressions if an impression previously taken as part of the investigation is insufficient or of inadequate quality to allow a match to be made.

240. *Subsection (4)*. As with fingerprints, when skin impressions of other parts of the body are taken electronically the device used must have type approval.

241. *Subsection (5)* makes it clear that the term "analysis" in relation to skin impressions includes comparison and matching. The existing definitions of "footprints or similar impressions" is replaced with a new definition of "skin impression" covering impressions made by any means of parts of the body other than the hand.

242. *Subsection (6)* sets out circumstances in which samples may be regarded as insufficient (and may therefore be retaken) including where scientific failure inhibits the production of a DNA profile or where the sample has been damaged or destroyed prior to analysis. This would give the police the ability to retake samples if for example the laboratory was damaged by fire or where other unforeseen circumstances prevented the production of a profile from the sample.

Section 81: Speculative searches

243. *Subsections (1) & (2)*. Police forces in the UK and Islands can cross search an individual's fingerprints against those held by another UK or Island force and can check DNA profiles against the DNA database. This section extends the power to check fingerprints and DNA samples and the profiles derived from them against records held by those listed in section 63A(1A) of the 1984 Act (for example foreign police forces, the Ministry of Defence and the Armed Forces police forces) on the same basis that already exists between UK and Island forces.

244. Subsection (2) also adds a new subsection (1C) to section 63A(1A). There are occasions when an individual, who is not a suspect, provides fingerprints or samples voluntarily for the purposes of elimination. An example of this is a DNA intelligence (or mass) screen. This subsection would enable the fingerprints or DNA profile derived from the sample to be entered onto the database for cross matching purposes if the individual concerned consents in writing.

Section 82: Restrictions on use and destruction of fingerprints and samples

245. *Subsection (2)* removes the obligation to destroy fingerprints and samples when the individual is cleared of the offence for which they were taken or a decision is made not to prosecute. The obligation to destroy is replaced by a rule to the effect that any fingerprints or samples retained can only be used for the purposes related to the prevention and detection of crime, the investigation of any offence or the conduct of any prosecution. The term "use" includes retaining fingerprints and information derived from samples on databases that will allow speculative searches. Thus if a match is established between an individual who has been cleared of an offence at a subsequent crime scene the police are able to use this information in the investigation of the crime.

246. *Subsection (3)* and *(4)* have the effect that if a person, who is not a suspect, provides a sample or fingerprints voluntarily e.g. for the purposes of elimination, there is no obligation for him to allow his samples or fingerprints to be retained or used other than for the purpose for which they were taken. He will be asked whether he wishes to consent to their retention and use. Where consent is not given the fingerprints or samples must be destroyed and the information derived from them can not be used in evidence against the person concerned or for the purposes of investigation of any offence.

247. *Subsection (5)* preserves the existing gateway in the Immigration and Asylum Act 1999 for disclosure of police information to the Secretary of State for Home Affairs, for use for immigration purposes.

248. *Subsection (6)* will allow all fingerprints samples that have already been taken on suspicion of involvement in a crime to be retained and used once the section is in force.

Section 83: Provision for Northern Ireland corresponding to s.82

249. This section amends the Police and Criminal Evidence (NI) Order 1989 so that the restrictions on the use and destruction of fingerprints and samples correspond to the new provisions for England and Wales contained in section 82.

Section 84: Amendment of Terrorism Act 2000 equivalent to s.82

250. This section makes consequential amendments to the Terrorism Act 2000. It modifies the restriction on the use of fingerprints and samples taken under the provisions of the Act in England and Wales and Northern Ireland to allow their use additionally for the purposes set out in section 82 (the prevention and detection of any crime, the investigation of any offence or the conduct of any prosecution).

Section 85: Power to apply 1984 Act provisions

251. This section amends the Police and Criminal Evidence Act 1984 to enable the Secretary of State by order to apply the "special procedure" material provisions of Schedule 1 to the 1984 Act for the purposes of certain investigations as they apply for the purposes of investigations of offences conducted by police officers. *Subsection (2)* limits the investigations to which the provisions will apply to investigations of serious arrestable offences conducted by an officer of the Department of the Secretary of State for Trade and Industry (or another person authorised to act on his behalf). *Subsection (3)* provides that the provision applies to the investigation of offences committed before the coming into force of the order or the section and *subsection (4)* provides that any order made under *subsection (1)* shall be subject to the negative resolution procedure.

Section 86: Process for obtaining excluded and special procedure material

252. This section amends the Police and Criminal Evidence Act 1984 to apply section 4 of the Summary Jurisdiction (Process) Act 1881 to orders and warrants for special procedure and excluded material. The 1881 Act currently enables process issued by a court of summary jurisdiction in England & Wales to be endorsed for execution in Scotland and vice versa. However these arrangements do not apply to search warrants and production orders in respect of 'special procedure' material (e.g. bank details) or excluded material, since such warrants and orders can be issued and made only by a circuit judge, who does not constitute a court of summary jurisdiction. Comparable provision is made in relation to Northern Ireland.