

CRIME AND SECURITY ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Retention, destruction and use of fingerprints and samples etc

Section 14: Material subject to the Police and Criminal Evidence Act 1984

50. **Section 14** substitutes a new section 64 into PACE and inserts fourteen new sections immediately after it. Section 64 (destruction of fingerprints and samples) currently sets out the purposes for which fingerprints, impressions of footwear and samples may be retained but permits them to be retained after they have fulfilled the purposes for which they were taken without reference to a retention period. The effect of section 14 is to establish a framework for the retention and destruction of such material, following the decision of the European Court of Human Rights in *S and Marper v United Kingdom* [2008] ECHR 1581. The new provisions require the destruction of DNA samples once they have been profiled and loaded satisfactorily onto the national database. In any event, all samples (whether biological DNA material or other samples, such as dental or skin impressions) are required to be destroyed within six months of their being taken (see new section 64ZA(2)).
51. The retention periods for the various categories of data depend on a number of factors including the age of the individual concerned, the seriousness of the offence or alleged offence, whether the individual has been convicted, and if so whether it is a first conviction. The different categories can be summarised as follows:
- Adults - convicted: indefinite retention of fingerprints, impressions of footwear and DNA profile (see substituted section 64(2));
 - Adults - arrested but unconvicted: retention of fingerprints, impressions of footwear and DNA profile for 6 years (see new section 64ZD);
 - Under 18 year olds - convicted of serious offence or more than one minor offence: indefinite retention of fingerprints, impressions of footwear and DNA profile (see substituted section 64(2));
 - Under 18 year olds - convicted of single minor offence: retention of fingerprints, impressions of footwear and DNA profile for 5 years (see new section 64ZH);
 - 16 and 17 year olds - arrested for but unconvicted of serious offence: retention of fingerprints, impressions of footwear and DNA profile for 6 years (see new section 64ZG);
 - All other under 18 year olds - arrested but unconvicted: retention of fingerprints, impressions of footwear and DNA profile for 3 years (see new sections 64ZE and 64ZF);
 - Persons subject to a control order: retention of fingerprints and DNA profile for 2 years after the control order ceases to have effect (see new section 64ZC);

*These notes refer to the Crime and Security Act 2010
(c.17) which received Royal Assent on 8 April 2010*

- All DNA samples: retained until profile loaded onto database, but no more than 6 months (see new section 64ZA).
52. For the purposes of these provisions, the concept of “qualifying offence” is used to distinguish between serious and minor offences. Qualifying offence is defined in section 7.
 53. The substitution of new section 64 also has the effect of removing the existing right of a person to witness the destruction of their fingerprints or impressions of footwear as, with the increasing use of technology, there are often no physical prints to destroy. However, a person still has the right to request a certificate from the police confirming that their data have been destroyed (see new section 64ZM).
 54. The section also contains provision in new section 64ZB for material which has been given voluntarily to be destroyed as soon as it has fulfilled the purpose for which it was taken, unless the individual is subsequently convicted, has previous convictions or consents to its retention.
 55. In addition, where fingerprints or DNA profiles would otherwise need to be destroyed because of the expiry of a time limit set out in the above sections, new section 64ZK enables a responsible chief officer of police to determine that, for reasons of national security, those fingerprints or DNA profiles may be retained for up to two further years on that basis. It is open to the responsible chief officer to make further determinations to retain material where the necessity continues to exist.

Section 15: Material subject to the Police and Criminal Evidence (Northern Ireland) Order 1989

56. **Section 15** makes provision for Northern Ireland equivalent to that made for England and Wales by section 14.

Section 16: Material subject to the Criminal Procedure (Scotland) Act 1995

57. **Section 16** makes provision for Scotland for the retention and use of relevant physical data or samples (including a DNA profile derived from a DNA sample) taken under section 18(2), (6) or (6A) of the Criminal Procedure (Scotland) Act 1995 (prints, samples etc. in criminal investigations).
58. It provides that, where relevant physical data or samples would otherwise need to be destroyed by virtue of the 1995 Act, a responsible chief constable of police may determine that, for reasons of national security, those fingerprints or DNA profiles may be retained for up to two further years on that basis. It is open to chief constables to make further determinations to retain material where the necessity continues to exist.

Section 17: Material subject to the Terrorism Act 2000

59. Paragraph 14 of Schedule 8 to the Terrorism Act 2000 currently provides for the retention of fingerprints and samples (and DNA profiles derived from samples) taken from persons detained under section 41 of or Schedule 7 to the Terrorism Act 2000 (that is persons arrested as a suspected terrorist or persons detained under the ports and borders provisions in Schedule 7). Paragraph 14 of Schedule 8 to the 2000 Act sets out the purposes for which these fingerprints, samples and profiles may be used while they are retained, but permits retention without reference to a retention period.
60. **Section 17** substitutes for paragraph 14 new paragraphs 14 to 14I, making provision for a destruction and retention regime broadly equivalent to that in the amendments to PACE. New paragraph 14A makes provision for the destruction of samples, which must be destroyed within 6 months of being taken, or in the case of a DNA sample, as soon as a profile has been derived from it. Paragraphs 14B to 14E provide for retention periods broadly equivalent to those provided in PACE as amended by section 14. The time

limits for retention depend on the age of the person, whether the person has previous convictions and whether the person is detained under section 41 (arrest on suspicion of terrorism) or under Schedule 7 (detention at ports and borders). But where the person is convicted of a recordable offence in England and Wales or Northern Ireland or an offence punishable by imprisonment in Scotland (or where the person already has such a conviction in England and Wales or Northern Ireland, other than a conviction for a minor offence committed when they were under 18), the material need not be destroyed.

61. As in relation to the PACE provisions, where fingerprints or DNA profiles would otherwise need to be destroyed because of the expiry of a time limit set out in the new provisions, if a chief officer of police (or chief constable in Northern Ireland) determines that it is necessary to retain that material for the purposes of national security, those fingerprints or DNA profiles may be further retained for up to two years (new paragraph 14G). It is open to that chief officer to make further determinations to retain the material, which have effect for a maximum of two years.
62. Paragraph 14I largely replicates the existing provision in paragraph 14 (as prospectively amended by section 16 of the Counter-Terrorism Act 2008) in relation to the use to which retained material may be put: it may be used in the interests of national security, in a terrorist investigation, for the investigation of crime or for identification-related purposes (*sub-paragraphs (1) and (4)*). *Sub-paragraph (2)* replicates the existing provision in paragraph 14 about the material against which fingerprints and samples taken under the Terrorism Act 2000 may be checked. *Sub-paragraph (3)* is new, and provides that, once the new requirement to destroy material applies, the material cannot be used in evidence against the person to whom it relates or for the purposes of the investigation of any offence.

Section 18: Material subject to the Terrorism Act 2000 (Scotland)

63. **Section 18** provides for a new regime for the retention, destruction and use of biometric material taken in Scotland under paragraph 20 of Schedule 8 to the Terrorism Act 2000. Paragraph 20 of Schedule 8 currently provides for the retention of biometric material, including fingerprints, DNA samples and DNA profiles taken from persons detained under section 41 of or Schedule 7 to the Terrorism Act 2000 in Scotland. It sets out the purposes for which this material may be used while they are retained, but permits retention without reference to a retention period. Section 18 amends paragraph 20 of Schedule 8 to the Terrorism Act 2000 by substituting for sub-paragraph (3) new sub-paragraphs (3) to (3C) and repealing sub-paragraph (4). It also provides for new paragraphs 20A to 20I, which makes provision for Scotland broadly equivalent to that made for England and Wales and Northern Ireland by section 17.
64. The time limits for retention depend on the age of the person, whether the person has previous convictions and whether the person is detained under section 41 (arrest on suspicion of terrorism) or under Schedule 7 (detention at ports and borders). Where a person is convicted of a recordable offence in England and Wales and Northern Ireland or an offence punishable by imprisonment in Scotland (or where the person already has such a conviction, other than a conviction for a minor offence committed when they were under 18), the material need not be destroyed.
65. Where fingerprints or DNA profiles would otherwise need to be destroyed because of the expiry of a time limit set out in the new provisions, if a chief constable of police determines that it is necessary to retain that material for the purposes of national security, those fingerprints or DNA profiles may be further retained for up to two years (new paragraph 20G). It is open to a chief constable to make further determinations to retain the material, which have effect for a maximum of 2 years. Paragraph 20I covers the use to which retained material may be put: replicating those for England and Wales or Northern Ireland in section 17.

Section 19: Material subject to the International Criminal Court Act 2001

66. Fingerprints and samples may be taken from a person under Schedule 4 to the International Criminal Court Act 2001 if the International Criminal Court requests assistance in obtaining evidence of the identity of a person (who will usually be a person suspected of committing an “ICC crime” such as genocide or war crimes). Section 19 amends Schedule 4 to make provision about the retention and destruction of material taken under that Schedule, so that all material must be destroyed within six months of it being transferred to the International Criminal Court, or, if later, as soon as it has fulfilled the purposes for which it was taken.

Section 20: Material subject to the Counter-Terrorism Act 2008 (Scotland)

67. Section 11 of the Counter-Terrorism Act 2008 makes provision for the taking of fingerprints and non-intimate samples from persons subject to a control order in Scotland. The provisions contained in section 11 are similar to those in sections 61(6BA) and 63(3D) of PACE (inserted by section 10 of the 2008 Act), which relate to controlled persons in England and Wales, and Articles 61(6BA) and 63(3C) of the Police and Criminal Evidence (Northern Ireland) Order 1989 (“PACE NI”), inserted by section 12 of the 2008 Act, which relate to controlled persons in Northern Ireland. These provisions are yet to be brought into force, pending their amendment in this Act to take account of the *S & Marper* judgment.
68. **Section 20** of this Act amends section 11 of the 2008 Act and adds a new section 11A. These amendments make equivalent provision for the retention and use of fingerprints and non-intimate samples taken from controlled individuals in Scotland as section 14 does for England and Wales (amending PACE) and section 15 does for Northern Ireland (amending PACE NI).
69. The main area of difference between the provision for England, Wales and Northern Ireland and the provision for Scotland is that any samples that are retained in Scotland may be used only in the interests of national security or for the purposes of a terrorist investigation. This difference is necessary in order to avoid making provision in areas that are within devolved competence.

Section 21: Other material

70. Section 18 of the Counter-Terrorism Act 2008 (which, when the Crime and Security Act 2010 received Royal Assent, had not been brought into force) makes provision for the retention by law enforcement authorities in England and Wales and Northern Ireland of DNA samples and profiles and fingerprints obtained by or supplied to the authority in the way described in subsection (3) of that section (which includes covertly acquired material and material supplied by overseas authorities) and which is not held subject to “existing statutory restrictions” such as those set out in PACE or in Schedule 8 to the Terrorism Act 2000. This includes material which is on the police ‘counter-terrorism database’. Section 18 sets out the purposes for which this material may be used while it is retained, but permits retention without reference to a retention period.
71. **Section 21** amends section 18 of the 2008 Act to introduce the requirement to destroy any DNA sample referred to in section 18 as soon as a profile has been derived from it or, if sooner, within 6 months of the sample coming into the authority’s possession (new subsection (3A) of section 18). New subsection (3B) provides that fingerprints or DNA profiles (“material”) relating to an identifiable individual aged under 16 at the time they came into the authority’s possession must be destroyed within 3 years. New subsection (3C) provides for destruction of such material relating to a person aged 16 or over within 6 years of that material coming into the authority’s possession. In each case, where the person is convicted of a recordable offence in England and Wales or Northern Ireland (or where the person already has such a conviction, other than a conviction for a minor offence committed when they were under 18), the material need not be destroyed.

72. Where fingerprints or DNA profiles would otherwise need to be destroyed because of the expiry of a time limit set out in the new provisions, if the 'responsible officer' determines that it is necessary to retain that material for the purposes of national security, those fingerprints or DNA profiles may be further retained for up to two years (new subsections (3E) and (3F) of section 18). The responsible officer may make further determinations to retain the material, which again have effect for a maximum of 2 years. 'Responsible officer' is defined in new subsection (3G) as the chief officer of the police force or organisation which obtained or acquired the material.
73. New subsections (3H) and (3I) of section 18 replicate the provisions in PACE (as amended by this Act) about the destruction of copies of fingerprints and DNA profiles, and new subsection (3J) and substituted sections (4) and (4B) (inserted by *subsection (5)* of section 18) make provision about the uses to which the material may be put (which largely reproduces what is currently in section 18(2) and (4)).
74. *Subsection (8)* inserts a new section 18A into the Counter-Terrorism Act 2008 which provides definitions of terms used in section 18 (as amended by the Act).

Section 22: Destruction of material taken before commencement

75. **Section 22** requires the Secretary of State to make a statutory instrument prescribing the manner, timing and other procedures in respect of destroying relevant biometric material already in existence at the point this legislation comes into force. This will enable the Secretary of State to ensure that the retention and destruction regime set out in this Act is applied to existing material, while recognising that this exercise may take some time to complete; there are some 850,000 profiles of unconvicted persons on the National DNA Database. The statutory instrument will be subject to the negative resolution procedure.

Section 23: National DNA Database Strategy Board

76. **Section 23** provides for the Secretary of State to make arrangements for a National DNA Database Strategy Board. Such a Board already exists, and reports to the Home Secretary, providing strategic oversight of the application of powers under PACE for taking and using DNA. The principal members of the Board are the Association of Chief Police Officers, the Association of Police Authorities and the Home Office, but there is also an independent element to the Board from non-police bodies such as the Information Commissioner and the National DNA Database Ethics Group. This section puts the Board on a statutory footing and requires the Secretary of State to lay the Board's governance rules and annual reports before Parliament.
77. **Section 23** also requires the Board to publish guidance to chief officers on the circumstances in which DNA samples and profiles should be removed immediately from the National DNA Database (*subsection (2)*). Chief officers will be required to act in accordance with the Board's guidance.