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(Scot Law Com No 120)

# Report on Evidence: Blood Group Tests, DNA Tests and Related Matters

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Scottish Law Commission

*Item 1 of our First Programme of Law Reform*

# Evidence: Blood Group Tests, DNA Tests and Related Matters

*To:* The Right Honourable the Lord Fraser of Carmyllie, QC,
*Her Majesty's Advocate*

We have the honour to submit our Report on Evidence: Blood Group Tests, DNA Tests and Related Matters.

(*Signed*) C K DAVIDSON, *Chairman*
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KENNETH F BARCLAY, *Secretary*
*2 August 1989*

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# Part I Introduction

1.1 On 13 October 1988 we were asked by the Lord Advocate to consider the whole question of obtaining bodily samples for the purposes of evidence in civil and criminal cases. We had already done some work on aspects of this question.[1]

## The factual background

**Blood group tests**

1.2 It has been known for a long time that a person's blood has characteristics which distinguish it from the blood of many other people. The best known example is that blood may be of group O, A, B or AB, but many other blood grouping systems are now recognised. The genes responsible for the distinguishing characteristics of a person's blood are inherited from his or her parents in accordance with the known scientific laws of inheritance.

1.3 Blood group evidence may be used in various ways. In a criminal case, for example, tests may show that blood found at the scene of the crime could not have come from a particular suspect. Or tests may show that blood on the accused's clothing could have come from the victim of an assault but could not have come from the accused himself.

1.4 In civil cases the main value of blood group evidence is in paternity disputes. Where the blood of the mother, the child and the alleged father can be tested it may be possible to show that the child's blood has a characteristic which must have been inherited from his or her actual father but which could not have come from the man alleged to be the father. Because the genes responsible for some blood characteristics are inherited only from fathers (paternal genes) it is sometimes possible to exclude a particular man from paternity even if the mother's blood is not available for testing. Where the alleged father is not excluded from paternity, blood group evidence can give a positive indication of the likelihood that he is the father. This will depend on the frequency of the genes in question in the pool of potential fathers. Questions as to whether a particular woman is the mother of a child arise less frequently, but may arise in, for example, immigration or succession cases. The scientific considerations are the same as in the case of paternity disputes.

1.5 The weight to be attached to blood group evidence in any case will depend on the state of scientific knowledge at the time and on such factors as the risk of samples having been given by the wrong person, the risk of contamination or confusion of samples, the qualifications of the testers, and the way in which the tests were carried out. In some criminal cases the material available for testing (eg blood stains on clothing) may be less than ideal. Where, however, blood group tests have been properly carried out on adequate, and adequately identified, samples expert evidence of the results has, for many years now, been accepted by the courts as being of great value.[2]

1. See our Memorandum No 46 on the *Law of Evidence* (1980) paras M.04 to M.07 and our Report on *Illegitimacy* (Scot Law Com No 82, 1984) para 6.14. The recommendations in this Report were implemented by the Law Reform (Parent and Child) (Scotland) Act 1986 which included provisions on the giving of consent to the taking of blood samples from a child or other person incapable of giving consent. See para 3.2 below.
2. See eg *S* v *S* [1972] AC 24 per Lord Reid at p 41; *Docherty* v *McGlynn* 1983 SLT 645 1985 SC 89 and 1985 SLT 237.

**DNA tests**

1.6 DNA profiling (sometimes called "DNA fingerprinting" or (genetic fingerprinting") is a technique which enables blood and certain other body tissues or fluids to be identified in a very precise way.[1] DNA (deoxyribonucleic acid) is genetic material found in all human nucleated cells. The technique involves extracting the DNA from samples of blood or other appropriate body fluid or tissue (such as semen or hair roots) and subjecting it to scientific processes which eventually result in a visible pattern of bands, rather like the bar code found on certain mass produced goods. This is the DNA profile. A person's DNA profile is said to be as distinctive as his fingerprints—hence the colloquial term "DNA fingerprinting". The chances of two people (other than identical twins) having the same DNA profile are said to be extremely remote—one in many thousands of millions.

1.7 The bands in a person's DNA profile are inherited from his or her parents.[2] By comparing the DNA profiles of mother, child and alleged father an expert will be able to reach a conclusion as to whether the alleged man is or is not the child's father. The main difference from conventional blood group testing is that in many cases[3] a positive conclusion of paternity can be reached rather than a conclusion that the alleged father is not excluded and is one of so many men who could be the father.

1.8 A further technique, known as the "single locus probe" has been developed for testing DNA.[4] This can be used on very small samples of material. In some cases it can provide information about parentage which cannot be provided by the normal DNA profiling tests.[5] Yet another technique, known as PCR (polymerase chain reaction), can reduce still further the amount of DNA required for testing.

1.9 The ability of DNA testing to provide positive identification of a person from a sample of blood, semen[6] or other suitable body tissue or fluid means that it is of great potential value in criminal cases. Its ability to provide evidence excluding or confirming parentage means that it is also of great potential value in civil cases where paternity or maternity is in doubt. As in the case of blood group evidence, the weight to be given to evidence of DNA profiles in any case will depend on the state of scientific knowledge at the time and on such factors as the reliability and quality of the samples, and the way in which the tests were carried out. Such evidence has already been successfully used in prosecutions.[7]

**Other forensic tests**

1.10 There are other forensic tests which may require the taking of samples or impressions from a person's body. For example, it may be important in a criminal case to analyse scrapings from under a suspect's fingernails,[8] or stains rubbed from

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1. See generally, Kelly *et al.*, "Method and Applications of DNA Fingerprinting: A Guide for the Non-Scientist" [1987] Crim L R 105; White & Greenwood, "DNA Fingerprinting and the Law" (1988) 51 MLR 145; "DNA Identification Tests and the Courts" (1988) 63 Wash L Rev 903; Burk "DNA Fingerprinting: Possibilities and Pitfalls of a New Technique" (1988) 28 Jurimetrics Journal 455; M A Gelowitz, "DNA Fingerprinting: What's Bred in the Blood" (1988), 65 CR (3d) 122; Rankin, "DNA Fingerprinting" 1988 Journal of the Law Society of Scotland 124; White, "DNA Profiling and Scots Law" 1988 SCOLAG 134; Susskind & Eccles, "DNA Fingerprinting: Implications for Civil Proceedings" 1988 Journal of the Law Society of Scotland 324.
2. In some cases (perhaps about 1 in 10) a band is found in a child which is derived from neither the father nor the mother. In a few cases (less than 1 in 100) two such unascribable bands are found. See the Home Office, *DNA Profiling in Immigration Casework: Report of a pilot trial by the Home Office and Foreign and Commonwealth Office* (1988) para 10.
3. In some cases the paternal bands could have come from the alleged father or a close relative of his (eg his brother). See the Home Office Report, cited above, Annex A.
4. Unlike the normal probes used in DNA profiling, which show up simultaneously many locations in the DNA molecule, the single locus probe examines only one location and reveals a pattern of two bands, one inherited from the mother and the other from the father.
5. See the Home Office Report, cited above, paras 20-21.
6. The DNA is actually in the sperm heads. So semen from a man who had had a vasectomy would be of no use for this purpose.
7. See Rankin, "DNA Fingerprinting" 1988 JLSS 124. See also *H M Adv* v *Gilheaney* (*The Scotsman*, 7 June 1988), where the accused pled guilty to rape when faced with the DNA evidence, *H M Adv* v *Thomas* (*Glasgow Herald*, 17 Feb 1989) where the accused was convicted of rape after DNA tests showed that semen found on the victim's clothing matched a blood sample taken from the accused; *H M Adv* v *Paton* (*Glasgow Herald*, 7 Mar 1989) where the accused pled guilty to rape when faced with the results of DNA tests, *R* v *Maclean* (*The Times*, 14 April 1989), *R* v *Cannan* (*The Times*, 28 April 1989), *R* v *Connors* (*The Times*, 17 June 1989) and *H M Adv* v *Patrick* (*The Scotsman*, 26 July 1989).
8. See eg *McGovern* v *H M Adv* 1950 JC 33.

his fingers,[1] or a dental impression.[2] Somewhat similar issues arise in relation to the taking of fingerprints, or hand or foot impressions.

## The legal background

1.11 There is no legal difficulty in using evidence of blood groups or DNA profiles where such evidence is properly available. In practice this means that there is no difficulty where blood samples, or other suitable samples, have been provided voluntarily. The difficulties arise where consent to the taking of a sample is refused. The difficulties are less acute in criminal cases, because a court may grant a warrant for the taking of a sample[3] but even in criminal cases there are some points of doubt and difficulty relating to the taking of samples of blood or other matter from a person's body for the purpose of testing. We discuss these later. The difficulty in civil cases is that the courts, under the present law, will not order anyone to supply a sample of blood for the purposes of enabling evidence of the results of tests on that blood to be obtained.[4] This has given rise to a great deal of comment and concern.[5]

## Consultation

1.12 In December 1988 we published a discussion paper on *Evidence: Blood Group Tests, DNA Tests and Related Matters*[6] in which we invited views on various options and proposals for reform. The comments received have been most useful to us and have been taken into account in preparing this report. We are grateful to all who responded.[7]

1. See eg *Bell* v *Hogg* 1967 JC 49.
2. See eg *Hay* v *H M Adv* 1968 SLT 334.
3. *H M Adv* v *Milford* 1973 SLT 12.
4. *Whitehall* v *Whitehall* 1958 SC 252.
5. Recent concern was triggered by the case of *Conlon* v *O'Dowd* 1987 SCLR 771; 1988 SCLR 119. See para 3.4 below.
6. Discussion Paper No 80.
7. A list of those submitting written comments is given in Appendix B.

# Part II Criminal cases

## Present law

**Common law rules**

2.1 The present law on the taking of samples or impressions from the body of a suspected or accused person is almost wholly based on common law. In order to show how this has developed, and to reveal the difficulties in the present law, we shall set out the leading cases in chronological order. The starting point is that to go up to someone and extract blood from him or scrape skin from him, or scrape matter from under his fingernails, or take fingerprints or other impressions from his body, by force and without his consent, is an assault and consequently illegal unless authorised by law.[1] It does not necessarily follow that evidence obtained illegally will be inadmissible. The courts have a discretion, which is not exercised lightly, to admit evidence obtained illegally.[2] We are not concerned in this paper with the discretion to admit illegally obtained evidence. We are concerned with the circumstances in which the obtaining of evidence is legal.

2.2 The first case involving normal fingerprinting was the civil case of *Adamson* v *Martin*.[3] In that case the Inner House accepted that the police had no authority to take the fingerprints of a youth after he had been released from custody.

2.3 In *Adair* v *McGarry*[4] objection was taken to evidence of the accused's fingerprints which matched those found on some stolen bottles. It was argued that the police had taken the fingerprints without his consent, and that the police ought to have obtained a warrant before taking such evidence. The High Court (Lord Hunter dissenting) rejected this line of argument. The majority were of the opinion that a warrant was a mere formality and that "the suggested protection by way of warrant is quite illusory".[5] The earlier case of *Adamson* was distinguished because in *Adair* the accused had been under arrest at the time while in *Adamson* the pursuer had been released on bail. The court was also of the view that to deny the police power to take fingerprints would unduly hamper criminal detection. An argument that to force a man to have his fingerprints taken would mean that he was being compelled to supply evidence against himself was rejected since the taking of such evidence was "entirely passive ... he is not compelled to do anything requiring any exercise of his own will or control of his body".[6]

2.4 The case of *Adair* is one of a line of cases[7] which are taken as authority for the police to search any person whom they have lawfully arrested with or without warrant. The right to take fingerprints is regarded as being part of this right of search.

2.5 The next case which involved the extraction of real evidence from the person of the accused was *McGovern* v *H M Adv*[8] In that case the accused came under suspicion while he was at the police station, although he had been neither arrested nor charged with the offence. The police took scrapings from underneath his fingernails. On appeal, the Crown conceded that such evidence had been improperly

1. *Jackson* v *Stevenson* (1897) 2 Adam 255; *McGovern* v *H M Adv* 1950 JC 33 at p 36.
2. *Lawrie* v *Muir* 1950 JC 19; *McGovern* v *H M Adv* 1950 JC 33.
3. 1916 1 SLT 53.
4. 1933 JC 72.
5. LJC Alness at p 80.
6. Lord Sands at p 89.
7. Cf. *Jackson* v *Stevenson* (1897) 2 Adam 255; *Bell* v *Leadbetter* 1934 JC 74.
8. 1950 JC 33.

obtained since it had been obtained without consent and without a warrant and the accused had not been arrested.

2.6 The case of *McGovern* was distinguished in the case of *Bell* v *Hogg*.[1] In *Bell* v *Hogg* a police sergeant took blotting paper rubbings of the accuseds' hands while they were in custody under caution, suspected of stealing copper wire. On appeal, the accused argued that these rubbings of their hands had been illegally carried out since they were not under arrest at the time and they had not been informed of their right to refuse to submit to this procedure. The Court of Appeal dismissed the appeal and distinguished *McGovern* on two grounds. First of all, there was no question of urgency in *McGovern* whereas in *Bell* the accused could have washed the copper marks off their hands. Secondly, the police in *McGovern* had no knowledge as to whether the scrapings would yield any evidence of the suspect's connection with the offence.[2]

2.7 In *Hay* v *H M Adv*[3] a warrant was sought and obtained, prior to the arrest of the accused, for the taking of a dental impression. Evidence of the dental impression was objected to during the course of the trial and the question of its admissibility was heard by the trial judge (Lord Justice-Clerk Grant) with Lord Walker and Lord Milligan. On appeal against conviction, the issue was debated before five judges. All eight judges who heard the case were of the opinion that the evidence had been quite properly obtained.

> "As regards the first and main issue in the appeal—namely the legality of the warrant—it has been observed in more than one of the cases ... that two conflicting considerations arise. On the one hand, there is the need from the point of view of public interest for promptitude and facility in the identification of accused persons and the discovery on their persons or on their premises of indicia either of guilt or innocence. On the other hand, the liberty of the subject must be protected against any undue or unnecessary invasion of it.
>
> "In the circumstances of the present case the obtaining of the warrant prior to the examination in question in our opinion rendered the examination quite legal, and the evidence which resulted from it was therefore competent."[4]

2.8 There are two reported Scottish cases on the taking of blood samples from an accused. In *H M Adv* v *Milford*[5] the procurator fiscal petitioned the sheriff for a warrant to take a blood sample from a man who had been arrested on a charge of rape. The man had been asked to give a blood sample but had refused to do so. Sheriff Macphail granted the warrant because he was of the view that the seriousness of the offence and the importance of the police investigation outweighed the argument that an invasion of bodily integrity was involved. In the later case of *Wilson* v *Milne*,[6] a similar warrant was granted by a sheriff. The accused presented a bill of suspension. In rejecting the bill, Lord Justice-General Emslie acknowledged that the terms of the warrant ought to be carefully considered prior to it being granted. Since then warrants have been granted in many other cases.[7]

2.9 Where a person has pled not guilty to an offence and has been committed for trial a warrant is required for the taking of fingerprints or other impressions or samples from his body.[8]

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1. 1967 JC 49.
2. LJC Clyde at p 56.
3. 1968 SLT 334.
4. 1968 SLT 334 at pp 336 and 337.
5. 1973 SLT 12.
6. 1975 SLT (Notes) 26.
7. Eg in *H M Adv* v *Thomas* (*Glasgow Herald*, 17 February 1989) where the blood sample was used for DNA testing.
8. *Lees* v *Weston* 1989 SLT 446. The case of *Smith* v *Innes* [1984] SCCR 119 must now be read in the light of this case. See also *McGlennan* v *Kelly* (unreported, High Court of Justiciary, 9 June 1989) where a warrant to take a second sample of pubic hair from the accused was refused in the special circumstances of the case.

2.10 If one imagines a police investigation from start to finish, it seems, on the basis of the above cases, that the common law powers of the police to take evidence from the body of the accused without his consent are as follows. At the initial stage of investigation before the suspect has been arrested, the police have no general powers to take samples or impressions,[1] unless they obtain a warrant[2] or the matter is one of urgency.[3] It is not easy to envisage a case where it would be a matter of urgency to take a sample of a suspect's own blood or other body fluid or tissue for the purpose of blood group testing or DNA testing. Once a person has been arrested, the police may take fingerprints[4] and, probably, scrapings from underneath his fingernails[5] from him without a warrant. With regard to samples of blood and other body fluids or tissues, a warrant would be required,[6] the argument being that the ordinary powers to search and fingerprint an arrested person

> "do not extend to the invasion of or removal of any part of the person's body. The taking of blood samples, dental impressions and all searches which involve invasion of the body or removal of any part of it, such as hair or nail-clippings, should ordinarily be previously authorised by a warrant granted by a sheriff upon the application of the procurator fiscal."[7]

Once the accused has been committed for trial, a warrant would be required for the taking of samples or impressions. In deciding whether or not to grant a warrant, a sheriff must weigh the public interest in the investigation and suppression of crime against the interests of the person from whom the sample is to be taken.[8]

**Statutory provisions**

2.11 The provisions in the Road Traffic Act 1988 on the furnishing of samples of breath, blood or urine do not authorise the taking of samples by force. In the case of breath tests the Act authorises a constable, in specified circumstances, to require the suspected person to provide a specimen or specimens of breath.[9] A person who refuses, without reasonable excuse, to do so is guilty of an offence.[10] In addition the Act makes it an offence for a person under investigation under section 4 or 5 of the Act (driving under the influence of drink or drugs etc.) to refuse, without reasonable excuse, to provide a specimen of blood or urine for laboratory tests when he had been duly required by a constable to do so, in certain prescribed circumstances and with the observance of certain prescribed formalities.[11]

2.12 While the provisions in the Road Traffic Act are of interest it does not follow that they would be suitable for more general use. The samples are required, not for identification purposes, but to prove one of the main ingredients of an offence under sections 4 and 5. In the case of serious crimes where there is a strong public interest in the correct identification of the offender the arguments for a warrant to take a sample (by force if need be) may well be stronger.

2.13 The Criminal Justice (Scotland) Act 1980 gives the police power to detain, without arrest, for up to six hours any person reasonably suspected of committing an offence punishable by imprisonment. Section 2(5) of the Act provides that where a person is detained under these provisions a constable may exercise the same powers of search as are available following an arrest and may

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1. *Adamson* v *Martin* 1916 1 SLT 53; *McGovern* v *H M Adv* 1950 JC 33.
2. *Hay* v *H M Adv* 1968 SLT 334.
3. *Bell* v *Hogg* 1967 JC 49. This case concerned mere blotting paper rubbings of the suspects' hands. It is by no means clear that it would cover more invasive techniques.
4. *Adair* v *McGarry* 1933 JC 72.
5. This seems to have been accepted in *McGovern* v *H M Adv* (on the analogy of a simple search of the person) but was not a matter of express decision as the accused had not been arrested.
6. *H M Adv* v *Milford* 1973 SLT 12; *Wilson* v *Milne* 1975 SLT (Notes) 26.
7. Macphail, *The Law of Evidence* (1979) para 25.32.
8. *Wilson* v *Milne* 1975 SLT (Notes) 26; *Lees* v *Weston* 1989 SLT 446.
9. S 6(1) and 7(1).
10. Ss 6(4) and 7(6).
11. Ss 7-11. See also ss15 and 16 of the Road Traffic Offenders Act 1988.

"take fingerprints, palmprints and such other prints and impressions as the constable may, having regard to the circumstances of the suspected offence, reasonably consider appropriate".[1]

Section 2(6) provides that a constable may use reasonable force in exercising these powers to search and take prints or impressions.

2.14 There are various specific statutory powers of personal search.[2] For example, section 60(1) of the Civic Government (Scotland) Act 1982 provides that, if a constable has reasonable grounds to suspect that a person is in possession of any stolen property, he may without warrant

"search that person or anything in his possession, and detain him for as long as is necessary for the purpose of that search".[3]

He may use reasonable force for this purpose and may seize and detain anything found in the course of the search which appears to have been stolen or to be evidence of the commission of the crime of theft.[4] Provisions of this type would not appear to authorise the taking of samples of body fluid or tissue.

## Position in other parts of the United Kingdom

2.15 In England and Wales a distinction is drawn between intimate samples and non-intimate samples.[5] A non-intimate sample may be taken from a person in police detention or lawful custody, without his consent, on the authority of a senior police officer, who may only give authorisation if he has reasonable grounds for suspecting the person's involvement in a serious arrestable offence and for believing that the sample will tend to confirm or disprove his involvement. Various procedural requirements are also laid down. An intimate sample (which includes a blood sample) may not be taken from a person without his consent, but adverse inferences may be drawn from the refusal and the refusal may be treated as corroborating other evidence against the person. An intimate sample is defined as

"a sample of blood, semen or any other tissue fluid, urine, saliva or pubic hair, or a swab taken from a person's body orifice".[6]

A non-intimate sample is defined as

"(a) a sample of hair other than pubic hair;

(b) a sample taken from a nail or from under a nail;

(c) a swab taken from any part of a person's body other than a body orifice;

(d) a footprint or a similar impression of any part of a person's body other than a part of his hand".[7]

Even if consent is given, an intimate sample (other than a sample of urine or saliva) may only be taken by a registered medical practitioner.[8] It is a significant and curious feature of the English provisions that they do not enable a warrant to be obtained from a court for the taking of an intimate sample where a suspect refuses consent.[9]

1. S 2(5)(c). A proviso to this paragraph requires the record of prints or impressions taken under it to be destroyed immediately after a decision not to take proceedings against the person or on the acquittal of the accused.
2. See, eg the Deer (Scotland) Act 1959 s27; the Firearms Act 1968 s 47; the Misuse of Drugs Act 1971 s 23(2); the Customs and Excise Management Act 1979 s164; the Wildlife and Countryside Act 1981 s 19; the Civic Government (Scotland) Act 1982 s 60.
3. S 60(1)(a).
4. S 60(1)(d).
5. Police and Criminal Evidence Act 1984, ss 62 to 65.
6. *Ibid* s 65.
7. *Ibid*. Fingerprints are dealt with separately in s 61.
8. *Ibid*. s 62(9).
9. In the United States of America warrants can be obtained for the taking of blood samples without the consent of the suspect. In the context of drunk driving the Supreme Court has held that samples may be taken even without a warrant if there is urgency and probable cause (*Schmerber* v *California* 384 US 757 (1966). Cf *Breithaupt* v *Abram* 352 US 432 (1957) (sample taken from unconscious person). It has been pointed out that, because DNA, unlike the blood alcohol level, does not change with the passage of time the exigency needed for warrantless sampling may not be present where the sample is required for DNA testing. See Burk, "DNA Fingerprinting: Possibilities and Pitfalls of a New Technique", (1988) 28 Jurimetrics Journal 455 at p470.

These provisions date from before the advent of DNA profiling in forensic cases and may not be well-adapted to the present situation. The House of Commons' Home Affairs Committee has suggested that

> "the Home Office should introduce a change in the law to enable Courts to order the taking of samples for DNA testing".[1]

2.16 The Northern Irish provisions are essentially similar but the definition of non-intimate sample has been extended to include a sample of saliva and a swab taken from a person's mouth.[2] A swab which rubbed or scraped sufficient ephithelial cells from the cheek linings could be used for DNA profiling, although this is not at present the preferred type of sample for this purpose.[3]

## Criticisms of the present law

2.17 The law on the taking of samples and prints or impressions from the body of a person without his consent[4] for the purposes of obtaining evidence for use in criminal proceedings is less obviously defective than the corresponding law for civil proceedings. Nonetheless there are certain defects in the law which could usefully be remedied.

2.18 If the law is that, in the absence of consent, a warrant is required for the "taking of blood samples, dental impressions and all searches which involve invasion of the body or removal of any part of it, such as hair or nail clippings"[5] a criticism is that this is too cumbersome and top-heavy in the case of samples such as hair or nail clippings. Any invasion of bodily integrity in such cases is little more than is involved in taking fingerprints and any protection afforded by the requirement of a warrant may be illusory. The requirement may simply use up valuable police and judicial time without serving any useful purpose.

2.19 Another criticism of the present law, which emerged on consultation, is that it may give rise to difficulty if a suspect, when presented with a warrant for the taking of a blood sample, still refuses to co-operate. Although the warrant would provide authority for the "taking" of a sample,[6] which implies that reasonable force could lawfully be used if necessary, we were told that some doctors are uneasy about attempting to take a blood sample from an unwilling person and may refuse to do so.

2.20 In the discussion paper we mentioned that another possible criticism of the law might be that certain procedural aspects of applications for warrants to take samples were not clearly regulated.[7] We also referred to the Thomson Committee's view that there should be no appeal from a sheriff's decision to grant or refuse a warrant.[8]

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1. House of Commons, Home Affairs Committee, First Report 1988-89, *The Forensic Science Service*, Vol 1, p xxxiii (1989).
2. Criminal Justice Act 1988, Sch 14. See now the Police and Criminal Evidence (Northern Ireland) Order 1989, arts 53 to 64.
3. Letter from Cellmark Diagnostics dated 3 April 1989. For a critical discussion of the Northern Irish provisions, see Gelowitz, " 'Yet he opened not his mouth': A Critique of Schedule 14 to the Criminal Justice Act 1988." 1989 Crim LR 198 .
4. There is nothing in the present law to prevent a sample or impression being taken with the consent of the person concerned. It was only because consent was refused in *H M Adv* v *Milford* 1973 SLT 12 that a warrant had to be sought.
5. Macphail, *The Law of Evidence* (1979) para 25.32.
6. In *H M Adv* v *Milford* 1973 SLT 12 the warrant authorised a named doctor to proceed to the prison "and to take from said Eric Milford such a sample of his blood as such doctor thinks reasonably necessary for the furtherance of said comparisons of blood groups.".
7. Discussion paper para 2.18.
8. *Criminal Appeals in Scotland (Third Report)* (Cmnd 7005) para 18.05.

## General considerations

2.21 In assessing the need for, and options for, reform we think that three important points need to be borne in mind. The first is that an innocent person has nothing to fear from the testing of a sample of blood or other body matter or from the taking of prints or impressions. Indeed the results of such tests may well prove his innocence. Secondly, any invasion of bodily integrity in the taking of samples of the type we are considering is minimal. This is not to say that the taking of samples from a person's body is a matter to be treated lightly. It is most certainly not. But it must be kept in perspective. Thirdly, any interference with the person involved in the taking of a sample or print or impression must be balanced against the public interest in the proper investigation and prosecution of crime and the interests of other citizens who might be falsely suspected or accused. The interests of the victim of the offence must also be taken into account—not only the interest in seeing the offender brought to justice but also the possible interest of the victim in the obtaining of compensation under a compensation order.

## Views of consultees

2.22 The first question we asked in the discussion paper was whether the present law on the obtaining of samples or impressions from the body of a person for the purposes of evidence in criminal cases was regarded as satisfactory in all respects. Several consultees—the Sheriff's Association, the Faculty of Advocates, the Procurators Fiscal Society, the Law Society of Scotland, and the Scottish Law Agents Society—thought that the law was satisfactory and that there was no need for change. Most of the other consultees who commented on this issue thought that the general approach of the present law was satisfactory and that no major change was needed but that some minor changes could usefully be made. The British Medical Association, however, supported the replacement of the Scottish system of warrants to obtain samples by a system whereby such warrants could not be obtained but adverse inferences could be drawn from a refusal to consent to the taking of a sample when requested to do so by a police officer.

2.23 The second question we asked in the discussion paper was whether the law should allow non-intimate samples to be taken from an arrested or lawfully detained person on the authority of a senior police officer without the need for a warrant from the sheriff. The question also asked for views as to appropriate definitions of senior police officer and non-intimate sample for this purpose and as to the restrictions, if any, which should be placed on a power to authorise the taking of samples. Most of those who commented on this question thought that it should be possible for certain non-intimate samples to be taken from an arrested or lawfully detained person on the authority of a police officer, without the need for a warrant from a sheriff. There was, however, some difference of opinion as to an appropriate definition of a non-intimate sample and as to which police officers should be able to authorise such samples to be taken. These two questions are clearly connected. If the definition of non-intimate sample includes only matters truly akin to fingerprints then, as several commentators suggested, any police constable could be allowed to take them. If, on the other hand, more invasive or intimate procedures than fingerprinting are involved, then there is an argument for requiring the authority of a senior police officer to be obtained.

2.24 In the discussion paper we put forward for consideration the definition of non-intimate sample used, in relation to Northern Ireland, in Schedule 14 to the Criminal Justice Act 1988.[1] This is:—

(a) a sample of hair other than pubic hair;

(b) a sample taken from a nail or from under a nail;

(c) a sample of saliva;

1. See now the Police and Criminal Evidence (Northern Ireland) Order 1989, art 53.

(d) a swab taken from a person's mouth;

(e) a swab taken from any other part of a person's body except a body orifice other than his mouth;

(f) a footprint or a similar impression of any part of a person's body other than a part of his hand".

Although some commentators were content with this as a definition of a non-intimate sample, others considered that it went too far or contained anomalies. The consulted Court of Session judges thought that a sample of saliva or a swab taken from a person's mouth should be excluded from the definition. This would bring the definition into line with that used in England and Wales which is more limited in this respect than the definition used for Northern Ireland.[1] One member of the Crime Committee of the Association of Chief Police Officers (Scotland) also thought that the definition used in England and Wales would be more acceptable than the one quoted above. The Faculty of Law of Dundee University had grave doubts about including saliva and mouth swabs in the non-intimate category. Some members of the Law Faculty of Aberdeen University thought that the taking of a mouth swab was sufficiently invasive to require a warrant. A few commentators pointed out that swabs from *around* the genital or anal areas would be regarded by many people as intimate and suggested that they should be excluded. On the other hand a few commentators thought that the definition was too narrow. A few considered that blood samples should be included in the non-intimate category—on the view that the taking of such a sample did not involve any intimate area of the body. The Association of Scottish Police Superintendents said that in their experience an accused or suspect was less likely to refuse to give a blood sample than to refuse to give any other type of sample and that this suggested that consideration should be given to the possibility of placing blood samples in the non-intimate category, thus eliminating the need to obtain a warrant in the event of a refusal. The Association also pointed out that sometimes rubbings from the skin (using e.g. blotting paper) were taken instead of swabs and suggested that they should be expressly included in the definition. Professor Busuttil, the Professor of Forensic Science at Edinburgh University, referred in his very helpful comments to rubbings, hair *combings*, and other trace evidence, such as loose fibres or hairs attached to the surface of the body.

2.25 On the question of the seniority of the police officer who might be allowed to authorise the taking of a non-intimate sample the preferred option was the officer in charge of the police station at the time. This was the view of the Association of Chief Police Superintendents and of some members of the Association of Chief Police Officers (Scotland). Clearly the views of these commentators on this matter are entitled to particular weight. One concern expressed by several commentators was that to require authorisation by, say, a superintendent could give rise to difficulties in small police stations. We have already mentioned that some commentators suggested that, on the analogy of fingerprints, any constable should be allowed to take a non-intimate sample without authorisation from a senior officer. This presupposes, however, that the taking of the samples concerned is truly comparable to fingerprinting. We return to this point later.

2.26 There was not much support from consultees for confining the power to take non-intimate samples to serious cases (however such cases might be defined) or indeed for placing any restrictions on the power to take non-intimate samples.

2.27 In relation to blood samples and other intimate samples we asked in the discussion paper whether the present Scottish system whereby warrants must be obtained for the taking of such samples should be replaced by a system whereby such warrants could not be obtained but adverse inferences could be drawn from a refusal to consent to the taking of such a sample when requested to do so by a police officer. A system of adverse inferences is used in England and Wales and Northern Ireland.[2] In the discussion paper we expressed the provisional view that it would not be

1. See Police and Criminal Evidence Act 1984, s 65.
2. Police and Criminal Evidence Act 1984, s 62 (England and Wales); Criminal Justice Act 1988, Sch 14. See now the Police and Criminal Evidence (Northern Ireland) Order 1989, art 62.

desirable to abandon the system of warrants, which appeared to us to achieve a satisfactory balance between the interests of the suspect and the interests of the public and the victim, and which seemed to work reasonably well in practice. We had grave reservations about basing convictions on adverse inference rather than hard evidence.[1] This view was shared by almost all of those who commented. The only consultees who favoured the abandonment of the system of warrants in favour of a system of adverse inferences were the British Medical Association, although some consultees suggested the use of adverse inferences in certain circumstances as a supplement to the system based on warrants. The general tenor of the submissions was that the Scottish system of warrants worked well in practice and that most suspects, when presented with a warrant, consented to the taking of a sample. There was evidence, however, from several quarters that if a suspect refused to co-operate when presented with a warrant some doctors were reluctant to attempt to take a sample. This, it was said, was due not only to fear that to proceed would be to commit an assault (a fear which would, of course, be totally unjustified if the taking of the sample were authorised by a lawful warrant) but also to considerations of medical ethics and of the risks to the suspect and the personnel taking the sample. This view was expressed by Professor Busuttil, Professor of Forensic Medicine at the University of Edinburgh. He suggested that if the suspect refused to comply with a warrant then it should be possible to draw adverse inferences. The refusal should also be a criminal offence, but medical practitioners should never be asked to enforce a warrant against the resistance of the suspect. This last point was also made by the British Medical Association. Their position was that

> "apart from exceptional public health measures, no person should be subjected to medical intervention without consent unless it can clearly be seen to be in the interests of that person's health. The use of force by a doctor to take a sample 'in the interests of justice' is entirely inconsistent with this principle and is totally contrary to medical ethics."

The Association of Scottish Police Superintendents favoured a combination of warrants and adverse inferences. They suggested that if the suspect refused to co-operate after a warrant had been obtained for the taking of a blood sample or other "intimate" sample then it should be possible for an adverse inference to be drawn and for the refusal to provide corroboration. All of the legal consultees were, however, opposed to adverse inferences. The consulted Court of Session judges, for example, said:

> "We wholly oppose any system whereby if consent were refused any adverse inference could be drawn from the refusal of consent. This approach seems to us to be wrong in principle. The reasons which may cause any individual to refuse consent could be various and in a criminal case we consider that a conviction should depend on evidence and not on inference."

2.28 We asked in the discussion paper whether there was a need to regulate the procedure for the obtaining of warrants for the taking of samples or impressions from a person's body. The view of most consultees who commented on this question was that there was no such need and that existing procedures were satisfactory.

2.29 On the question of whether or not there should be a right of appeal from a decision of the sheriff allowing or refusing a warrant for the taking of a sample differing views were expressed. Some consultees observed that appeal against the grant or refusal of a warrant was already competent by way of Bill of Suspension or advocation and were content that this should remain the position. A few expressly favoured ordinary rights of appeal. Others opposed rights of appeal and expressed concern that they would introduce unacceptable delays and serious practical complications.

2.30 One further point made by some consultees was that a warrant to take an intimate sample should be obtainable only from a sheriff, and not from a justice of the peace.

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1. Discussion paper, para 2.24.

## Recommendations

2.31 In the light of the comments received by us it seems clear that no fundamental change is required in the Scottish law on the obtaining of samples or impressions from a suspect's body for the purposes of forensic tests. In particular there is overwhelming support on consultation for retaining the requirement of a sheriff's warrant. It also seems clear, however, that some minor reforms in the taking of certain non-invasive samples and impressions would be useful and that careful consideration must be given to the position which arises when a suspect who is presented with a warrant still refuses to co-operate. We deal with these two points later. The general level of satisfaction with the existing system, and the fact that several consultees whose views command great respect advocated no change, have led us to adopt a cautious approach to reform and to recommend only those changes which seem to us to be necessary to remove obvious anomalies or defects.

2.32 We think that one minor amendment which should be made is in section 2(5)(c) of the Criminal Justice (Scotland) Act 1980. This provides that where a person is detained under section 2(1) of the Act (which applies only where a constable has reasonable grounds for suspecting that a person has committed or is committing an offence punishable by imprisonment) a constable may

> "(c) take fingerprints, palmprints and such other prints and impressions as the constable may, having regard to the circumstances of the suspected offence, reasonably consider appropriate:
>
> Provided that the record of the prints and impressions so taken shall be destroyed immediately following a decision not to institute criminal proceedings against the person or on the conclusion of such proceedings otherwise than with a conviction or [an order for absolute discharge or probation]".

We think that it would be useful and rational to have the same rules applying to lawfully arrested persons and to lawfully detained persons. To this extent section 2(5)(c) should be made more general in its application. There would then be a uniform statutory basis for the power to take fingerprints and similar impressions, and uniform provision for the destruction of records of prints in certain cases. If this were being done it would be advisable to make it clear that the power to take impressions does not apply to dental impressions, but applies only to impressions of external parts of the body. This would merely bring the law into line with existing practice.[1] We therefore **recommend** that:

1. **Section 2(5)(c) of the Criminal Justice (Scotland) Act 1980 (taking of fingerprints and other prints and impressions from a person detained under the section) should be replaced by a more general provision which would apply in all cases where a person has been lawfully arrested or is lawfully detained but which would be limited to prints or impressions of an external part of the body. The ancillary provisions in section 2(5)(c) on the use of reasonable force and the destruction of records should be preserved in the new provision.**

2.33 It is our view, and this is confirmed by the results of our consultation, that there are certain samples which could reasonably be taken from a person's body, if that person were lawfully arrested or detained, on the authority of an appropriate police officer without the need for a sheriff's warrant. In degree of invasiveness and interference the taking of this type of sample falls halfway between the taking of a fingerprint and the taking of a sample of blood. In the light of our consultation we now propose that the list of samples of this kind should be more restricted than the list of non-intimate samples which we put forward for consideration in the discussion paper.[2] In particular it should not include anything which involves going inside a person's body.[3] We suggest that the list should be:

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1. See *Hay* v *H M Adv* 1968 SLT 334.
2. See para 2.22 above.
3. The provision in Sched 14 of the Criminal Justice Act 1988 for the taking of mouth swabs without a warrant has been criticised as a possible contravention of the European Convention on Human rights. See Gelowitz, "'Yet he opened not his mouth': A Critique of Schedule 14 to the Criminal Justice Act 1988" 1989 Crim L R 198.

(a) a sample cut or combed from the hair,

(b) a sample from a nail or from under a nail, and

(c) a sample swabbed or rubbed from any external part of the body.

This list would not include samples of saliva or other matter taken from inside a person's mouth. It would, on the other hand, include samples cut or combed from pubic hair. In these respects it would differ from the list put forward in the discussion paper. It would not include plucked hair with the roots attached. The criterion applied would be invasiveness.

2.34 Although some consultees suggested that a constable should be able to take samples of this type without the need for authorisation by a more senior officer, we consider that the degree of interference with the suspect potentially involved in taking these samples justifies a requirement of authorisation. Taking into account the views of consultees, we suggest that the appropriate officer to give consent is the officer in charge of the police station. This implies that the arrested or detained person is at a police station but that does not seem inappropriate in the circumstances. Like most of our consultees we do not consider it necessary to limit this power to serious offences. Nor do we think it necessary to place any other restrictions on its exercise. It would be advisable to have a provision making it clear that reasonable force could be used to obtain the samples in question.

2.35 Our recommendation on the range of samples intermediate between fingerprints and blood samples are, therefore, as follows—

**2.(a) There should be a new statutory provision to the effect that, where a person has been arrested and is in custody at a police station, or is being detained under section 2 of the Criminal Justice (Scotland) Act 1980 in a police station, a constable may, with the authority of the officer in charge of the station at the time, take**

**(i) a sample cut or combed from the hair**

**(ii) a sample from a nail or from under a nail**

**(iii) a sample swabbed or rubbed from any external part of the body.**

**(b) It should be made clear that reasonable force may be used in order to take any such sample, where its taking is duly authorised.**

2.36 It is not our intention to place any unnecessary obstacles in the way of the collection of vital evidence (such as fibres loosely adhering to a suspect's body in such a way that they can simply be picked off) in the course of a lawful search and we think it would be advisable to have an express saving for existing powers of search. We also have no desire to restrict the obtaining of evidence in cases of urgency and again we think that express saving provisions would be advisable. There is, in our view, no need to provide for the destruction of samples. The samples in question (cut hair, or material combed from the hair; a sample from a nail or from under a nail; a sample swabbed or rubbed from the external skin) would not be used for the compilation of any records and are essentially different from fingerprints in this respect. It goes without saying that the new powers would be without prejudice to the power to take a sample or impression with the consent of the person concerned, but we do not think that has to be referred to in the legislation. We **recommend** that—

**3 The new statutory provisions recommended above should be without prejudice to any power (i) to search or (ii) to take possession of any evidence as a matter of urgency where there is imminent danger of its loss or destruction.**

2.37 In relation to body samples not covered by ordinary powers of search, or by the provisions we have recommended above, we have no doubt that the requirement of a warrant should continue. In particular, a warrant should continue to be required for the taking of a blood sample in any case where the suspect does not agree to provide a sample voluntarily. This was the view of the overwhelming majority of those who commented on our discussion paper and we endorse it. Our consultation did, however, reveal some concern about the situation where the suspect refuses to

co-operate even when presented with a warrant. Although a warrant authorises the taking of a sample regardless of whether or not the suspect consents, some doctors are reluctant to try to obtain a blood sample from an unwilling suspect.[1] This is an unusual situation, because most suspects consent to the taking of samples, but it is one which must be carefully considered.

2.38 We would be very reluctant to move to a system of adverse inferences in criminal cases. We remain of the view, and we are fortified in this view by the comments received on consultation, that evidence is preferable to inference as a basis for a criminal conviction. The question we have had to face is whether the reluctance of some doctors to take a sample of blood from an unwilling suspect, even where the taking of the sample is expressly authorised by a lawful warrant, is a factor of such importance as to force us to recommend a change to a system of adverse inferences. We do not think that it is.

2.39 We do not believe that there is any insurmountable barrier to the taking of a sample of blood or other body fluid or tissue, under the authority of a warrant, from a non-consenting suspect. There are three possible barriers—legal, ethical and practical. The legal barrier is the fear that to take a sample without consent would constitute an assault. Where the action is taken under the authority of a warrant, this fear is quite unjustified. The whole point of the warrant is to make lawful what would otherwise be unlawful. We are not aware of any ethical barrier to the granting or execution of search warrants, or to the taking of fingerprints, and, so far as general ethics are concerned, the considerations applicable to the taking of samples of the type under consideration here seem to us to be essentially the same. Medical ethics may come into the case if the services of a medical practitioner are required for the taking of a sample. We have noted the view of the British Medical Association on this point.[2] We hope, however, that this view might eventually be reconsidered. We find it difficult to accept, and we believe that the public would find it difficult to accept, that the public interest in the investigation and prosecution of serious crimes, such as murder and rape, does not justify the taking of a sample of body fluid or tissue, under the authority and protection of a warrant, from a non-consenting suspect where this can be done safely and with minimal discomfort to the suspect. The process is a forensic one—the obtaining of evidence—and there is no reason why there should be any continuing relationship between the person taking the sample and the suspect. It is also relevant to point out that the services of a medical practitioner would not always be essential. Even if it is assumed that a registered medical practitioner would be used in the case of venepuncture,[3] this is not the only way of obtaining a sample. A small sample of capillary blood can be obtained, virtually painlessly and with minimal invasion of bodily integrity, by means of the automatic finger pricking devices used by diabetics to test their own blood.[4] This involves a mere pricking of the finger. It is safe and sterile and would not require the services of a doctor. It would require no more physical restraint than is required for fingerprinting. The amounts of blood produced suffice for DNA testing using single locus probes, a technique which is excellent for identity analysis and which is routinely used in forensic casework.[5] Other

1. See para 2.25 above. We were told, however, that where doctors had proceeded in such circumstances "the required samples were obtained without difficulty". Letter from Association of Chief Police Officers (Scotland) dated 1 April 1989.
2. Para 2.25 above.
3. In England and Wales the Police and Criminal Evidence Act 1984 provides that a blood sample (and other "intimate samples" other than urine or saliva) may only be taken by a registered medical practitioner. (Ss 62(q) and 65). There is no such provision in Scotland.
4. At least 5 types of these small, inexpensive devices, using sterile disposable lancets, are on the market. Some are triggered automatically by pressing against the puncture site. Others are triggered by pressing or pushing a button. In some the needle is always hidden from view. The needle is very short—up to 3 mm—and there is no possibility of deep penetration. The preferred puncture site is the front of the finger, towards the side of the fingerprint area.
5. Letter from Cellmark Diagnostics dated 25 July 1989. The drops of blood can be absorbed on suitable material, such as cotton or synthetic material but preferably not paper tissue. They should then be allowed to air dry completely before being sealed in a polythene bag and stored at 4°C.

material, such as hair roots[1] or scrapings from the gums or cheek linings,[2] can be used for DNA testing. We cannot see any insurmountable ethical barriers to the obtaining of such samples under the authority of a lawful warrant. The practical barrier to the taking of a sample from a non-consenting suspect is that a suspect who puts up a determined struggle could make the obtaining of a sample difficult. The same applies to searching and fingerprinting. A person who physically resists the execution of a lawful warrant can make things very difficult for himself and others and must, unfortunately, expect to be forcibly restrained. We can see no reason, however, why a sample should not be obtainable from a person who is safely restrained. One commentator mentioned the danger that the people taking the sample might be exposed to infection from the suspect's blood. This danger is present in many surgical situations and suitable protective measures can be taken. We would again stress that scientific developments mean that very small samples, obtainable by means which are minimally invasive, suffice for testing purposes. We cannot see any insurmountable practical barriers to the obtaining of such samples.

2.40 It is important to consider this question not only from the point of view of those taking the sample, but also from the point of view of the suspect. An innocent suspect has nothing to fear from the giving of a sample and has every incentive to consent and co-operate. The results of the tests on the samples may exonerate him.[3] A guilty suspect, if he asks his solicitor about the consequences of refusing to give a sample, will have to be advised that a warrant may be obtained for the taking of a sample. If he asks about the consequences of still refusing to consent after a warrant has been obtained, he will have to be advised that the warrant authorises the *taking* of a sample whether or not he consents. Physical resistance would only make things difficult and unpleasant for himself. It would also be a criminal offence.[4] It is perhaps not surprising that all the evidence we received was to the effect that it was very rare for a suspect to refuse to give a sample on production of a warrant.

2.41 Our conclusion is that there is, at the present time, no reason to abandon the system of obtaining and executing warrants in favour of a system of adverse inferences.

2.42 Consultation revealed very little dissatisfaction with existing procedures for the obtaining of warrants and we make no recommendation for legislation on this subject. Nor do we make any recommendation on rights of appeal from a decision granting or refusing a warrant. Existing rights by way of Bill of Suspension or advocation seem adequate. The suggestion that the power to grant warrants for the taking of samples should be confined to sheriffs raises questions, which go far beyond this exercise, about the power to grant warrants generally and we do not think that it would be appropriate to deal with it here. In practice it seems that applications, in the type of case under consideration, are invariably made to sheriffs.

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1. About 10 are required. The hairs can be stuck across a piece of adhesive tape so that the roots hang free and placed inside an ordinary blood sampling tube. The extraction of DNA from hair roots is more difficult and expensive than extraction from a blood sample, but perfectly possible. Cellmark Diagnostics, as at 3 April 1989, had carried out tests on hair roots in 39 forensic cases. Letter from them dated 3 April 1989. In *R* v *Connors* (*The Times*, 17 June 1989) a rapist was convicted on the basis of DNA evidence where the DNA had been extracted from hair roots. He had refused to supply a blood sample but had agreed to hair samples being taken from his scalp.
2. Although results have been obtained from such material it is regarded, at present, as a sample of last resort. One technique is to rub at least two cotton buds over the cheek linings to pick up the cellular material on the inside of the mouth. The cotton buds are left to dry in a dry atmosphere at room temperature and can then be placed in an ordinary blood sampling tube. Letter from Cellmark Diagnostics dated 3 April 1989.
3. The same applies to dental impressions. In a recent case in Perth sheriff court, dental impressions cleared a couple who were suspected of ill-treating their young child. A babysitter was found to have been responsible for the injuries. *The Scotsman* 31 March 1989.
4. It could be the subject of a charge under the Police (Scotland) Act 1967 s41 which provides that "Any person who ... assaults, resists, obstructs, molests or hinders a constable in the execution of his duty or a person assisting a constable in the execution of his duty ... shall be guilty of an offence.". It could also be the subject of a charge of attempting to pervert the course of justice. *Cf. H M Adv* v *Mannion* 1961 J C 79; *Fletcher* v *Tudhope* 1984 SCCR 267; *Waddell* v *MacPhail* 1986 SCCR 593.

2.43 We **recommend** that:

4. **A warrant should continue to be required for the taking of a sample (including a blood sample) or impression, other than any sample or impression covered in the preceding recommendations, from a person's body without his consent for the purposes of evidence in criminal proceedings.**

# Part III Civil cases

## Present law

3.1 The civil courts in Scotland have no power to order anyone to supply a sample of blood so as to enable evidence of tests on that blood to be obtained.[1] The same principle would apply to other body fluids or tissue. Where, however, blood samples have been given voluntarily the results of blood group tests are now regarded as valuable and reliable evidence.[2] There is every indication that the results of DNA tests will be found to be even more useful. They will often provide positive proof of paternity.[3]

3.2 The use of blood group tests or DNA tests in civil proceedings depends on the parties concerned giving their consent to samples being taken. Problems have arisen in the past[4] over who could give consent on behalf of a pupil, that is, a boy under 14 or a girl under 12. The matter is now resolved by section 6 of the Law Reform (Parent and Child) (Scotland) Act 1986 which deals with the question of consent, not only on behalf of a pupil, but on behalf of any person incapable of consenting himself. It is in the following terms.

> "6.—(1) This section applies where, for the purpose of obtaining evidence relating to the determination of parentage in civil proceedings, a blood sample is sought by a party to the proceedings or by a curator ad litem.
>
> (2) Where a blood sample is sought from a pupil child, consent to the taking of the sample may be given by his tutor or any person having custody or care and control of him.
>
> (3) Where a blood sample is sought from any person who is incapable of giving consent, the court may consent to the taking of the sample where—
>
> (a) there is no person who is entitled to give such consent, or
>
> (b) there is such a person, but it is not reasonably practicable to obtain his consent in the circumstances, or he is unwilling to accept the responsibility of giving or withholding consent.
>
> (4) The court shall not consent under subsection (3) above to the taking of a blood sample from any person unless the court is satisfied that the taking of the sample would not be detrimental to the person's health."

3.3 Where a person refuses to provide a blood or other sample for testing, the question arises whether any adverse inference can be drawn from that refusal. In *Docherty* v *McGlynn*[5] Lord Cameron pointed out that in civil proceedings of various types (e.g. an action for damages for personal injury) the court might order a party to submit himself or herself to medical examination. Such orders were not enforced against a recalcitrant party but perhaps

1. *Whitehall* v *Whitehall* 1958 SC 252; *Torrie* v *Turner* (Sh Ct) 1989 SCLR 126. It is understood that this case has been appealed to the Court of Session.
2. See eg *S* v *S* [1972] AC 24 per Lord Reid at p 41; *Docherty* v *McGlynn* 1983 SLT 645, 1985 SC 89 and 1985 SLT 237; *Russell* v *Wood* 1987 SCLR 207. For an earlier, less accepting, attitude to blood group tests see *Imre* v *Mitchell* 1958 SC 439.
3. See para 1.7 above.
4. See *Docherty* v *McGlynn*, *supra*.
5. 1983 SC 202 at p 214.

"sufficient sanction in respect of refusal to obtemper such an order, is to be found in the consequential inference to be drawn adverse to the interest of the party in disobedience".[1]

The considerations applicable to orders for medical examination, where a party has put his own medical condition in issue,[2] have not so far, however, been regarded as applying to blood tests in paternity disputes.[3] The courts have not got to the stage of granting orders for blood samples in such cases and so have not had to consider whether an adverse inference can, or should, be drawn from refusal to obtemper an order. There is no case, so far as we are aware, in which an adverse inference has been drawn by a court in a paternity dispute from a mere refusal of one party to comply with a request by the other party for a blood sample. In adversarial proceedings, where neither party is obliged to help the other to obtain evidence, any such inference would be unusual and, in the absence of any statutory provision on the matter, unjustifiable.

3.4 Much publicity about DNA profiling was generated by the case of *Conlon* v *O'Dowd*.[4] In this action of affiliation and aliment, the sheriff found in favour of the pursuer without the benefit of blood group or DNA evidence, and the defender was ordered to pay aliment in respect of twin children. The defender, a police constable who had married another woman after the birth of the twins, maintained that he was not the father, appealed to the sheriff principal on a point of law, and sought to have the closed record amended to include calls for the pursuer to subject herself and the children to DNA tests. The sheriff principal refused the appeal on the point of law and also refused, on procedural grounds, to allow the amendment at that late stage. The issue of whether or not the court could order blood samples to be taken for testing was not, therefore, considered. The popular newspapers, however, made much of the case. The defender, supported by his wife and relatives, continued to protest his innocence and claimed that the lack of DNA test evidence had led to a great injustice.[5] The pursuer denied this. One of them was obviously lying. The whole question of DNA testing in civil cases was reviewed in a critical article in the *Glasgow Herald*[6] which concluded as follows

"Because of this daft and out-dated aspect of Scottish court procedure two families are destined to live in an air of continued dispute because of a judgment which resolves a case only in the eyes of the law, but which to ordinary people is out of touch with commonsense and justice. The law should quickly be changed and brought up to date."

The matter was taken up by Dr John Reid, Member of Parliament for Motherwell North, who argued that genetic evidence would enable justice to be done in affiliation cases in a relatively quick and efficient manner, would save court time and might deter false cases from being brought to court.[7] Later the parties in *Conlon* v *O'Dowd* voluntarily supplied samples for DNA testing, which confirmed that the defender was the father.[8]

3.5 The Scottish Legal Aid Board has issued the following statement.[9]

"The evidential value of DNA fingerprinting tests in paternity disputes is obviously very high, since this scientific development has the capacity to establish the paternity of a child with virtual certainty.

"In legally aided actions where the paternity of a child is an issue, the Board will normally be prepared to sanction such tests and would expect them, in all but the most exceptional circumstances, to be conclusive of the issue of paternity."

In cases where an action has not yet been raised the Board is also prepared to grant requests for an increase in authorised expenditure, under the legal advice and

1. *Ibid.*
2. See eg *Junner* v *North British Railway Co* (1877) 4 R 686.
3. See *Torrie* v *Turner* (Sh Ct) 1989 SCLR 126 per Sheriff Principal Taylor at p127.
4. 1987 SCLR 771; 1988 SCLR 119.
5. See letters from the defender's wife and brother in the *Glasgow Herald*, 28 June, 1988
6. Murray Ritchie, "Science can answer as sure as Solomon", *Glasgow Herald*, 20 June, 1988.
7. See *Scotland on Sunday*, 14 Aug, 1988.
8. See the *Sunday Mail*, 23 Oct 1988, the *Glasgow Herald*, 25 Oct 1988.
9. Journal of the Law Society of Scotland, March 1989, p 110.

assistance scheme, for DNA tests provided that the applicant appears to have good grounds for requiring that the test be undertaken and that there is a reasonable prospect that the outcome of the tests will avoid proceedings being raised.[1] All of this presupposes that the necessary consents for the taking of samples for the purposes of tests will be given. That is where the difficulty lies under the present law.

## Criticism of the present law

3.6 The law relating to the taking of blood or other body samples for use in civil cases has for some time been open to the criticism that it deprives the courts of evidence which might be valuable or even conclusive. The advent of DNA testing makes this criticism even more serious. Cases may have to be decided on unreliable assessments of credibility, unreliable inferences from circumstances, and unreliable presumptions, when they could be decided more reliably, and probably in many cases more quickly and more economically, on the basis of scientific evidence. As Ormrod J said over twenty years ago, "there is nothing more shocking than that injustice should be done on the basis of a legal presumption when justice can be done on the basis of fact".[2] There is a great deal at stake in a paternity dispute as the case of *Conlon* v *O'Dowd* so clearly shows. It is, first of all, important for the child or children involved that paternity be reliably established. It is also important for the parties. Quite apart from the direct financial consequences, which can be considerable, failure for either party could mean the destruction of reputation, personal relationships and career. The injustice of a wrong decision could be very serious indeed. A wrong decision is more likely if the best scientific evidence is not available to the court.

## Comparative law

3.7 Many jurisdictions have made legislative provision to facilitate the use of blood test and similar evidence in civil proceedings. In England and Wales the relevant provision is in section 20(1), of the Family Law Reform Act 1969. It is as follows.[3]

> "In any civil proceedings in which the parentage of any person falls to be determined, the court may, either of its own motion or on an application by any party to the proceedings, give a direction—
>
> (a) for the use of scientific tests to ascertain whether such tests show that a party to the proceedings is or is not the father or mother of that person; and
>
> (b) for the taking, within a period specified in the direction, of bodily samples from all or any of the following, namely, that person, any party who is alleged to be the father or mother of that person, and any other party to the proceedings—
>
> and the court may at any time revoke or vary a direction previously given by it under this subsection."

"Bodily sample" is defined as "a sample of bodily fluid or bodily tissue taken for the purpose of scientific tests" and "scientific tests" as "scientific tests carried out under this Part of this Act and made with the object of ascertaining the inheritable characteristics of bodily fluids or bodily tissue".[4] After providing for detailed regulations as to the taking of samples and the carrying out of tests the English Act goes on to provide that where any person fails to consent to the taking of a sample from himself or any person in his care and control, or fails to take any other step required of him for the purpose of giving effect to the direction,

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1. *Ibid.*
2. *Holmes* v *Holmes* [1966] 1 WLR 187 at p 188.
3. Family Law Reform Act 1969 s20(1), as substituted by the Family Law Reform Act 1987 s 23(1). The 1969 provisions were based on recommendations made by the English Law Commission in its Report on *Blood tests and the proof of Paternity in Civil Proceedings* (Law Com No 16, 1968).
4. Family Law Reform Act 1969, s 25, as amended by the Family Law Reform Act 1987, s 23(2).

"the court may draw such inferences, if any, from that fact as appear proper in the circumstances".[1]

A sample will not be taken without consent.[2] The legislation also makes special provision for the case where the person claiming any relief in the proceedings is entitled to rely on a presumption of legitimacy. An example would be where a married woman is claiming maintenance from her separated husband for a child alleged by her to be a child of the marriage. The English Act provides that in this type of case, if the claimant fails without reasonable cause to comply with a direction for providing a sample, the court may dimiss the claim notwithstanding the absence of evidence to rebut the presumption.[3]

3.8 Similar legislative provisions are to be found in Ireland[4] and Australia.[5] Some European countries provide for the automatic loss of the case if a party refuses to submit to a blood test.[6] Other countries adopt a mixed approach, allowing for both automatic loss of the case and the drawing of adverse inferences. In New Zealand, for example, if the complainant in affiliation proceedings refuses to take a blood test, her case will be dismissed but if the defendant refuses adverse inferences may be drawn.[7] In the United States of America the Uniform Parentage Act (which dates from 1973 and has been adopted in 16 states) provides that:

"The court may, and upon the request of a party shall, require the child, mother, or alleged father to submit to blood tests."[8]

It appears that the court order would be enforceable in the same way as any other order in civil proceedings. The earlier Uniform Act on Paternity (which dates from 1960 and is still in force in 6 states) provides that:

"The court, upon its own initiative or upon suggestion made by or on behalf of any person whose blood is involved may, or upon the motion of any party to the [action] ... shall order the mother, child and alleged father to submit to blood tests. If either party refuses to submit to such tests, the court may resolve the question of paternity against such party or enforce its order if the rights of others and the interests of justice so require."[9]

## Views of consultees

3.9 With one exception, all of those who commented on the use of blood group tests and DNA profiling in civil cases thought that the existing law was in need of reform. The one exception was the Scottish Law Agents Society who considered that they did not have enough information about the reliability of DNA testing to express a view.

"We cannot answer the question until we know whether DNA testing is *certain* or *almost certain*. If it was certain we would welcome reform of the law regarding DNA profiling *because* it was simple and certain."

This overlooks two points. First, the value of any scientific evidence varies from case to case. In the case of DNA test results in a paternity dispute, an expert will be able to testify as to the probabilities of a particular man being, or not being, the father of the child. The probabilities will depend on the test results in the particular case, and on whether there is a possibility that a close relative of the tested man (eg his brother) might be the father. The important thing is not absolute certainty, but that

1. Family Law Reform Act 1969, s 23(1) and (3) as amended by the Family Law Reform Act 1987, Sch 2 para 24. In *McV* v *B*, *The Times*, 28 November 1987, it was held that an adverse inference drawn from a putative father's refusal to provide a sample could corroborate the mother's story.
2. *Ibid* s 21.
3. *Ibid* s 23(2), as amended by the Family Law Reform Act 1987, Sch 2 para 24.
4. Status of Children Act 1987, based on recommendations contained in the Law Reform Commission's Report on *Illegitimacy* (Report No 4, 1982).
5. Family Law Act 1985, s 99A.
6. Chloros (ed), *The Reform of Family Law in Europe* (1978) p 252.
7. Domestic Proceedings Act 1968, s 50(2).
8. S 11(a).
9. S7.

this type of scientific evidence is likely to be extremely valuable. Secondly, even if DNA testing had never been developed, there would be a strong case for reform in order to enable the results of blood group testing to be more frequently available to the courts. It would be a mistake to think that the case for reform in this area rests entirely on the development of DNA testing.

3.10 In the discussion paper we asked whether the courts should have power to direct samples of blood or other matter to be taken from a person's body for the purpose of blood group tests, DNA profiling or other procedures. All of those who commented on this question, with the sole exception of the Scottish Law Agents Society, thought that the courts should have such a power, although some pointed out that the reference to a sample being "taken" was inappropriate if the only sanction was to be the drawing of an adverse inference. Consultees were not in favour of confining the power to cases where the question was whether a person was or was not another person's *parent*. Several pointed out that there was no logical reason for confining the power to that, or any other, category of cases. Almost all consultees thought, however, that the power should be restricted to samples from the parties to the proceedings and, if relevant, any child whose parentage was in issue: they did not favour giving the court power to order a witness to provide a sample.

3.11 We referred in the discussion paper to the fairly detailed provisions in the English legislation on this subject,[1] regulating such matters as the sampling and testing procedures and the form and contents of the tester's report, and requiring samples to be taken by "approved" medical practitioners and the tests to be carried out only by persons and at places appointed by the Secretary of State.[2] We expressed the view that such detailed regulation of one particular type of scientific evidence was unnecessary and potentially too restrictive. It is in the interests of the party requesting the tests that the samples are properly taken and adequately identified, that the tests are properly carried out by qualified persons and that the report of the results should stand up to scrutiny in court. Almost all those who commented on this issue agreed that detailed regulation was unnecessary. Most consultees also agreed that there was no need for a special statutory offence of personation of a person ordered to provide a sample, as is provided for in English law. In Scotland such conduct could be dealt with under the head of attempting to pervert the course of justice or as fraud.[3]

3.12 The most important question in relation to an order for the obtaining of bodily samples for use in civil cases is the sanction for refusing to provide a sample under the order. In the discussion paper we reached the provisional conclusion that in a civil case the use of reasonable force to obtain a sample would be unjustifiable and possibly impracticable. We thought that there was a clear distinction to be drawn between civil and criminal cases in this respect, and that in civil cases physical compulsion should not be used. We also thought that the sanction of contempt of court would be unlikely to provide a satisfactory solution, particularly if directed against a parent with custody of a child who was refusing to consent on behalf of the child. Almost all of those who commented agreed with these views.

3.13 We suggested in the discussion paper that, if the use of force were ruled out, there were two main possibilities. One was that the person refusing should automatically lose his or her case. The other was that the court should be permitted to draw any adverse inference from the refusal which might be appropriate. In the case of the pursuer we suggested that it would be reasonable to provide for automatic dismissal, on the ground that a person bringing proceedings should be prepared to present the best evidence in support of his or her claim. In the case of the defender we suggested that adverse inferences might be more appropriate. There was a difference of opinion among consultees on this issue. Most, however, supported the use of adverse inferences in the case of both the pursuer and the defender. They pointed out that this would have the same result in almost all cases but would introduce an

1. Family Law Reform Act 1969, s20(1) as substituted by s 23(1) of the Family Law Reform Act 1987.
2. Family Law Reform Act 1969, ss 20 and 22, as substituted and amended by the Family Law Reform Act 1987 and rules made thereunder.
3. See Gordon, *Criminal Law* (2nd edn 1978 and 1st Suppl 1984) paras 48-36 and 48-38.

element of flexibility. On reconsideration we agree with the majority of consultees on this issue. We think that in an appropriate case evidence of refusal to provide a sample could be used to rebut a presumption of paternity and that no express provision is necessary on this point.[1]

3.14 We raised in the discussion paper the question whether any new law on the obtaining of blood or other samples should be retrospective, pointing out that that would be unusual and contrary to principle. Cases have to be decided on the rules of evidence applying at the time and it could lead to great inconvenience and injustice to allow decided cases to be reopened on a change in the courts' powers relating to the obtaining of evidence. Almost all of those who commented on this question were opposed to giving the new rules retrospective effect. A suggestion made by the consulted Court of Session judges and the Sheriffs Principal was that the new power should apply only to cases raised after the new legislation came into force or in which proof had not commenced by that date. We respectfully adopt this suggestion.

3.15 We do not claim that a system based on adverse inferences is as satisfactory from the evidential point of view as a system based on actual test results. As in criminal cases, evidence is better than inference. There are cases where any inference which could be drawn from a refusal by a defender to provide a sample would be inconclusive. One such case which we mentioned in the discussion paper is where the defender in an action for a finding or declarator of paternity admits having had intercourse with the pursuer at the relevant time but proves that another man also had intercourse with her around the same time, and alleges that the other man is the father. Here it is clear that actual DNA test results could establish the truth whereas any inference from a refusal to provide a sample, if it were equally likely that either man could be the father, would be inconclusive. One answer to this problem, if actual enforcement of an order for the providing of samples is ruled out in civil cases, would be to empower or direct the court to find against the defender who refused to provide a sample, whether or not any inference of his paternity could properly be drawn from the refusal. We sought views on this possibility in the discussion paper, pointing out that, while not a very principled or logical solution, it might have the effect of inducing the defender to opt for the chance of exoneration by a test rather than the certainty of a decree against him. He would have only himself to blame if the wrong result were reached.[2] The Law Society of Scotland supported this solution but the other consultees who commented on it thought that the only sanction for the defender's refusal should be the possibility of an adverse inference being drawn. We accept the majority view on this point, although it may be that some stronger sanction than adverse inferences may have to be considered in the future if there should turn out to be a serious gap or weakness in the law.

3.16 We proposed in the discussion paper that section 6 of the Law Reform (Parent and Child) (Scotland) Act 1986 (which is quoted in paragraph 3.2 above and which refers to blood samples) should be expanded to include other samples of body tissue or fluid.[3] No-one dissented from this proposal. It would introduce an element of flexibility and would enable, for example, an order to be made in cases where a party had a genuine pathological fear of needles.

## Recommendations

3.17 The results of our consultation reveal almost unanimous support for a change in the law which would allow a court in a civil case to direct a party to the case to provide a sample of blood or other body fluid or tissue for the purpose of tests, or to consent to the taking of such a sample from a child, on pain of an adverse inference being drawn from a refusal. We therefore make the following recommendations.

1. Presumptions of paternity are rebuttable by proof on a balance of probabilities. Law Reform (Parent and Child) (Scotland) Act 1986, s5. For the English law on this point see para 3.6 above.
2. Discussion paper, para 3.26.
3. *Ibid* para 3.21.

5.(a) **A court in a civil case should have power to direct a party to the case to provide a sample of blood or other body fluid or tissue for the purpose of laboratory analysis, or to consent to the taking of such a sample from any child in relation to whom the party has power to give such consent.**

(b) **A direction made under this power should not be directly enforceable. However, the court should be empowered to draw any adverse inference which may be appropriate from the refusal or failure of a party to consent to, or to take any step necessary for, the taking of a sample.**

(c) **The new power should be available only in actions commenced after the date of commencement of the new legislation or in which the proof has not begun by that date.**

(d) **The reference to blood samples in section 6 of the Law Reform (Parent and Child) (Scotland) Act 1986 should be expanded to include any sample of body fluid or tissue.**

# Part IV Summary of recommendations

## Criminal cases

1. Section 2(5)(c) of the Criminal Justice (Scotland) Act 1980 (taking of fingerprints and other prints and impressions from a person detained under the section) should be replaced by a more general provision which would apply in all cases where a person has been lawfully arrested or is lawfully detained but which would be limited to prints or impressions of an external part of the body. The provisions ancillary to section 2(5)(c) on the use of reasonable force and the destruction of records should be preserved in the new provision.

2. (a) There should be a new statutory provision to the effect that, where a person has been arrested and is in custody at a police station, or is being detained under section 2 of the Criminal Justice (Scotland) Act 1980 in a police station, a constable may, with the authority of the officer in charge of the station at the time, take
   (i) a sample cut or combed from the hair
   (ii) a sample from a nail or from under a nail
   (iii) a sample swabbed or rubbed from any external part of the body.

   (b) It should be made clear that reasonable force may be used in order to take any such sample, where its taking is duly authorised.

3. The new statutory provisions recommended above should be without prejudice to any power (i) to search or (ii) to take possession of any evidence as a matter of urgency where there is imminent danger of its loss or destruction.

4. A warrant should continue to be required for the taking of a sample (including a blood sample) or impression, other than any sample or impression covered in the preceding recommendations, from a person's body without his consent for the purposes of evidence in criminal proceedings.

## Civil cases

5. (a) A court in a civil case should have power to direct a party to the case to provide a sample of blood or other body fluid or tissue for the purpose of laboratory analysis, or to consent to the taking of such a sample from any child in relation to whom the party has power to give such consent.

   (b) A direction made under this power should not be directly enforceable. However, the court should be empowered to draw any adverse inference which may be appropriate from the refusal or failure of a party to consent to, or to take any step necessary for, the taking of a sample.

   (c) The new power should be available only in actions commenced after the date of commencement of the new legislation or in which the proof has not begun by that date.

   (d) The reference to blood samples in section 6 of the Law Reform (Parent and Child)(Scotland) Act 1986 should be expanded to include any sample of body fluid or tissue.

# Appendix A

## EVIDENCE (SCOTLAND) BILL

ARRANGEMENT OF CLAUSES

Clause

DRAFT

OF A

# BILL

TO

A.D.1989. Make further provision in the law of Scotland as to the taking of prints, impressions and samples from persons arrested or persons detained under section 2 of the Criminal Justice (Scotland) Act 1980, and as to the power of the court in civil proceedings in relation to the provision or taking of samples of blood or other body fluid or of body tissue; and for connected purposes.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Prints, etc., in criminal investigations. 1980 c.62.

**1.**—(1) Subject to subsection (5) below, where a person has been arrested and is in custody in a police station, or is detained in a police station under section 2(1) of the Criminal Justice (Scotland) Act 1980 (detention and questioning at police station), a constable may take fingerprints, palmprints and such other prints and impressions of an external part of the body as the constable may, having regard to the circumstances of the suspected offence in respect of which the person has been arrested or detained, reasonably consider appropriate.

(2) The record of any prints or impressions taken under subsection (1) above shall be destroyed immediately following a decision not to institute criminal proceedings against the person or on the conclusion of such proceedings otherwise than with a conviction or an order under section 182 or 383 (absolute discharge) or 183(1) or 384(1) (probation) of the Criminal Procedure (Scotland) Act 1975. 1975 c.21.

(3) A constable may use reasonable force in exercising any power conferred by subsection (1) above.

(4) In section 2 of the Criminal Justice (Scotland) Act 1980—

(*a*) paragraph (c) of subsection (5), and the proviso to that paragraph,

(*b*) the word "and" immediately preceding that paragraph, and

(*c*) in subsection (6), the words "or (c)",

are hereby repealed.

(5) Nothing in this or the next following section shall prejudice

(*a*) any power of search;

(*b*) any power to take possession of evidence where there is imminent danger of its being lost or destroyed; or

(*c*) any power to take prints, impressions or samples under the authority of a warrant.

Samples in criminal investigations. 1980 c.62.

**2.**—(1) Subject to section 1(5) above, where a person has been arrested and is in custody in a police station, or is detained in a police station under section 2(1) of the Criminal Justice (Scotland) Act 1980 (detention and questioning at police station), a constable may, with the authority of the officer for the time being in charge of the police station, take—

(*a*) from the hair of an external part of the body, by means of cutting or combing, a sample of hair or other material;

(*b*) from a finger-nail or toe-nail or from under any such nail, a sample of nail or other material;

(*c*) from an external part of the body, by means of swabbing or rubbing, a sample of blood or other body fluid, of body tissue or of other material.

(2) A constable may use reasonable force in exercising any power conferred by subsection (1) above.

*Clause 1*

This clause implements recommendation 1 (para 2.32). It replaces, with amendments, section 2(5)(c) of the Criminal Justice Act (Scotland) Act 1980 (fingerprinting etc of detained persons). The amendments are designed to ensure (a) that arrested persons are covered by the provision (which at present applies only to persons detained under the 1980 Act) and (b) that dental impressions are not covered by the provision. The new clause clarifies the law but does not fundamentally change it because, at present, arrested persons can be fingerprinted at common law and dental impressions would not, in practice, be regarded as coming within the provisions. In practice a warrant would be sought for taking a dental impression without consent. See *Hay* v *H M Adv* 1968 SLT 334.

*Subsection (1)*

This is intended to replace and supersede section 2(5)(c) of the Criminal Justice (Scotland) Act 1980. It applies to arrested, as well as detained, persons. The point of the words "an external part of the body" is to exclude dental impressions.

*Subsections (2) and (3)*

These merely repeat provisions in section 2 of the Criminal Justice (Scotland) Act 1980.

*Subsection (4)*

This repeals section 2(5)(c) of the Criminal Justice (Scotland) Act 1980 and makes minor consequential changes.

*Subsection (5)*

This saving provision (which applies also to clause 2) implements recommendation 3 (para 2.36) and also makes it clear that the power to take e.g. dental impressions under the authority of a warrant is not affected. It goes without saying that the clause does not restrict the obtaining of a print or impression with the consent of the person from whom it is being obtained.

*Clause 2*

*General*

This is a new provision which enables certain samples to be taken, without a warrant, from a person arrested or detained in a police station on the authority of the officer in charge of the police station at the relevant time. Although the law is not entirely clear it is thought that in at least some of these cases a warrant would be required under the present law. See paragraph 2.10 above and Macphail, *The Law of Evidence* (1979) para 25.32. The taking of the samples in question involves more interference with the body of the person concerned than would normally be involved in a simple search or fingerprinting but does not involve going inside the body. In this sense the samples could be described as non-invasive samples. The list is broadly similar to, but not the same as, the list of non-intimate samples in section 65 of the (English) Police and Criminal Evidence Act 1984. The clause implements recommendation 2 (para 2.35).

*Subsection (1)*

The opening words are a reminder that the saving provision in clause 1(5) applies to this clause also. The wording of paragraph (a) is intended to exclude a sample of hair pulled out with roots attached. It would also - because of the words "external part" - exclude hair cut from inside the nasal orifices. In paragraph (c) the reference to "other material" is intended to be quite general. It could cover, for example, paint or oil stains of any kind.

*Subsection (2)*

This is perhaps implicit in the word "take" in subsection (1) but is included for the avoidance of doubt. It corresponds to clause 1(3).

Samples in civil proceedings.

**3.**—(1) In any civil proceedings to which this section applies, the court may (whether or not on application made to it) direct a party to the proceedings

(*a*) to provide a sample of blood or other body fluid or of body tissue for the purpose of laboratory analysis;

(*b*) to consent to the taking of such a sample from a child in relation to whom the party has power to give such consent.

(2) Where a party to whom a direction under subsection (1) above has been given refuses or fails

(*a*) to provide, or, as the case may be, to consent to the taking of, a sample as directed by the court, or

(*b*) to take any step necessary for the provision or taking of such a sample,

the court may draw from the refusal or failure such adverse inference, if any, in relation to the subject-matter of the proceedings as seems to it to be appropriate.

1986 c.9.

(3) Section 6 (determination of parentage by blood sample) of the Law Reform (Parent and Child) (Scotland) Act 1986 shall apply to a sample of body fluid or tissue as it applies to a sample of blood; and accordingly, in subsection (1) of the said section 6, for the words "blood sample" there shall be substituted the words "sample of blood or other body fluid or of body tissue" and, in subsections (2), (3) and (4) thereof, for the words "a blood" there shall be substituted the words "such a".

(4) This section applies to any civil proceedings brought in the Court of Session or the sheriff court

(*a*) on or after the date of the commencement of this Act, or

(*b*) before the said date in a case where the proof has not by that date begun.

Citation, commencement and extent.

**4.**—(1) This Act may be cited as the Evidence (Scotland) Act 1989.

(2) This Act shall come into force at the end of the period of three months beginning with the date on which it is passed.

(3) This Act shall extend to Scotland only.

*Clause 3*

*General*

This clause gives civil courts in Scotland power to make directions for the provision of samples of blood or other body tissue or fluid for the purpose of laboratory tests. It should have the effect that evidence of the results of blood group tests or DNA tests is available in most civil cases where parentage is in dispute. This will remedy a serious defect in the present law, which has attracted much criticism. However, the clause does not enable samples of blood or other fluid or tissue to be taken by force in the absence of the necessary consent. This is clear from the wording. The court is not empowered to grant a warrant for the *taking* of a sample. It is merely empowered to direct a party to provide a sample, or to give consent on behalf of a child. The sanction for refusal or failure is the drawing of adverse inferences under subsection (2). The clause implements recommendation 5 (para 3.17).

*Subsection (1)*

This confers the new statutory power on the Court of Session and sheriff courts. The power may be exercised on the application of a party or by the court on its own initiative. For the persons who have power to give consent on behalf of a child see the Law Reform (Parent and Child) (Scotland) Act 1986, section 6.

*Section (2)*

This subsection provides for the drawing of adverse inferences from a party's refusal or failure to comply with a direction under subsection (1). In many cases the appropriate inference will be that the party knows that test results would show that he or she is lying.

*Subsection (3)*

This subsection makes a slight extension to section 6 of the Law Reform (Parent and Child)(Scotland) Act 1986 so that it will apply not only to blood samples but also to samples of blood or other body fluid or tissue. Section 6 regulates the question of who can consent to the taking of a sample from a child or other person incapable of giving consent.

*Subsection (4)*

The new power applies only where proof has not begun by the date of commencement of the new Act. This is the same rule as was adopted in the Civil Evidence (Scotland) Act 1988, section 10(2).

# Appendix B

**List of those submitting comments**

Association of Chief Police Officers (Scotland)
Association of Scottish Police Superintendents
British Medical Association
Professor A Busuttil, Regius Professor of Forensic Medicine, University of Edinburgh
Cellmark Diagnostics
Court of Session (Consulted Judges)
Crown Office
Faculty of Advocates
Law Society of Scotland
James P McKeown, Solicitor
Procurator Fiscal Society
Royal College of Surgeons
Scottish Council for Single Parents
Scottish Courts Administration
Scottish Law Agents Society
Scottish Police Federation
Sheriffs' Association
Sheriffs Principal
Claire M Sturrock
Tayside Regional Council, Social Work Department
University of Aberdeen, Faculty of Law working party
University of Dundee, Faculty of Law

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