



The Law Reform Commission  
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

# REPORT

**THE ESTABLISHMENT OF A DNA DATABASE**

**(LRC 78-2005)**

**IRELAND**

**The Law Reform Commission  
35-39 Shelbourne Road, Ballsbridge, Dublin 4.**

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# THE LAW REFORM COMMISSION

## Background

The Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20 October 1975, pursuant to section 3 of the *Law Reform Commission Act 1975*.

The Commission's Second Programme for Law Reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas in December 2000. The Commission also works on matters which are referred to it on occasion by the Attorney General under the terms of the Act.

To date the Commission has published 76 Reports containing proposals for reform of the law; 11 Working Papers; 37 Consultation Papers; a number of specialised Papers for limited circulation; An Examination of the Law of Bail; and 26 Annual Reports in accordance with section 6 of the 1975 Act. A full list of its publications is contained on the Commission's website at [www.lawreform.ie](http://www.lawreform.ie).

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The Law Reform Commission consists of a President, one full-time Commissioner and three part-time Commissioners.

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## ACKNOWLEDGEMENTS

This Report follows from and builds upon the work carried out by the Law Reform Commission which led to the publication of the *Consultation Paper on the Establishment of a DNA Database* (LRC CP 29-2004) in March 2004. As such, the Commission wishes to thank once again all those who offered their advice and assistance at that stage.

In September 2004, the Commission held a seminar on the establishment of a DNA database as part of the consultation process. The Commission would like to thank all those who attended and contributed to the seminar.

The Commission would also like to express its gratitude to those who made written submissions on the content of the Consultation Paper, namely the Commissioner of An Garda Síochána Noel Conroy; the then Data Protection Commissioner Joe Meade; the Forensic Science Laboratory; Dr. Tom Hannigan; IMPACT Trade Union; and IdentiGen Genetic Testing Services.

In the course of researching and writing this Report, the Commission held a number of informative meetings and discussions with individuals and representatives of interested bodies. In this regard, the Commission would like to thank Dr Sheila Willis, Director of the Forensic Science Laboratory, Dr Louise McKenna and Dr Maureen Smyth of the Forensic Science Laboratory; Detective Superintendent William Coen of the Garda Technical Bureau; Professor Neil McLeod of Murdoch University, Western Australia; His Honour Judge Arthur Tompkins, New Zealand Judicial Expert on DNA; and Tom Ross of Tayside Police, Dundee, Scotland.

However, full responsibility for the content of this publication lies with the Commission.



## **NOTE**

This Report was submitted to the Attorney General, Mr Rory Brady SC, under section 4(2)(c) of the *Law Reform Commission Act 1975*. It embodies the results of an examination of and research in relation to the establishment of a DNA database which was carried out by the Commission at the request of the Attorney General, together with the proposals for reform which the Commission was requested to formulate.

While these proposals are being considered in the relevant Government Departments, the Attorney General has requested the Commission to make them available to the public, in the form of this Report, at this stage so as to enable informed comments or suggestions to be made to the relevant Government Departments by persons or bodies with special knowledge of the subject.



## TABLE OF CONTENTS

<b>INTRODUCTION</b>		<b>1</b>
<b>CHAPTER 1</b>	<b>ESTABLISHING A DNA DATABASE</b>	<b>5</b>
	A Introduction	5
	B DNA	6
	C DNA Profiling	7
	D DNA Database	9
	E Limited versus Comprehensive Database	13
<b>CHAPTER 2</b>	<b>PURPOSE AND SCOPE OF THE DNA DATABASE</b>	<b>15</b>
	A Introduction	15
	B Purpose of the DNA Database	15
	(1) Statement of Purposes in Primary Legislation	16
	(2) Crime Investigation Purposes	16
	(3) Identification of Deceased Persons	18
	(4) Identification of Severely Injured Persons	20
	C Scope of the Database	21
	(1) Taking DNA Samples	21
	(2) Profiles on the Database	31
	D Missing Persons	52
<b>CHAPTER 3</b>	<b>RETENTION, DESTRUCTION AND ANALYSIS OF SAMPLES</b>	<b>55</b>
	A Introduction	55
	B Retention Versus Destruction of Samples	55
	(1) Crime Scene Samples	56
	(2) Comparator Samples	57
	C Permissible Analysis of Biological Samples	61
	(1) Crime Scene Samples	62
	(2) Comparator Samples	64
<b>CHAPTER 4</b>	<b>CUSTODIAN OF THE DATABASE AND INFORMATION SHARING</b>	<b>67</b>
	A Introduction	67
	B Oversight and Regulation of the DNA Samples and Database	67
	(1) Custodian of the Database	67
	(2) Security of the Database and Samples	73
	C DNA Evidence and Contamination	79
	(1) Laboratory Performance	80
	(2) Crime Scene Management	80
	(3) Elimination Databases	82
	D Information Sharing and the International Dimension	83
	(1) Consultation Paper Recommendation	83
	(2) Discussion	84

	(3) Report Recommendation	87
<b>CHAPTER 5</b>	<b>DNA EVIDENCE IN COURT</b>	<b>89</b>
	A Introduction	89
	B Probative Value of a DNA Match	90
	C Presentation of Statistical Evidence	92
	(1) Consultation Paper Recommendation	92
	(2) Discussion	92
	(3) Report Recommendation	96
	D Pre-Trial Evidential Hearings	96
	(1) Consultation Paper Recommendation	96
	(2) Discussion	96
	(3) Report Recommendation	98
	E Judicial Warning	98
	(1) Consultation Paper Recommendation	98
	(2) Discussion	99
	(3) Report Recommendation	99
	F Corroboration of DNA Evidence	99
	(1) Consultation Paper Recommendation	99
	(2) Discussion	100
	(3) Report Recommendation	101
	G Illegally and Unconstitutionally Obtained Evidence	101
	(1) Consultation Paper Recommendation	101
	(2) Discussion	102
	(3) Report Recommendation	103
<b>CHAPTER 6</b>	<b>SUMMARY OF RECOMMENDATIONS</b>	<b>105</b>
	A Chapter 1: Establishing a DNA Database	105
	B Chapter 2: Purpose and Scope of the DNA Database	105
	C Chapter 3: Retention, Destruction and Analysis of Samples	108
	D Chapter 4: Custodian of the Database and Information Sharing	109
	E Chapter 5: DNA Evidence in Court	110
<b>APPENDIX</b>	<b>DRAFT CRIMINAL JUSTICE (DNA DATABASE) BILL 113</b>	

## INTRODUCTION

1 On 5 February 2003, the Attorney General, Mr Rory Brady SC, acting pursuant to section 4(2)(c) of the *Law Reform Commission Act 1975*, requested the Commission to consider the following matter:

“The establishment of a DNA Databank. I would appreciate that in your consideration of this issue you would address the complex constitutional and human rights issues that may arise. In particular, the classes of DNA profiles, that would make up the database, would have to be addressed. For instance, would the database include suspects who have not been convicted.”

This Report follows a *Consultation Paper on the Establishment of a DNA Database* which was published in March 2004.<sup>1</sup>

2 This Report examines the possibility of establishing a DNA database in Ireland, the advantages and disadvantages, and the human rights implications involved. It also examines DNA evidence in general, including the probative value of a DNA match and the presentation of the evidence at trial.

3 A DNA database is a repository of DNA profiles, generated from biological samples, which can be electronically stored for comparison with profiles generated from material found at the scene of a crime. The primary aim of a DNA database is to link individuals to unsolved offences and unsolved offences to each other by means of DNA profiling. DNA databases established in various countries worldwide have proved to be very successful investigative tools. Against these advantages, the disadvantages in terms of the possible infringement of an individual’s human rights, such as the right to privacy and bodily integrity, are also considered. This Report seeks to strike a balance between these conflicting interests. In doing so, the Commission recommends the establishment of a limited DNA database primarily for crime investigation purposes.

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<sup>1</sup> Law Reform Commission *Consultation Paper on the Establishment of a DNA Database* (LRC CP 29-2004) (hereinafter referred to as ‘the Consultation Paper’).

4 In Chapter 1 the Commission discusses the essential principles which inform its views on whether a DNA database should be established. This chapter is intended to provide a brief description of some of the relevant scientific terms in this area, including DNA, DNA profiling and DNA database. The establishment of a comprehensive DNA database containing DNA profiles of the entire population is rejected by the Commission in favour of the establishment of a limited DNA database.

5 Chapter 2 emphasises the importance of developing a comprehensive and unambiguous legal framework for the establishment and management of the proposed DNA database. The Commission recommends that the purpose of the database be explicitly limited to criminal investigation and identification purposes. The scope of the proposed database is also examined. Both the taking of DNA samples and the retention of DNA profiles are considered. The Commission divides the retention of DNA profiles into three categories: suspects, convicted persons and volunteers. The Commission recommends the temporary retention of the DNA profiles of suspects and the indefinite retention of the DNA profiles of convicted persons on the database. A volunteer's DNA profile may also be retained on the database where an informed consent has been given for this. Chapter 2 also examines the potential of the DNA database to identify missing persons.

6 Chapter 3 focuses on the DNA sample as opposed to the DNA profile. The Commission examines the benefits of retention or destruction of the biological sample once the DNA profile has been generated. The permissible analysis of biological samples, beyond the generation of a profile is also considered.

7 Chapter 4 sets out in detail the Commission's proposal for the custodianship of the database under a proposed Forensic Science Agency. The principal function of the proposed Agency would be to maintain the integrity of the DNA database. It would be given responsibility for ensuring the security of the database and the accuracy of the information on it. The security of the retained DNA samples and the procedures for the destruction of DNA profiles and samples are also considered. Issues such as laboratory performance in relation to DNA analysis, crime scene management and the establishment of elimination databases are examined. The international exchange of DNA information is also considered.

8 Chapter 5 addresses the issue of DNA evidence in court. In this chapter the Commission considers a number of issues which are particularly relevant to DNA evidence including the probative value of a DNA match,

the presentation of statistical evidence, pre-trial evidential hearings and other related evidential matters.

9 Chapter 6 is a summary of the Commission's recommendations.

10 The Appendix contains a draft Criminal Justice (DNA Database) Bill to give effect to the Commission's recommendations which require legislative implementation.



## CHAPTER 1 ESTABLISHING A DNA DATABASE

### A Introduction

1.01 In this chapter, the Commission discusses the essential principles which inform its views on whether a DNA database should be established and, if so, the nature of such a database. DNA has been used with great success to investigate crimes in which traces of blood, saliva, semen, hair or other biological material are available to assist in convicting the guilty and exonerating the innocent. DNA evidence has been successfully used on a case-by-case basis in a number of investigations. However, it has been argued that the power of the technique is limited by the absence of a permanent collection of reference profiles to which samples obtained at a crime scene could be compared. The benefits of establishing a DNA database have been widely acknowledged. Experience in other jurisdictions has illustrated the important contribution a DNA database makes to crime investigation. Such a database enables a person, not previously suspected of committing a crime, to be identified as the possible perpetrator of an offence or to exclude a person from further investigation. In the Consultation Paper, the Commission favoured the establishment of a limited DNA database in Ireland. The Commission continues to support this recommendation, the details of which are examined throughout this Report.

1.02 When analysing the issues involved in the establishment of a DNA database, the Commission considers that a clear understanding of the science involved is vital for an informed discussion of the human rights concerns as well as the evidential issues that the use of the forensic analysis of DNA entails. In the Consultation Paper, the Commission provided a detailed analysis of the science of DNA and DNA profiling, along with the purpose and benefits of the establishment of a DNA database including an analysis of the individual rights affected by the use of this technology.<sup>1</sup> By way of a brief summary of that analysis, this chapter contains a description of some of the relevant scientific terms in this area. This chapter is divided into four parts. Part B contains a brief description of DNA, Part C examines DNA profiling and Part D discusses the concept of a DNA database. Finally, Part E examines the advantages and disadvantages of establishing a limited or comprehensive DNA database.

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<sup>1</sup> See Chapters 1-3 of the Consultation Paper.

## **B DNA**

1.03 DNA is an acronym for deoxyribonucleic acid. It is a chemical which is found in the nucleus of every cell in the human body.<sup>2</sup> It is inherited from both parents and is unique to each individual, with the exception of identical twins.

1.04 In the 1940s, it became apparent that DNA is the principal molecule which carries genetic information from one generation to the next. This was not conclusively established however until 1953, when Watson and Crick deduced the structure of DNA.<sup>3</sup> Each molecule of DNA consists of two strands which coil around each other to form a double helix, a structure like a twisted ladder. Each rung of the ladder consists of a pair of chemical groups called bases (nucleotides), linked together by hydrogen bonds. There are four types of bases known by their initial letters – A, G, C and T.<sup>4</sup> The bases combine in specific pairs; A and T pair with each other and G pairs with C. Hence, the sequence on one strand of the double helix is complementary to that on the other. It is the specific sequence of these bases which constitutes the genetic information.

1.05 A genome is the complete set of genetic material of a particular organism. Each diploid cell has a nucleus containing the entire genome, which is the same from one cell to another. The human genome has approximately 3 billion base pairs. A gene, on the other hand, is a unit of inheritance. It is a piece of genetic material that determines the inheritance of a particular characteristic, such as hair or eye colour. Essentially, genes are a particular sequence of base pairs along the DNA strand. The length or sizes of genes vary, but an average gene consists of 3,000 bases.<sup>5</sup> The number of genes present throughout the genome is about 30,000.<sup>6</sup> The regions of the DNA molecule which contain genes are known as ‘coding regions’. The coding regions from one individual to the next are almost the same because during evolution they are subjected to selection pressure to maintain their specific function; one could say that they are essentially what make us human. However, genes comprise only about 2% of the human genome; the remainder consists of non-coding regions. These non-coding

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<sup>2</sup> A notable exception is erythrocytes (red blood cells) which do not have nuclei.

<sup>3</sup> Watson and Crick “Molecular Structure of Nucleic Acids: A Structure for Deoxyribonucleic Acids” (1953) 171 *Nature* 738-740.

<sup>4</sup> Meaning adenine, guanine, cytosine and thymine.

<sup>5</sup> See Human Genome Management Information System *Genomics and Its Impact on Science and Society: The Human Genome Project and Beyond - A Primer* (March 2003). Available at [http://www.ornl.gov/sci/techresources/Human\\_Genome/publicat/publications.shtml](http://www.ornl.gov/sci/techresources/Human_Genome/publicat/publications.shtml).

<sup>6</sup> *Ibid.*

areas are reported to have little prescribed function; indeed they may not have any biological function and consequently are often described as 'genetic junk'. The key point is that the coding regions contain sequences that are almost identical from one individual to another, whereas differences can be observed in non-coding areas. Accordingly, the non-coding regions are more pertinent for forensic analysis the purpose of which is to differentiate between individuals.

## **C DNA Profiling**

1.06 DNA profiling refers to the identification of particular parts of a person's DNA molecule. It is a technique which enables scientists to compare two biological samples and to determine the likelihood that these samples originated from the same individual. Because DNA is the same in all cells of the body, DNA profiles extracted from different samples at different times and in different places can be compared to determine whether they have come from the same person. If human biological samples are found at a crime scene, DNA profiling can determine whether a suspect could be a possible source of a sample.

1.07 The technology underlying DNA profiling was developed as a result of an unexpected discovery by Professor Sir Alec Jeffreys and colleagues in the 1980s in the course of research into DNA variation and the evolution of families of genes.<sup>7</sup> The technology has developed exponentially since then. Multi locus probes (MLP) and Single locus probes (SLP) have given way to the routine use of Polymer Chain Reaction (PCR) where small samples can be examined because the extracted DNA can be replicated in a controlled way. The STR (Single Tandem Repeat) system in use in Ireland and in most of Europe is called SGM Plus™. Defined areas which can differ from one individual to the next (non-coding regions) are targeted and the resulting profile is referred to as an SGM Plus profile. The areas targeted, 10 in all, are at different parts of the DNA molecule. Each area (called locus) has two components (called alleles), one inherited from the mother and one from the father. At each locus, the strands of DNA consist of repeated sequences of bases. The DNA type is referred to as a number equal to the number of repeat units. The targeted loci are amplified and the target DNA is then separated on the basis of length (related to the number of repeat units). A DNA profile when transcribed is a digital representation of the 10 areas of variability with the number of repeat units at each locus.

1.08 Once a DNA profile is generated, it is compared with other profiles such as comparator profiles taken from suspects or those profiles

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<sup>7</sup> Jeffreys, Wilson and Thein "Hypervariable 'Minisatellite' Regions in Human DNA" (1985) 314 *Nature* 67-73 and Jeffreys, Wilson and Thein "Individual-Specific 'Fingerprints' of Human DNA" (1985) 316 *Nature* 76-79.

generated from stains found at other scenes of crime. If the same alleles are present at all 10 loci tested, the profiles are said to ‘match’. The next step is to determine the significance of the match. It is necessary to ascertain how common or rare the particular profile is in the population. An evaluation of the rarity of a profile is made with the aid of frequency databases. For this purpose, a sample population database containing the profiles of 300 of the Irish population is used to estimate how often an allele occurs within the population. Each allele may be relatively common. What results in a profile being a rare occurrence is the combination of the 10 loci, each with two alleles, each of which may be common but which combine into a rare total. Typically, this probability could be in the order of one in several billions, which implies that any one profile is likely to be very rare in the general population, if not unique.

1.09 The forensic potential of DNA profiling technology was quickly realised. The compelling effect of DNA evidence on the outcome of a case became apparent. In England in 1987, Robert Melias became the first person to be convicted on the basis of DNA evidence. Shortly afterwards in the USA, Tommy Lee Andrews was convicted of rape after matching DNA from semen traces found on a rape victim with a DNA profile generated from a sample of his blood.<sup>8</sup> The Forensic Science Laboratory in Ireland began using DNA technology in 1994. Prior to that, samples were sent to England to be tested using profiling technology. The first occasion on which the process was tested in Irish courts was in *The People (DPP) v Mark Lawlor*.<sup>9</sup> In 1995, Lawlor was convicted of the sexual assault and murder of Rose Farrelly. The forensic evidence against Lawlor included DNA from the semen found on the victim’s clothing, which matched the DNA profile generated from Lawlor’s blood sample. The profile obtained was estimated to occur in the population with the frequency of approximately 1 in 100 million. A lengthy voir dire of several weeks was held in which the validity

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<sup>8</sup> *State v Andrews* 533 So.2d 841 (Dist. Ct. App. 1989). For an early discussion of the use of DNA evidence in Ireland see Fennell “DNA profiling: hidden agendas” (1991) *Irish Criminal Law Journal* 34.

<sup>9</sup> Central Criminal Court 2 December 1995, Court of Criminal Appeal 19 February 2001 (the appeal was dismissed). Other examples of the use of DNA evidence in Irish courts include: *The People (DPP) v O’Donnell*, Central Criminal Court, 1996 (murder of Imelda Riney, Liam Riney and Fr Joe Walsh); *The People (DPP) v Lawlor*, Central Criminal Court, 1998 (murder of Marilyn Rynne); *The People (DPP) v Crerar*, Central Criminal Court, 31 October 2002 (murder conviction concerning death of Phyllis Murphy in 1979: currently under appeal); *The People (DPP) v Allen* [2003] 4 IR 295 (Court of Criminal Appeal: robbery and possession of firearms, discussed at paragraph 5.06 below: re-trial ordered for failure to adduce evidence on sibling statistical probability); *The People (DPP) v Howe*, Central Criminal Court, 14 October 2003 (directed acquittal, discussed at paragraph 5.30 below); and *The People (DPP) v Horgan*, Central Criminal Court, June 2002 Court of Criminal Appeal, 6 December 2004 (murder and rape charges: re-trial ordered).

of the DNA profiling and the security and integrity of the DNA samples was challenged. These challenges failed and the trial judge permitted the forensic evidence to go to the jury.<sup>10</sup>

1.10 The use of DNA profiling as a forensic tool in criminal investigations is now well established. Advances have been made in the automation and computerisation of the technique, and there have been improvements in the sensitivity and application of the method. Examinations of crime scenes have become pivotal, with DNA profiles being generated from blood, semen, saliva, skin, hair and other tissues. The *Criminal Justice (Forensic Evidence) Act 1990* empowers the Gardaí to obtain bodily samples from suspects for comparison with material found at the scene of a crime. The technique of DNA profiling can now be used to establish the true identity of an individual, to link a suspect to the scene of a crime or to a victim, to link crimes perpetrated by the same offender together by matching the crime stains, and to exclude and exonerate innocent individuals from suspicion.

#### **D DNA Database**

1.11 A DNA database is a repository of DNA profiles generated from biological samples, which can be electronically stored for comparison with profiles generated from material found at the scene of a crime. The purpose of a DNA database is to assist in:

- (i) identifying links between crimes, such as in the case of stains left at the scene of the crime by serial offenders;
- (ii) the rapid exclusion from the ambit of the investigation of suspects who are already on a database and whose profiles do not match;
- (iii) the making of ‘cold hits’- that is where a stain is matched with a profile of a person on the database who was not a suspect.<sup>11</sup>

In summary, the primary aim of any DNA database is to link individuals to unsolved offences and unsolved offences to each other by means of DNA profiling. Profiles which are retained on a DNA database are used by the police to generate intelligence information to be further followed up by investigators. Any DNA evidence presented in court in support of a criminal

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<sup>10</sup> See Smyth “DNA in the Dock” [1995] *Lab Link* Volume 2 Issue 6 and Willis “DNA in the Investigation of Crime” *Communiqué: An Garda Síochána Management Journal* (March 2003).

<sup>11</sup> See Consultation Paper at paragraph 2.13.

prosecution must be derived from new samples of biological material taken from the accused individual. It is the second sample, the profile derived from it and the results obtained from comparing it to crime scene sample profiles, which will be presented in court by a recognised scientific expert.

1.12 In the absence of a DNA database, DNA profiling can only be useful once police have identified a suspect through traditional investigative means. With a DNA database, the investigative process itself becomes more effective and efficient. It is axiomatic that if an investigation can be concentrated on a primary suspect from the outset, the net need not be cast too widely and, in consequence, resources which would otherwise be expended on time-consuming door-to-door enquiries may not be required. The retention of DNA profiles on a database is considered to be particularly useful as an intelligence tool in combating current as well as future crime. The system is particularly successful in identifying repeat offenders for 'volume crime' such as criminal damage, burglary and car theft.

1.13 There is no generally agreed model regarding the organisational structure of a national DNA database. The category of persons from whom samples are obtained and retained and hence who comprise a database, can vary. The world's first national criminal DNA database was established in the United Kingdom in April 1995, following a report by the Royal Commission on Criminal Justice.<sup>12</sup> The UK DNA database holds profiles from individuals arrested for a recordable offence,<sup>13</sup> profiles that were given voluntarily for the purposes of elimination, and profiles derived from scenes of crime. In March 2004, the UK DNA database held 2,527,728 subject sample records and 228,463 records from scene of crime samples.<sup>14</sup> As each new subject sample profile is added to the database, it is checked against all the crime scene sample profiles on the database. When a new crime scene sample profile is added, it is checked against all subject and other crime scene sample records. Any profiles that are compatible are identified as a match. Matches between a subject and a crime scene are useful in identifying possible suspects for the offence. Matches between one crime scene and another provide valuable intelligence information which, together with other information, may also help the police to identify suspects. The probability of identifying one or more suspects for an offence when a profile

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<sup>12</sup> The Royal Commission on Criminal Justice (1993) CM 2263 London, HMSO.

<sup>13</sup> A recordable offence is one which is potentially punishable by imprisonment, and certain other specified offences such as loitering or soliciting for the purposes of prostitution, possessing a weapon with a blade or a point in a public place or tampering with a motor vehicle.

<sup>14</sup> See Forensic Science Service *The National DNA Database Annual Report 2003-2004* at 18. Available at <http://www.forensic.gov.uk>.

from a crime scene was loaded onto the DNA database in 2003/04 was 45%.<sup>15</sup>

1.14 Various other countries worldwide have sought to access the benefits of DNA technology.<sup>16</sup> In 1995, New Zealand became the second country in the world to have a national DNA databank. Since its establishment, 50,000 DNA profiles have been entered in the databank and 10,000 profiles from unsolved crimes have been registered on the Crime Sample Database.<sup>17</sup> The FBI's Combined DNA Index System (CODIS) commenced operations in October 1998 and the National DNA Databank of Canada commenced operations in June 2000. The majority of European countries either have, or are establishing, DNA databases.<sup>18</sup> Each of these countries have approached the implementation and use of these databases differently. Issues such as who is to be included in the database, the storage of samples, security and custodianship, are just some that must be addressed in the development of forensic databases. Consideration must also be given to individual human rights when debating these matters.

1.15 The Commission is aware that strong support exists for the establishment of a DNA database in Ireland. The current Director of Public Prosecutions has observed that a DNA database would be "a powerful tool" in the fight against organised crime in Ireland. He added that the DNA of criminals who are convicted (whether sent to prison or given a suspended sentence) should be retained to check against DNA gathered at future crime scenes.<sup>19</sup> Similarly, the early introduction of a DNA database has been supported by the current Garda Commissioner who observed that the Gardai are at a distinct disadvantage in solving crime because Ireland does not have

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<sup>15</sup> See Forensic Science Service *The National DNA Database Annual Report 2003-2004* at 21. Available at <http://www.forensic.gov.uk>.

<sup>16</sup> A survey conducted by Interpol of its member states showed that 77 states perform DNA analysis, out of which 41 operate a national DNA database. 38% of the member states are predicted to house a DNA database in the next few years. See Interpol DNA Unit *Global DNA Database Inquiry, Results and Analysis 2002*. Available at <http://www.interpol.int/Public/Forensic/dna/inquiry/default.asp>.

<sup>17</sup> New Zealand Government Press Release: Research, Science and Technology Minister Steve Maharey and Police Minister George Hawkins "50,000<sup>th</sup> DNA profile a crime fighting milestone" 21 April 2005. Available at <http://www.beehive.govt.nz>.

<sup>18</sup> See Williams & Johnson *Forensic DNA Databasing: A European Perspective* June 2005. Available at <http://www.dur.ac.uk/p.j.johnson/>.

<sup>19</sup> Opening Address of James Hamilton, Director of Public Prosecutions at the 6<sup>th</sup> Annual National Prosecutors Conference, 28<sup>th</sup> May 2005, pages 5-6.

a DNA database.<sup>20</sup> The current Director of the Forensic Science Laboratory agrees that the lack of a national DNA database hampers crime detection.<sup>21</sup>

1.16 The Commission is equally aware that the establishment of a DNA database may interfere with both an individual's right to privacy and bodily integrity, and the privilege against self-incrimination.<sup>22</sup> Consideration must be given to finding a proportionate balance between the rights of the person, who is the source of a DNA sample, and the wider societal interests such as the prevention of disorder and crime and the protection of the rights of others. A number of discrete human rights issues arise from the establishment of a DNA database. First, any procedure whereby samples are taken from an individual is, by its nature, intrusive and may raise issues in relation to privacy, self-incrimination and bodily integrity. Furthermore, the retention of DNA profiles and samples, which can potentially reveal many personal details about the genetic characteristics of an individual, raises many privacy questions. The establishment of a DNA database must be balanced against the human rights concerns that it raises. Detailed data protection measures must be put in place to ensure that information collected and retained is confined to the criminal justice sphere. These principles are taken into account by the Commission when formulating recommendations on the practical aspects of DNA profiling and the establishment of a DNA database. The Commission has considered the question of whether a database could be established on an administrative basis rather than under a legislative framework.<sup>23</sup> The Commission has concluded that a comprehensive legislative framework is required to secure the necessary fundamental changes to existing practices regarding the taking and retention of DNA samples and profiles. In addition, the Commission notes that the current international practice with regard to the establishment of DNA databases indicates a preference for a legislative as opposed to administrative framework for the database.

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<sup>20</sup> "Absence of DNA database for Gardaí deplored" *The Irish Times* 27 April 2005.

<sup>21</sup> "Testing times for DNA" *Irish Independent* 13 June 2005.

<sup>22</sup> See Chapter 3 of the Consultation Paper for a detailed analysis of the right to privacy, bodily integrity and the privilege against self-incrimination in relation to the establishment of a DNA database.

<sup>23</sup> In this respect, the Commission notes the recommendations made in the *Report of the Working Group on Garda Vetting* (February 2004). At present, there is no statutory basis for vetting the suitability of persons for certain sensitive occupations, such as child care, and current Garda vetting arrangements are on an administrative basis only. The Working Group considered that the current administrative vetting process is no longer adequate to meet the demands being placed on it and recommended that the Garda vetting process be placed on a legislative footing (paragraph 5.2.6).

## **E Limited versus Comprehensive Database**

1.17 In the Consultation Paper, the Commission supported the establishment of a limited DNA database which would include the DNA profiles of suspects of serious crime, convicted persons and volunteers. Debate regarding the possibility of establishing a comprehensive database involving every person in the State has surfaced both before and during the consultation process. It has been suggested that the universal retention of profiles would enhance rather than diminish civil liberties.<sup>24</sup> It has also been pointed out that a database which would contain the DNA profiles of every citizen in the state would be non-discriminatory and that its composition would not depend on arbitrary and possibly discriminatory distinctions made between various categories of individuals such as suspects of serious crime and all those in prison.<sup>25</sup> Advocates of a comprehensive DNA database suggest that the benefits of such a database would outweigh any potential human rights concerns, and that a comprehensive database would ensure that an increased number of criminals would be apprehended, creating a safer and more secure society. It would, they suggest, be hugely beneficial in excluding the innocent from suspicion, avoiding miscarriages of justice and identifying as prime suspects first-time as well as repeat offenders.<sup>26</sup>

1.18 Arguments against the establishment of a comprehensive DNA database have also been voiced in various forums. It has been suggested that states could not be trusted to resist the pressure of private interests to expand the uses to which a DNA database might be put. Questions have been raised about the practicalities of safeguards put in place by politicians and it has been suggested that the first thing to be compromised by politicians, responsive to the clamour of public opinion, would be the safeguards.<sup>27</sup> Human rights organisations such as Liberty<sup>28</sup> and the Irish Council for Civil

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<sup>24</sup> See the views of Professor David Mc Connell in *The Irish Times* 20 August 2003.

<sup>25</sup> Professor Alec Jeffreys has repeatedly advocated the establishment of a global DNA database in which every citizen's DNA profile would be stored under strict controls. See "Inventor warns over abuse of DNA data: Privacy in peril from genetic fingerprint technology" *The Observer* 8 August 2004.

<sup>26</sup> For an informative debate on the merits of the establishment of a comprehensive DNA database see Kaye & Smith "DNA Identification Databases: Legality, Legitimacy, and the Case for Population-Wide Coverage" (2003) *The Wisconsin Law Review* 414.

<sup>27</sup> Donncha O'Connell "DNA database would pose threat to our civil liberties" *The Irish Times* 27 August 2003.

<sup>28</sup> See John Wadham, Director of Liberty "Databasing the DNA of innocent people – why it offers problems not solutions" Press Release 13 September 2002. Available at <http://www.liberty-human-rights.org.uk>.

Liberties<sup>29</sup> echo these concerns. In the Consultation Paper, the Commission concluded that the establishment of a comprehensive database was not justifiable. The Commission considered that such a measure would involve a disproportionate interference with the privacy and bodily integrity rights of innocent citizens and would not meet the test in the European Convention on Human Rights that it was necessary in a democratic society.<sup>30</sup> The Commission also noted that limited DNA databases established in various countries worldwide have proved to be very successful investigative tools. Police are apprehending more criminals and excluding suspects from their inquiries because of the increasing effectiveness of limited DNA databases established in countries such as New Zealand, the United States and the United Kingdom. In addition, the Commission considers that the establishment of a limited DNA database does not necessarily give rise to discrimination. Whilst arbitrary classifications and grouping is objectionable, a difference in treatment between different groups does not, as such, amount to discrimination, whether under the Constitution or the European Convention on Human Rights. The crucial issue is whether differentiation in treatment can be justified on some objective criteria, including the questions of reasonableness and proportionality. These factors must be borne in mind when addressing the issue of whose profiles should be stored on any proposed DNA database.

1.19 The Commission's aim is to effect a compromise between two competing arguments, namely the argument that the storage of DNA profiles taken from citizens is an unjustifiable intrusion into an individual's right to privacy and bodily integrity, and the argument that retaining the profiles of the entire population would significantly assist crime investigation and would consequently enhance human rights. While these competing positions have merit, neither can be pursued in isolation. In this context, the Commission has concluded that the view expressed in the Consultation Paper remains correct and that a limited DNA database should be established.

*1.20 The Commission recommends the establishment of a limited, rather than comprehensive, DNA database.*

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<sup>29</sup> Irish Council for Civil Liberties Position Paper on *Human Rights Compatibility of the Establishment of a DNA Database* October 2003. Available at: [http://www.iccl.ie/criminalj/policy/03\\_dnapaper.pdf](http://www.iccl.ie/criminalj/policy/03_dnapaper.pdf).

<sup>30</sup> See Consultation Paper at paragraphs 5.112-5.117.

## **CHAPTER 2      PURPOSE AND SCOPE OF THE DNA DATABASE**

### **A            Introduction**

2.01      This chapter emphasises the importance of developing a comprehensive and unambiguous legal framework for the establishment and management of the proposed DNA database. The chapter is divided into three parts. Part B focuses on the purpose and permitted uses of the proposed DNA database. It recommends that the purpose of the database be explicitly limited to criminal investigation and identification purposes. Part C deals with the scope of the proposed database. The composition of the DNA database is primarily dependent on whether the authorities may lawfully obtain a bodily sample from an individual from which a DNA profile can be generated. It also depends on whether the authorities are permitted to retain this profile on the database. Consequently, in determining the scope of the proposed DNA database, both the taking and retention of DNA profiles are considered.<sup>1</sup> Finally, Part D discusses the use of the DNA database to identify missing persons.

### **B            Purpose of the DNA Database**

2.02      The Commission regards as fundamental that the purposes for which the DNA database may be used should be set out explicitly in legislation. The Commission is conscious that one of the greatest concerns in relation to DNA retention is the temptation to expand its usage. The phenomenon of ‘function creep’, whereby technology introduced for one narrowly defined purpose is extended in its usage over time to other areas, must be guarded against. Any future alteration to the purpose of the database should be the result of debate on the fundamental principles on which the database is based. Specifying the purposes for which the database may be used will facilitate more effective control of the use of that database, thereby creating public confidence in the process. The purpose of the DNA database is also an important factor to be taken into account in assessing the proportionality of any measure providing for the taking and retention of DNA samples from individuals. If the purposes for which the samples and

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<sup>1</sup>      The retention of DNA samples, as opposed to profiles, is considered in Chapter 3 below.

database may be used are limited, it follows that samples may be obtained from a wider range of persons.

**(1) Statement of Purposes in Primary Legislation**

2.03 It has been suggested to the Commission during the consultation process that it should be permissible for an appropriate Minister to give effect to the broad terms of the primary legislation establishing the database by way of secondary Regulations. The Commission does not share this view. The Commission envisages that the legislation providing for the establishment of a DNA database should be as comprehensive as possible and the use of broad terms should be kept to a minimum, although it is acknowledged that some regulation will be unavoidable. In this respect, the courts in this jurisdiction have held that Regulations may only give effect to the principles and policies contained within the legislation itself.<sup>2</sup> The Consultation Paper was critical of the New South Wales approach, which enables Regulations to prescribe additional purposes for the database.<sup>3</sup> Any attempt to enact a provision into Irish law mirroring this approach would most likely be unconstitutional. Thus, while Regulations may be suitable to give effect to certain subsidiary elements of the legislation establishing the database, the Commission considers that any additional useful purposes of the database that become evident with time should be prescribed by primary legislation only and not by Regulations.

2.04 *The Commission recommends that the purposes of the database should be stated in precise terms in primary legislation and that any change to its purpose or scope would also be prescribed by further primary legislation.*

**(2) Crime Investigation Purposes**

**(a) Consultation Paper Recommendation**

2.05 In the Consultation Paper, the Commission recommended that the database should be used for crime investigation purposes and the identification of deceased and severely injured people.<sup>4</sup>

**(b) Discussion**

2.06 This recommendation confines the primary application of the database to the investigation of crime. The principle behind this recommendation is that only criminal investigation purposes could justify the significant infringement of an individual's privacy, bodily integrity and

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<sup>2</sup> *Cityview Press Ltd v An Chomhairle Oiliúna* [1980] IR 381.

<sup>3</sup> See section 92 of the NSW *Crimes (Forensic Procedures) Act 2000*. See Consultation Paper at paragraph 7.36.

<sup>4</sup> See Consultation Paper at paragraph 7.39.

privilege against self-incrimination which the taking and retention of DNA samples entails. In this respect, the database's primary function in the criminal investigation system would be to enable 'speculative searches' to be conducted to facilitate 'cold hits', whereby a crime scene stain is matched to a sample taken from a person who is not already a suspect. The database may also need to be accessed for other reasons supplementary to this primary function. The Consultation Paper suggested a list of permitted purposes which might justify accessing the database by the custodian.<sup>5</sup> These include:

1. To conduct forensic matching.
2. To make the information available to the person to whom the information relates.
3. To administer the DNA database system.
4. To facilitate a review of an alleged miscarriage of justice under section 2 of the *Criminal Procedure Act 1993*.
5. To investigate a complaint by the oversight commissioner of the database.
6. To compile statistics for the oversight commissioner on the operation of the database.
7. To enable the exchange of DNA profiles between jurisdictions in accordance with relevant international obligations.
8. To identify unknown deceased persons.
9. To identify severely injured persons where the court sanctions it.
10. Or any other related purpose.

2.07 The general tenor of these proposals has been met with approval in the submissions received by the Commission during the consultation process. It is generally agreed that specifying the purposes for which the information in the DNA database can be utilised is extremely important and must be clearly set down in legislation. In this regard, a number of submissions suggested that a more expansive definition of 'crime investigation purposes' be included to ensure that it incorporates crime prevention purposes and the investigation of past and future offences; otherwise no justification would exist for sampling convicted persons who are not suspects in a current investigation. It was also suggested that the proposed permitted purpose of 'or any other related purpose' should be more specific in the proposed legislation establishing the database.

2.08 The Commission accepts that there is a concern that 'crime investigation purposes' and 'any other related purpose' could be interpreted to allow the database to be used for research purposes which have only an indirect connection with crime detection and prevention. This concern becomes particularly acute when one considers the retention of DNA

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<sup>5</sup> See Consultation Paper at paragraph 7.35.

samples as well as profiles and the Commission agrees that the sensitivity of the information contained in an individual's genetic code cannot be over-emphasised. In this respect, the Commission considers that the use of broad terms without precise definitions should be avoided where possible. The relevant legislation in the UK provides that the samples can be utilised for "purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution".<sup>6</sup> No further definition is given in the legislation as to the precise purposes for which the database can be accessed. Some organisations have criticised this approach as it has left the information on the database vulnerable to various research projects, without the consent of the participants.<sup>7</sup> However, the Commission also considers it important to ensure that the definitions of the purposes of the database, and therefore its uses, are not so constrained that the functioning of the database would be impaired. The Commission considers that this concern can be overcome by providing, in the legislation, for a broad purpose such as crime investigation and then illustrating what this purpose entails by use of the examples specified in the Consultation Paper. The addition of the 'any other related purpose' proviso suggested would facilitate the day-to-day running of the database. The Commission considers that the 'any other related purpose' proviso would be interpreted in the light of the specific examples given and would not be interpreted in any wider manner. For these reasons, the Commission recommends that the approach taken in the Consultation Paper should be included in the legislation establishing the database.

**(c) Report Recommendation**

2.09 *The Commission recommends that the database should be used for the purposes of criminal investigations or proceedings. The specific purposes for which the database may be used should be detailed in legislation.*

**(3) Identification of Deceased Persons**

**(a) Consultation Paper Recommendation**

2.10 In the Consultation Paper, the Commission recommended that the profiles of deceased persons may be matched against the indexes of the database dealing with convicted persons, suspects and volunteers only for the purpose of identifying these persons and not for any other purpose such as paternity determination.<sup>8</sup> The Commission also recommended that the

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<sup>6</sup> Section 64(1A) of the *Police and Criminal Evidence Act 1984* as amended by section 82 of the *Criminal Justice and Police Act 2001*.

<sup>7</sup> See *Liberty (2002) Third Party Intervention in R (S and Marper) v Chief Constable of South Yorkshire and Secretary of State for the Home Department* Court of Appeal (Civil Division), at paragraphs 2.1 and 3.5.

<sup>8</sup> See Consultation Paper at paragraph 7.27.

profile of a deceased person may be matched against the crime scene index where a authorised by a court, on the basis that there are reasonable grounds for suspicion that the deceased was responsible for the crime and that it is an appropriate order to make having regard to all the circumstances of the case.<sup>9</sup>

**(b) Discussion**

2.11 DNA identification is increasingly used as a means of ascertaining or confirming the identity of unknown deceased persons.<sup>10</sup> The DNA of the deceased person can be matched with DNA from their personal articles or from their close personal relatives to determine their identity. In certain circumstances, where the Gardaí have no other leads to help identify the deceased person, it could prove useful to match the profiles from the deceased person with the profiles on the database. Hence, the Consultation Paper provisionally recommended that the profiles of deceased persons may be matched against the convicted persons, suspects and volunteers indexes of the database for the purpose only of identifying these persons and not for any other purpose such as paternity determination.<sup>11</sup> This restriction seeks to protect the individual's right to privacy even in death.

2.12 This identification purpose of the database is of great practical importance and may prove very useful, particularly in the context of a mass disaster. The Commission notes that the use of DNA for identification purposes proved invaluable in the aftermath of the 2002 Bali bombing and the 2004 Asian tsunami disaster. The Commission emphasises that the database would be used for identification purposes only and that no other information, such as relatedness, would be released. It has been suggested that an application should be made to the Courts to seek permission to access the database for this identification purpose. This requirement would provide an additional safeguard against abuse but the Commission is confident that application to the courts is unnecessary in these circumstances. It is anticipated that the custodian of the database would provide the necessary oversight and regulation of this identification purpose of the database.

2.13 In the Consultation Paper, the Commission further recommended that the profile of the deceased person could be matched against the crime scene index of the database in limited and clearly defined circumstances, namely that the Gardaí could apply to the courts for such a search, if there was a reasonable suspicion that the deceased person had committed an offence.<sup>12</sup> The court would have discretion as to whether, having regard to

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<sup>9</sup> See Consultation Paper at paragraph 7.30.

<sup>10</sup> See paragraphs 2.99-2.102 below for a discussion of the use of the DNA database for the identification of missing persons.

<sup>11</sup> See Consultation Paper at paragraph 7.27.

<sup>12</sup> See Consultation Paper at paragraph 7.30.

all the circumstances of the case, it is appropriate to make an order which would allow a DNA sample to be obtained and the profile speculatively searched against the crime scene index of the database. The Commission considers that this is a balanced approach which respects the privacy of the deceased and any relatives, whilst acknowledging the need to resolve outstanding offences.

**(c) Report Recommendation**

2.14 *The Commission recommends that the profiles of deceased persons may be matched against the suspects, convicted persons and volunteers indexes of the database for the purposes of identifying these persons and not for any other purpose such as paternity determination. The Commission recommends that the profile of a deceased person may be matched against the crime scene index where a court authorises this on the basis that there are reasonable grounds for suspicion that the deceased was responsible for a crime and it is an appropriate order to make having regard to all the circumstances of the case.*

**(4) Identification of Severely Injured Persons**

**(a) Consultation Paper Recommendation**

2.15 In the Consultation Paper, the Commission recommended that in the event of a person being so severely injured as to be unable to indicate his or her identity, a person with a proper interest in the matter should be entitled to make a High Court application seeking the identification of the person from the DNA database.<sup>13</sup>

**(b) Discussion**

2.16 The Commission considers that the approach taken in the Consultation Paper involves an appropriate balance, respecting the individual's right to privacy whilst acknowledging the importance of identification. The courts would be given the authority to authorise the taking of a DNA sample from a severely injured person, so that the profile generated could be searched against the indexes of the database dealing with convicted persons, suspects and volunteers for identification purposes only. The Commission considers that the profile should not be searched against the crime scene index of the database in these circumstances. In order to obtain a profile from a severely injured person for crime investigative purposes, the individual would have to be arrested and detained under the relevant provisions and the profile would be classified as a suspect's profile. This profile could then be used to speculatively search the database in the normal way.

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<sup>13</sup> See Consultation Paper at paragraph 7.32.

**(c) Report Recommendation**

2.17 *The Commission recommends that in the event of a person being so severely injured as to be unable to indicate his or her identity, a person with a proper interest in the matter should be entitled to make a High Court application seeking the identification of the person from the suspects, convicted persons and volunteers indexes of the DNA database.*

**C Scope of the Database**

2.18 In the Consultation Paper, the Commission recommended the establishment of a limited as opposed to a comprehensive database. As has been noted, “the most controversial policy issue in the creation of these databases is the question of coverage: whose profiles should be stored in them?”<sup>14</sup> This report examines this central issue, taking into account the submissions received during the consultation process. The taking of DNA samples and the retention of the DNA profiles of suspects, convicted persons and volunteers is considered below.

**(1) Taking DNA Samples**

2.19 The precise scope of the proposed DNA database will depend on the extent to which the authorities may lawfully obtain a bodily sample from an individual from which a DNA profile can be generated. In this section, the Commission considers the current legal situation in Ireland under the *Criminal Justice (Forensic Evidence) Act 1990*, with particular emphasis on the taking of DNA samples from suspects in custody. The Consultation Paper highlighted the informal practice operated by the Gardaí of obtaining DNA samples outside the framework of the 1990 Act, whereby individuals are commonly asked to volunteer a sample.<sup>15</sup> This practice was criticised by the Commission for its failure to adequately protect human rights. Doubts have also been raised as to the lawfulness of this method of obtaining samples.<sup>16</sup>

2.20 It is appropriate at this point to reiterate the Commission’s position on this issue. Legislation for the taking of bodily samples must encompass all samples, and the practice of obtaining a bodily sample outside the legislative framework is objectionable in principle and creates significant

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<sup>14</sup> Kaye & Smith “DNA Identification Databases: Legality, Legitimacy, and the Case for Population-Wide Coverage” (2003) *Wisconsin Law Review* 414.

<sup>15</sup> See Consultation Paper at paragraphs 4.13-4.15.

<sup>16</sup> Judge Mac Mahon in *The People (DPP) v Carroll* Circuit Criminal Court 24 February 2004, held that fingerprints and palm-prints obtained under this voluntary method were inadmissible in court. It was accepted by the judge that in order for fingerprints and palm-prints to be lawfully taken, they must be obtained under the legislative provisions enacted for this purpose.

evidential risks. The Commission intends to incorporate the taking of DNA samples from volunteers, along with suspects and convicted persons, into a comprehensive legislative framework which would include the establishment of a DNA database.

2.21 *The Commission recommends that the taking of DNA samples should only occur under a clear legislative framework.*

**(a) *The Criminal Justice (Forensic Evidence) Act 1990***

2.22 The *Criminal Justice (Forensic Evidence) Act 1990*<sup>17</sup> is the primary legislative provision regulating the taking of bodily samples for forensic testing.<sup>18</sup> It applies where a person is in Garda custody under section 30 of the *Offences Against the State Act 1939*, section 4 of the *Criminal Justice Act 1984*, or section 2 of the *Criminal Justice (Drug Trafficking) Act 1996*,<sup>19</sup> or where a person is in prison and would, but for that imprisonment, be liable to be arrested and taken into custody for an offence under these Acts. In these circumstances, a Garda or medical practitioner, complying with appropriate safeguards and procedures, may take a bodily sample for the purposes of forensic testing. A distinction is made in the 1990 Act between samples that require consent in order to be taken and samples that do not require consent. Section 13 of the *Criminal Justice Bill 2004*, which is currently before the Oireachtas, intends to shift saliva and mouth swabs into the category that does not require consent. If enacted, this would follow the changes made in UK legislation.<sup>20</sup>

2.23 Under section 4 of the *Criminal Justice (Forensic Evidence) Act 1990*, forensic samples and records including DNA samples and records, must be destroyed when proceedings for an offence are not instituted against

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<sup>17</sup> This is due to be amended by the *Criminal Justice Bill 2004*. All references in the Report are to the Bill as initiated.

<sup>18</sup> Section 2(11) of the 1990 Act states that the powers conferred by this section are without prejudice to any other powers exercisable by a member of the Garda Síochána. These other powers include statutory provisions which govern the taking of an arrested person's breath, blood or urine under the *Road Traffic Acts 1961-2004*. The reference in section 2(11) to 'without prejudice' powers has been cited, erroneously in the Commissions view, to justify the undesirable practice of requesting samples from volunteers in order to circumvent the legislative framework.

<sup>19</sup> The *Criminal Justice (Forensic Evidence) Act 1990* was amended by section 3 of the *Criminal Justice (Drug Trafficking) Act 1996* to permit the sampling of those detained under section 2 of the 1996 Act.

<sup>20</sup> Section 65 of the *Police and Criminal Evidence Act 1984* was amended by section 58 of the *Criminal Justice and Public Order Act 1994* which shifted saliva and mouth swabs from the intimate to non-intimate category, so that consent was no longer required.

the person concerned within 6 months<sup>21</sup> or, when proceedings have been instituted and the person is acquitted or discharged or the proceedings are discontinued. Where samples and records are obtained outside the framework of the 1990 Act, the authorities may keep the samples and records indefinitely. While this may be an attractive situation from one perspective, the Commission does not support this.

2.24 The Consultation Paper made reference to the desirability of developing a legislative power which would allow for another DNA sample to be obtained in the event of the first sample becoming contaminated, destroyed or lost.<sup>22</sup> The law in the UK was referred to as a model approach that could be adopted in Ireland. In the UK, the taking of another sample from a person is permitted by sections 78 and 80 of the *Criminal Justice and Police Act 2001*. A second sample may be taken from a person if the first sample proves insufficient. References to a sample proving insufficient include references to where, as a consequence of

- (a) loss, destruction or contamination of the whole or any part of the sample
- (b) any damage to the whole or a part of the sample, or
- (c) use of the whole or a part of the sample for an analysis which produced no results or which produced results some or all of which must be regarded in the circumstances as unreliable,

the sample has become unavailable or insufficient for the purpose of enabling information, or information of a particular description, to be obtained by means of analysis of the sample.<sup>23</sup>

2.25 The additional sample must be taken from the person within one month, beginning with the date on which the appropriate officer is informed of the fact that the sample has proved insufficient.<sup>24</sup> The importance of providing an option to take a second sample was highlighted to the Commission during the consultation process. Hence, the Commission reiterates the view taken in the Consultation Paper that the power to obtain an additional sample is necessary for technical reasons and should be provided for in legislation.

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<sup>21</sup> Section 13 of the *Criminal Justice Bill 2004* proposes to extend the period to 12 months.

<sup>22</sup> See Consultation Paper at paragraph 4.23.

<sup>23</sup> Section 65 of the *Police and Criminal Evidence Act 1984*, as amended by section 80(6) of the *Criminal Justice and Police Act 2001*.

<sup>24</sup> Section 63A of the *Police and Criminal Evidence Act 1984*, as amended by section 56 of the *Criminal Justice and Public Order Act 1994*.

2.26 *The Commission recommends that legislation should provide for the power to obtain an additional sample in the event of the first sample being insufficient or unsatisfactory, or where the first sample is contaminated, destroyed or lost.*

**(b) Safeguards and Protections**

2.27 A number of safeguards and protections in relation to the taking of bodily samples are set out in the 1990 Act. Authorisation for sampling must be given by an officer not below the rank of superintendent.<sup>25</sup> The authorising officer must have reasonable grounds for suspecting the involvement of the person from whom the sample is taken in the offence in respect of which he or she is in custody, or in a case where the person is in prison, in the commission of an offence under the 1939, 1984 or 1996 Act.<sup>26</sup> In addition, the authorising officer must have reasonable grounds for believing that the sample will tend to confirm or disprove the involvement of the person from whom the sample is taken in the offence.<sup>27</sup> This requirement will be examined in greater detail below.

2.28 Section 2(6) of the 1990 Act sets out an obligation to inform the suspect, prior to taking the sample or seeking consent, of the nature of the offence in which it is suspected that that person has been involved, that the appropriate authorisation has been given to take the sample, and that the results of any tests on the sample may be given in evidence in any proceedings. In the Consultation Paper, the Commission recommended that the reason and basis for taking samples should be given in a readily understandable manner, using ordinary language.<sup>28</sup> The Commission continues to support this recommendation.

2.29 *The Commission recommends that the explanation for taking samples should be given in a readily understandable manner, using ordinary language.*

2.30 In addition to the protections already in place under the 1990 Act, the Commission recommended in the Consultation Paper that safeguards, similar to those recommended by the Irish Human Rights Commission in respect of the taking of bodily samples, should be provided for in a code of practice.<sup>29</sup> Such safeguards include a requirement that the taking of samples

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<sup>25</sup> Section 2(4)(a) of the *Criminal Justice (Forensic Evidence) Act 1990*.

<sup>26</sup> *Ibid* at Section 2(5)(a).

<sup>27</sup> *Ibid* at Section 2(5)(b).

<sup>28</sup> See Consultation Paper at paragraphs 4.38-4.39.

<sup>29</sup> Irish Human Rights Commission *Observations on the Scheme of the Criminal Justice Bill 2003* 14 January 2004. Available at <http://www.ihrcc.ie>. See Consultation Paper at paragraph 4.40.

should be carried out in the presence or view of a person who is of the same sex as the suspect, in circumstances affording reasonable privacy to the suspect, that there should be no questioning during the taking of samples and that the process should not involve any cruel, inhuman or degrading treatment. The Irish Human Rights Commission has recently reiterated its recommendations that adequate and effective safeguards should form part of the regulations that provide for the manner in which bodily samples are taken and that members of the Garda Síochána should receive specific training in this regard.<sup>30</sup>

2.31 It is worth noting that section 13(c) of the *Criminal Justice Bill 2004* proposes to amend section 5(2) of the *Criminal Justice (Forensic Evidence) Act 1990* by providing that the Minister for Justice, Equality and Law Reform may make provision for the manner in which samples may be taken, the location and physical conditions in which samples may be taken, the persons (including members of the Garda Síochána), and the number of such persons, who may be present when samples are taken. The Explanatory Memorandum of the Bill states that this subsection is intended to enhance the safeguards applicable to the taking of samples. The Commission welcomes the reference in the proposed Bill to the introduction of safeguards by the Minister. Such safeguards would ensure that an appropriate balance is struck between the bodily integrity rights of the suspect and wider societal interests. Hence, the Commission continues to support the views expressed by the Irish Human Rights Commission on the necessity of the formal adoption of detailed safeguards in respect of the taking of bodily samples.

2.32 *The Commission recommends that safeguards similar to those recommended by the Human Rights Commission, in respect of the taking of bodily samples, should be provided for in a code of practice.*

2.33 In the Consultation Paper, the Commission further recommended that so long as a particular forensic test may be conducted on a sample, a certain amount of latitude should be given to individuals to choose the type of sample to be obtained.<sup>31</sup> During the consultation process, the Commission was informed that limiting sampling to a single sample type, such as a mouth swab, would from a technical viewpoint, be the most efficient method of DNA profiling. In the Forensic Science Laboratory, work is carried out in batches and a greater variety in sample types would make it more difficult to establish an efficient system. Consequently, the Commission has concluded that it may be necessary to specify a particular procedure, such as mouth swabbing, as the standard procedure to be

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<sup>30</sup> Irish Human Rights Commission *Observations on the Criminal Justice Bill 2004* 3 November 2004 at 4-5. Available at <http://www.ihrc.ie>.

<sup>31</sup> See Consultation Paper at paragraphs 4.41-4.42.

followed. If possible however, an alternative option such as a hair root analysis should be made available to an individual where there is real and genuine opposition to the procedure in question. This would maintain an efficient and effective system, whilst still affording an element of choice.

2.34 *The Commission recommends that an individual should be subject to a standard sampling procedure such as mouth swabbing. If possible, an alternative option should be made available to the individual where there is real and genuine opposition to the procedure in question.*

**(c) Use of Reasonable Force**

2.35 In the Consultation Paper, the Commission noted that implicit in the *Criminal Justice (Forensic Evidence) Act 1990* is that Gardaí may use reasonable force to obtain a bodily sample which does not require consent.<sup>32</sup> The *Criminal Justice Bill 2004* does not contain the proposal, originally in Head 10 of the Scheme of the Bill, to authorise explicitly a member of the Garda Síochána to use force, if necessary, to exercise his or her powers under sections 6 or 28 of the *Criminal Justice Act 1984*<sup>33</sup> and section 2 of the *Criminal Justice (Forensic Evidence) Act 1990*. The Commission considers that if it is intended to empower the Gardaí to use reasonable force in regard to the taking of samples, and in consequence, interfere with an individual's personal rights and freedoms as guaranteed by the Constitution and the ECHR, this should be explicitly prescribed by legislation and the parameters of such force should be clearly set out.

2.36 In the Consultation Paper, the Commission recommended the implementation of safeguards to ensure that the power to use reasonable force is not arbitrarily exercised.<sup>34</sup> These safeguards should be similar to those suggested by the Irish Human Rights Commission<sup>35</sup> and could be implemented in the form of a code of practice. Such safeguards would include the use of force only where it is strictly necessary and to the extent required for the performance of the Garda's duty. Adequate police training in the taking of samples should be provided, comprehensive records should be kept and an individual should have the right of access to a medical practitioner and a legal representative.

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<sup>32</sup> See Consultation Paper at paragraph 4.45.

<sup>33</sup> These sections deal with the taking of photographs and fingerprints.

<sup>34</sup> See Consultation Paper at paragraph 4.50.

<sup>35</sup> The Irish Human Rights Commission has re-iterated its recommendations with regard to the use of reasonable force. See Irish Human Rights Commission *Observations on the Criminal Justice Bill 2004* 3 November 2004 at 6–8. Available at <http://www.ihrc.ie>.

2.37 *The Commission recommends the implementation of safeguards to ensure that the power to use reasonable force is not arbitrarily exercised.*

**(d) Authorisation for Sampling**

2.38 Under section 2(5)(b) of the 1990 Act, an authorisation to take a sample shall not be given unless the member of the Garda Síochána has reasonable grounds for believing that the sample will tend to confirm or disprove the involvement of the person from whom the sample is taken in the relevant offence. Hence, the Garda authorising the DNA sampling must have reasonable grounds for believing that the sample will support either the involvement or lack of involvement of the person in the commission of the relevant offence. This limits the sampling of suspects to cases where there is biological evidence found on the victim or at the scene of the crime thought to be left by the perpetrator. Indeed, it would seem that such material must also be capable of yielding either a DNA profile or other comparative analysis. This safeguard was included in an effort to avoid ‘fishing expeditions’ for evidence by the Gardaí by unnecessarily sampling suspects.

2.39 The Commission notes that this requirement was developed before the existence of a DNA database. A similar requirement in respect of authorisation existed in the United Kingdom in sections 62(2)(b) and 63(4)(b) of the *Police and Criminal Evidence Act 1984* but it has since been removed by the *Criminal Justice and Public Order Act 1994* (CJPOA). The CJPOA significantly redefined the power of the police in the UK to obtain DNA samples regardless of whether such a sample could prove or disprove involvement in an offence. Commentators have noted that the CJPOA created a formal similarity in law between bodily samples and fingerprint impressions.<sup>36</sup> The authority to collect fingerprint impressions or photographs from criminal suspects, unlike bodily samples, is not dependent on the availability or potential relevance to the investigation or prosecution of the particular crime in question. Instead, the wider use of such fingerprints and photographs for verification of identity and for the investigation of past and future crimes is central to the aim of collection and storage. The Commission considers that these pragmatic principles of collection should be transferred to the DNA sampling of suspects.

2.40 The Commission acknowledges that questions may be raised regarding provisions for bodily sampling in relation to offences where information derived from samples would have no evidential value for the case under investigation. However, the Commission considers that such a system would be in line with the establishment and use of a DNA database.

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<sup>36</sup> Williams, Johnson & Martin *Genetic Information and Crime Investigation: Social, Ethical and Public Policy Aspects of the Establishment, Expansion and Police Use of the National DNA Database* November 2004 at 82. Available at <http://www.dur.ac.uk/p.j.johnson/>.

In order to exploit the full potential of a DNA database, it must be permissible to obtain a DNA sample from a suspect regardless of its relevance to the current investigation. The suspect's profile can then be loaded on to the database and speculatively searched with the aim of producing a cold hit. The Commission considers that this would be a proportionate breach of the bodily integrity and privacy of a criminal suspect. This breach could be mitigated by a requirement to remove the profile from the database and destroy the sample if proceedings have not been instituted against the person or where proceedings have been instituted and the person is acquitted or discharged or where the proceedings are discontinued. This requirement to destroy suspect's samples and profiles is examined further at paragraphs 2.64-2.66.

2.41 *The Commission recommends that a member of the Garda Síochána authorising the taking of a DNA sample for the purposes of generating a DNA profile to be placed on the DNA database need not have reasonable grounds for believing that the sample will tend to confirm or disprove the involvement of the person from whom the sample is taken in the said offence.*

**(e) Sampling Threshold**

2.42 As discussed above, the *Criminal Justice (Forensic Evidence) Act 1990* limits DNA sampling to offences for which an individual may be detained under section 30 of the *Offences Against the State Act 1939*, section 4 of the *Criminal Justice Act 1984*, or section 2 of the *Criminal Justice (Drug Trafficking) Act 1996*. Consequently, the current sampling threshold set by the 1990 Act is broadly that of an arrestable offence, which is one carrying a penalty of at least five years imprisonment. Restricting DNA sampling to those suspected of the most serious of offences is in line with what appears to be usual international practice. The position in the United Kingdom under which samples may be obtained from all those arrested for a recordable offence, that is an offence which is potentially punishable by imprisonment, is an exception. The Consultation Paper concluded that permitting the sampling of those suspected of minor offences would constitute a disproportionate interference with their bodily integrity and privacy rights. Based on this, the Commission provisionally recommended in the Consultation Paper that there should be no amendment to the present position by which a person must be suspected of an arrestable offence (subject to limited exceptions) in order to authorise the taking of a forensic sample.<sup>37</sup>

2.43 It has been suggested to the Commission during the consultation process that this recommendation is too restrictive. An alternative proposal

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<sup>37</sup> See Consultation Paper at paragraph 5.36.

is that the taking of DNA samples should be available to the Gardaí when a person is arrested, regardless of the nature of the offence. This leads to the related proposal that, whenever a DNA sample is obtained from any arrested person, the DNA profile generated should be retained indefinitely where the person is convicted of the offence for which they were arrested, regardless of whether they receive a custodial sentence or not. In such a situation, where the person is not convicted of the offence and that offence is not an arrestable offence, the profile should be destroyed. The Commission considers that the introduction of mandatory DNA testing of all arrestees would be a radical step. The Commission notes that the current power to take photographs and fingerprints is not as extensive as this proposal. In addition, it is worth noting that individuals arrested for minor offences may not even be detained under the present law. If such a proposal was implemented, it is likely that forensic sampling would become a routine procedure on arrest to aid in both identification and crime investigation. The Commission considers that such an interference with an individual's right to privacy and bodily integrity would be disproportionate in the light of the provisions of the European Convention of Human Rights. The Commission agrees with the views widely expressed that forensic profiling should primarily be confined to serious offences.

2.44 In addition, the Commission is anxious to emphasise that under the current statutory provisions, DNA sampling is permissible in relation to a wide range of offences. The present situation allows for the DNA sampling of suspects in the bulk of cases which involve an 'offence against the person', with assault being the notable exception. The penalty for assault under section 2 of the *Non-Fatal Offences Against the Person Act 1997* is a fine or imprisonment for a term not exceeding 6 months or both. Consequently, an individual may not be detained under the 1939, 1984 or 1996 Act for this offence. However, an individual suspected of an assault causing harm<sup>38</sup> may be prosecuted on indictment as well as summarily. A conviction on indictment carries a maximum penalty of a fine or five years imprisonment, or both. Assault causing serious harm<sup>39</sup> carries a penalty of a fine or imprisonment of a term up to life. As a result, an individual arrested for either of these types of assault may be detained under section 4 of the *Criminal Justice Act 1984* and a DNA sample may be obtained in the usual way. DNA sampling is available for the majority of sexual offences including rape, sexual assault, aggravated sexual assault, rape under section 4, unlawful carnal knowledge of a girl under 15 years and unlawful carnal knowledge of a girl between 15 and 17 years of age. In addition, DNA sampling is available for the majority of property offences, including theft,

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<sup>38</sup> Section 3 of the *Non-Fatal Offences Against the Person Act 1997*.

<sup>39</sup> Section 4 of the 1997 Act.

burglary, robbery and forgery,<sup>40</sup> as well as criminal damage offences.<sup>41</sup> DNA sampling is also permitted for the bulk of drugs offences, offences against the state, explosive and firearms offences.

2.45 The main category of offences for which DNA sampling is not currently available is public order offences. These include offences such as intoxication in a public place, disorderly conduct in a public place, and threatening, abusive or insulting behaviour in a public place. The penalties for these offences include fines and/or imprisonment for up to 12 months. DNA sampling is not available for the majority of road traffic offences. Most are dealt with summarily; however, there are some exceptions, for example, dangerous driving causing death or serious bodily harm.<sup>42</sup> Lesser offences such as ‘careless driving’ and ‘driving without reasonable consideration’ do not meet the five year imprisonment threshold for detention and DNA sampling. Hence, it is clear that the 1990 Act permits DNA sampling for an extensive range of offences and the Commission favours the current sampling threshold as a proportionate use of DNA sampling.

2.46 Furthermore, in the Consultation Paper, the Commission rejected the suggestion that the present provision in the 1990 Act, which limits DNA sampling to offences for which an individual may be detained under the 1939, 1984 or 1996 Acts, should be replaced by a provision enabling DNA sampling where a person is suspected of an arrestable offence.<sup>43</sup> The Consultation Paper concluded that the definition of an arrestable offence does not cover a sufficiently broad spectrum of offences for the purposes of DNA sampling.<sup>44</sup> For example, persons detained under section 2 of the *Criminal Justice (Drug Trafficking) Act 1996* may not be suspected of offences which meet the threshold of an arrestable offence, but nonetheless could be suspected of a relatively serious offence, permitting detention. The Commission considers that it would be arbitrary and irrational to preclude DNA sampling in these few cases. The situation under the 1990 Act is preferable. The scope of the Act is determined by detention provisions, which limits sampling to serious offences without imposing the requirement of a strictly arrestable offence.

2.47 *The Commission does not recommend any amendment to the present position by which DNA sampling is limited to offences for which an*

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<sup>40</sup> See *Criminal Justice (Theft and Fraud Offences) Act 2001*.

<sup>41</sup> See *Criminal Damage Act 1991*.

<sup>42</sup> Dangerous driving is prohibited principally by section 53 of the *Road Traffic Act 1961*.

<sup>43</sup> See Consultation Paper at paragraphs 5.34-5.35.

<sup>44</sup> *Ibid.*

*individual may be detained under section 30 of the Offences Against the State Act 1939, section 4 of the Criminal Justice Act 1984 or section 2 of the Criminal Justice (Drug Trafficking) Act 1996.*

**(f) *Review and Consolidation of the Criminal Justice (Forensic Evidence) Act 1990***

2.48 The Commission notes that the *Criminal Justice (Forensic Evidence) Act 1990* has been amended by the *Criminal Justice (Drug Trafficking) Act 1996* and that the *Criminal Justice Bill 2004* proposes further amendments. In addition, the *Criminal Justice (Forensic Evidence) Act 1990 Regulations 1992* also set out detailed procedures for the taking of samples.<sup>45</sup> In this Report, the Commission makes various recommendations which would provide for further amendment of the 1990 Act. The Commission is conscious that the statutory procedure for the taking of DNA samples in this jurisdiction is complex and elaborate. In light of the amendments already made and being proposed, the Commission has concluded that a complete review of the statutory procedures for sampling with a view to consolidation would be beneficial.

2.49 *The Commission recommends that there should be a review of the statutory procedures for sampling with a view to consolidation.*

**(2) *Profiles on the Database***

2.50 The next step in determining the exact scope of the proposed DNA database is to determine which profiles will be retained on the DNA database. The related question of whether or not the full DNA sample will also be retained once the profile has been generated will be examined in Chapter 3. In the Consultation Paper, the Commission divided the retention of DNA profiles into 3 categories: suspects, convicted persons and volunteers. This report follows the same approach.

**(a) *Suspects***

**(i) *Consultation Paper Recommendation***

2.51 In the Consultation Paper, the Commission recommended that the DNA profiles obtained from individuals in custody under section 30 of the *Offences Against the State Act 1939*, section 4 of the *Criminal Justice Act 1984* and section 2 of the *Criminal Justice (Drug Trafficking) Act 1996* may be retained indefinitely on a national database.<sup>46</sup>

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<sup>45</sup> SI 130 of 1992.

<sup>46</sup> See Consultation Paper at paragraph 5.67.

**(ii) Discussion**

2.52 This recommendation provides that all those suspected of committing an arrestable offence, as well as those convicted, would have their DNA profiles retained indefinitely on a database. At this point it is important to clarify that when a DNA sample is obtained from a suspect in custody and a profile developed, the Commission is proposing that this profile be added to the database and speculatively searched against the crime scene profiles in the hope of making a match. The question that arises is whether these profiles should be removed from the database and destroyed (along with the DNA sample) if the suspect is not convicted or the investigation discontinued.

2.53 In the Consultation Paper, the Commission favoured the indefinite retention of these profiles on the database. The Consultation Paper outlined a number of limiting factors which would ensure that the indefinite retention of profiles, in particular the profiles of suspects, would be a proportionate interference with an individual's rights.<sup>47</sup> First, DNA sampling and the retention of profiles on the database would be limited to those suspected of committing serious offences, primarily arrestable offences. In addition, the purposes for which the database may be used would primarily be confined to use for crime investigation purposes. Any attempt to utilise the database for additional purposes not specified in the legislation would be strictly prohibited. Consequently, all the profiles retained, including suspect's profiles, would be regulated and safeguarded against misuse. The Commission considered that retaining the profiles of suspects on the database would increase the number of profiles on the database and correspondingly, the number of offenders likely to be detected. The Commission considered that a less inclusive database might not be so effective in solving crime and the substantial cost of operating such a database might not be justified. Accordingly, the Commission concluded that these limiting elements would assist in maintaining the proportionality of the measure.

2.54 In the Consultation Paper, the Commission noted that the European Court of Human Rights had yet to decide on the compatibility with the ECHR of measures allowing suspect's profiles to be retained indefinitely on national DNA databases. However, it must be emphasised that the indefinite retention of suspect's profiles on DNA databases is the exception rather than the norm. The majority of European countries, which permit the DNA profiles of suspects to be added to their DNA databases, require the

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<sup>47</sup> See Consultation Paper at paragraph 5.61-5.66.

removal of these profiles upon acquittal or the dropping of charges.<sup>48</sup> Such is the case in Scotland where there exists an obligation on the authorities to destroy samples and profiles taken from persons suspected of an offence, but who are subsequently acquitted or not prosecuted.<sup>49</sup> The destruction of these samples and profiles must be undertaken by the sample holder (the laboratory which carried out the DNA profiling) and all records must be expunged from both the Scottish Database and the UK National DNA Database.<sup>50</sup> There is a window period of approximately 7-12 months when the DNA profiles of suspects are stored and routinely searched on the databases. This is the period between the beginning of an investigation and its outcome in the courts.<sup>51</sup> This less 'inclusive' database in Scotland contains almost 182,000 DNA profiles.<sup>52</sup> In the two and half years from the beginning of 2002 to mid 2005, approximately 7,400 samples gathered from crime investigations in Scotland have been loaded onto the database and approximately 4,900 have matched a person on the database. This represents a match rate of over 60%. It is also worth noting that the database has provided "cold hits" in 10 murder cases in Scotland.<sup>53</sup>

2.55 A similar practice in relation to the destruction of suspect's samples and profiles, is followed in New South Wales. Section 88 of the *Crimes (Forensic Procedures) Act 2000* provides that DNA samples must be destroyed rather than stored where a suspect is found not guilty or where proceedings are not instituted against the suspect within 12 months. Under section 94, identifying information about a person may not be recorded or retained on a DNA database if the forensic material has been required to be destroyed by the Act. The Act provides further that a failure to comply with the Act in carrying out a procedure will render evidence inadmissible, except where the court finds that the desirability of admitting the evidence outweighs the undesirability of admitting improperly obtained evidence.<sup>54</sup>

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<sup>48</sup> See European Network of Forensic Science Institutes DNA Working Group *Report on ENFSI Member Countries' DNA Database Legislative Survey* prepared by Christopher H. Asplen, Smith Alling Lane, PC. Available at <http://www.enfsi.org/>.

<sup>49</sup> Scotland has its own DNA database, based at the Police Forensic Science Laboratory, Dundee, established by the *Criminal Procedure (Scotland) Act 1995*.

<sup>50</sup> Scotland currently exports all of their criminal justice profiles and all the crime scene profiles which do not match any sample held in Scotland to the UK National DNA Database.

<sup>51</sup> Paul Johnson & Robin Williams "DNA and Crime Investigation: Scotland and the UK National DNA Database" (2004) 10 *Scottish Journal of Criminal Justice Studies* 75.

<sup>52</sup> The Commission is grateful to Tom Ross of Tayside Police for statistical information regarding the database in Scotland.

<sup>53</sup> Martin Fairley "Detecting Crime Using Criminal Intelligence DNA Databases" 6<sup>th</sup> Annual National Prosecutors Conference, Dublin, May 2005.

<sup>54</sup> Section 82 of the NSW *Crimes (Forensic Procedures) Act 2000*.

Suspect's profiles can still be matched against crime scene profiles during the period (of up to 12 months) that they remain on the database. This legislation permits police to compare DNA profiles taken from suspects with DNA on the database of crime scene stains, adopting the approach taken in the UK and Germany. Thus, a suspect in a particular crime can be linked to an unrelated crime, even if the police do not suspect that the person is involved in the other crime. For this reason, the practice is known as generating 'cold hits'.

2.56 Changes introduced in England and Wales in the *Criminal Justice and Police Act 2001* permit the police to retain all samples and profiles taken during the investigation of a recordable offence regardless of the procedural outcome of that offence. Consequently, suspect's profiles are retained indefinitely on the UK National DNA Database. In England and Wales following the 2001 legislation, the issue of the retention of innocent individual's DNA has become central to debates regarding the proportionality and balance of police uses of the UK National DNA Database. Relevant case law on this topic is limited; however, in the light of the *Human Rights Act 1998*, the courts in the United Kingdom have recently had an opportunity to consider this area in some depth. In *R (S and Marper) v Chief Constable of South Yorkshire*<sup>55</sup> the House of Lords recently affirmed the decision of the Court of Appeal,<sup>56</sup> by accepting the compatibility of measures allowing for the indefinite retention of suspects profiles with the ECHR. The Commission discussed the Court of Appeal's decision in the Consultation Paper and it is therefore appropriate to discuss the House of Lords decision in this Report. The police lawfully took fingerprints and DNA samples from the claimants after they had been arrested and charged in connection with unrelated offences. Neither of them had any previous convictions. One of the claimants was acquitted, while proceedings against the other claimant were discontinued. Section 64(1A) of the *Police and Criminal Evidence Act 1984*<sup>57</sup> empowers the police to retain the lawfully taken fingerprints and samples of persons after they had fulfilled the purposes for which they had been taken, and provided that they were not used 'except for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution'. The defendant Chief Constable decided to retain the fingerprints and DNA samples taken from the claimants, in accordance with his policy to do so in all cases, save in exceptional circumstances. The claimants each applied for judicial review, contending that section 64(1A) infringed their right to respect for

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<sup>55</sup> [2004] 4 All ER 193.

<sup>56</sup> *R (S and Marper) v Chief Constable for South Yorkshire and Secretary of State for the Home Department* [2003] 1 Cr App R 16 247.

<sup>57</sup> As amended by section 82 of the *Criminal Justice and Police Act 2001*.

their private lives under Article 8(1) of the ECHR. The claimants also contended that section 64(1A) infringed the prohibition on discrimination in Article 14 of the ECHR, by drawing a distinction between two categories of innocent persons, those who had been suspected of an offence and those who had not.

2.57 The applications were dismissed by the Divisional Court and the claimants appealed to the Court of Appeal. All three judges in the Court of Appeal accepted that retention of DNA samples did interfere with Article 8 rights. But the court went on to confirm that this interference was justifiable under Article 8(2) as necessary and proportionate with the aim of the prevention of disorder and crime, the use of such samples being restricted to the purposes set out in the legislation. The Court also found no breach of Article 14.<sup>58</sup> The appeal to the House of Lords was unanimously dismissed. The majority opinion was delivered by Lord Steyn. His opinion begins: “It is of paramount importance that law enforcement agencies should take full advantage of the available techniques of modern technology and forensic science.”<sup>59</sup> Lord Steyn did not consider that the cultural traditions of the United Kingdom were relevant when deciding whether the retention of fingerprints and samples engaged Article 8. He maintained that the question should receive a uniform interpretation throughout Council of Europe member states, unaffected by different cultural traditions, which would only become relevant when one moved on to consider the objective justification under Article 8(2).<sup>60</sup> He ‘inclined to the view’ that Article 8 was not relevant to the retention of fingerprints and samples, and if it was, the interference was very modest indeed.<sup>61</sup> However, he observed that if Article 8(1) was engaged, there was ‘plainly’ an objective justification under Article 8(2).<sup>62</sup>

2.58 Lord Steyn listed a number of factors which cumulatively suggest that the retention of fingerprints and samples of suspects was not disproportionate, particularly when one bears in mind that the resultant expansion of the database by the retention confers enormous advantages in the fight against serious crime. These include the fact that fingerprints and samples are kept only for a limited purpose, they are not of any use without a comparator fingerprint or sample, that they will not be made public, and that

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<sup>58</sup> See Consultation Paper at paragraphs 5.49-5.58 for an analysis of the Court of Appeals decision in the Marper case.

<sup>59</sup> *R (S and Marper) v Chief Constable of South Yorkshire* [2004] 4 All ER 193, paragraph 1.

<sup>60</sup> *Ibid* at paragraph 27.

<sup>61</sup> *Ibid* at paragraph 31.

<sup>62</sup> *Ibid* at paragraph 40.

they are not identifiable by an untutored eye as belonging to a particular individual.<sup>63</sup> With regard to the potential infringement of Article 14, Lord Steyn's position was that first, if Article 8 was not relevant, neither was Article 14. If Article 8 was relevant there would still be no breach of Article 14 because the difference in the treatment of the appellants and those who have not been investigated and provided samples was not a prohibited ground under Article 14, nor were they in an analogous position. He also considered that, if contrary to this view, it was necessary to consider the justification for the difference in treatment, objective justifications could be established. Both the elements of proportionality and legitimate aim were, he considered, satisfied. As a result, there was no breach of Article 14.<sup>64</sup>

2.59 Baroness Hale, while concurring with other aspects of the opinion of Lord Steyn, disagreed with the view that the retention of fingerprints, DNA profiles and samples was not an interference with Article 8(1) rights. She pointed out that samples, profiles and fingerprints are kept as information and that the same privacy principles should apply to all three.<sup>65</sup> She maintained that if it was accepted that the taking and use of the information was an interference with Article 8(1), it was difficult to see why the retention, storage or keeping of that information was not also an interference with this right.<sup>66</sup> The appellants, she considered, had a very real interest in how their samples were stored and in regard to who had access to them. She did not believe that this interest was peculiar to the cultural traditions of the United Kingdom, as she observed that the data protection laws of the United Kingdom were originally a product of a 1981 Council of Europe Convention.<sup>67</sup> She confirmed, however, that justification for the retention could be found under Article 8(2).

2.60 The legal position in the United Kingdom with regard to the indefinite retention of samples, profiles and fingerprints of suspects is now clear. Commentators have expressed their lack of surprise with the decision, given that the DNA database is undoubtedly a vitally useful investigative tool. However, the Commission considers that the view expressed by the House of Lords that Article 8 of the ECHR is not relevant is a cause for

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<sup>63</sup> *R (S and Marper) v Chief Constable of South Yorkshire* [2004] 4 All ER 193, paragraph 38.

<sup>64</sup> *Ibid* at paragraphs 42-56.

<sup>65</sup> *Ibid* at paragraph 70.

<sup>66</sup> *Ibid* at paragraph 73.

<sup>67</sup> *Ibid* at paragraph 75. The 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data was implemented in Ireland by the *Data Protection Act 1988*. The 1995 Directive on Data Protection extended the scope of the protections to non-automatic data processing; this was given effect to by the *Data Protection (Amendment) Act 2003*.

concern. Baroness Hale observed the difficulties with this conclusion. If Article 8(1) is not relevant to the retention of DNA profiles on a national database, it is not necessary to find any justification for this retention under Article 8(2). The State would be free to retain this information without demonstrating a legitimate aim. Additionally, if Article 8(1) is not relevant to the mere keeping of private information, the state might be free to be thoroughly discriminatory in choosing which information to keep, without contravening Article 14. The Commission agrees with Baroness Hale's view that it would be surprising if the European Court of Human Rights did not consider it incumbent upon the state to justify its retention and storage of DNA samples and profiles.<sup>68</sup>

2.61 The Commission accepts that the indefinite retention of suspect's DNA profiles on a DNA database is a controversial proposal. At present, section 4 of the *Criminal Justice (Forensic Evidence) Act 1990* provides that every sample and record identifying the person from whom a sample has been taken must be destroyed where proceedings are not instituted against the person within 6 months,<sup>69</sup> or where proceeding have been so instituted and the person is acquitted or discharged or the proceedings are discontinued. By way of a saver, section 4(5) of the 1990 Act provides that the court may, on application, authorise retention for a longer period than 6 months in the event of there being a good reason that the sample should not be destroyed. These provisions are analogous to the legislation governing the retention of photographs, fingerprints and palm-prints in relation to those individuals detained under section 4 of the *Criminal Justice Act 1984*.<sup>70</sup> Hence, the traditional approach favours the destruction as opposed to the indefinite retention of suspect's samples. However, with the establishment of an Irish DNA database, this practice may have to be re-assessed.

2.62 The UK *Criminal Justice and Police Act 2001* removed the obligation to destroy DNA samples and profiles in the event of there being no prosecution or an acquittal. This gave Chief Constables discretion to decide whether or not samples would be retained in individual cases. This

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<sup>68</sup> *R (S and Marper) v Chief Constable of South Yorkshire* [2004] 4 All ER 193, paragraph 77.

<sup>69</sup> Section 13 of the *Criminal Justice Bill 2004* proposes to extend the period to 12 months.

<sup>70</sup> Section 8 of the *Criminal Justice Act 1984* provides for the destruction of photographs, fingerprints, and palm-prints in the event of proceedings not being instituted against the person within 6 months (which section 12 of the *Criminal Justice Bill 2004* proposes to increase to 12 months) or if the proceedings instituted result in acquittal, discharge or discontinuance. There is no corresponding provision in the *Criminal Law Act 1976* governing destruction of photographs, fingerprints and palm-prints obtained from an individual arrested and detained under section 30 of the *Offences Against the State Act 1939*.

legislative change has been upheld by the House of Lords in the Marper case.<sup>71</sup> However, the controversy surrounding the legal situation in the UK has not dissipated. In fact, commentators have described the practice of retaining, and continuously speculatively searching, the DNA profiles of those never convicted or charged with a recordable offence as the most contentious aspect of the current uses of the UK National DNA Database.<sup>72</sup> The arguments for the indefinite retention of the DNA profiles of suspects have been criticised for relying on a set of judgments about the moral character of persons who come into contact with the police but who are not proven to have committed any crime.<sup>73</sup> The House of Commons Science and Technology Committee have also noted the reservations that have been expressed about the practice of retaining the DNA profiles of suspects who have never been charged with an offence, or who have been found not guilty.<sup>74</sup> Various human rights organisations have been similarly critical of the retention of DNA profiles from this group of individuals.<sup>75</sup>

2.63 However, it has been emphasised that the extent of concern regarding the storage of DNA profiles of suspects remains significantly less than that in respect of the retention of DNA samples of suspects. The retention of samples is of greater significance because of the potential to derive sensitive genetic information and the possible use to which this information may be put.<sup>76</sup> The Commission is aware that questions have been raised as to the necessity of the indefinite retention of suspect's profiles on a national database, and whether crime detection will actually be improved by including these profiles. The UK National DNA Database Annual Report 2003/2004 notes that of the 128,517 profiles that would have been removed from the database before the legislative amendments in 2001, some 5,922 have subsequently been matched with crime scene profiles from

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<sup>71</sup> *R (S and Marper) v Chief Constable of South Yorkshire* [2004] 4 All ER 193.

<sup>72</sup> Williams, Johnson & Martin *Genetic Information and Crime Investigation: Social, Ethical and Public Policy Aspects of the Establishment, Expansion and Police Use of the National DNA Database* November 2004 at 129. Available at <http://www.dur.ac.uk/p.j.johnson/>.

<sup>73</sup> *Ibid.*

<sup>74</sup> House of Commons Science and Technology Committee *Forensic Science on Trial* Seventh Report of Session 2004-05.

<sup>75</sup> See GeneWatch UK *The Police National DNA Database* January 2005. Available at <http://www.genewatch.org>.

<sup>76</sup> Note the comments of Williams, Johnson & Martin *Genetic Information and Crime Investigation: Social, Ethical and Public Policy Aspects of the Establishment, Expansion and Police Use of the National DNA Database* November 2004 at 85-88. Available at <http://www.dur.ac.uk/p.j.johnson/>. See also the Report of the Human Genetics Commission UK *Inside Information-Balancing Interests in the Use of Personal Genetic Data* May 2002. Available at <http://www.hgc.gov.uk>.

over 6,280 offences. These include 53 murders, 33 attempted murders, 94 rapes, 38 sexual offences, 63 aggravated burglaries and 56 offences for the supply of controlled drugs.<sup>77</sup> It seems clear that the retention of suspects' samples on the UK's national database has improved its effectiveness.

2.64 An alternative scheme, suggested to the Commission during the consultation process, is to require the removal of suspect's profiles from the database on similar lines to those set out in section 4 of the 1990 Act. The profile would be removed from the database and destroyed (along with the DNA sample)<sup>78</sup> where proceedings for any offence, in respect of which a person could be detained under the 1939, 1984 and 1996 Acts, are not instituted against the person from whom the sample was taken within 6 or 12 months from the taking of the sample, and the failure to institute the proceedings within that period is not due to the fact that he or she has absconded or cannot be found. Additionally, the DNA profile would be removed from the database and the sample destroyed where proceedings have been so instituted and the person is acquitted or discharged or the proceedings are discontinued. A saver provision similar to section 4(5) of the 1990 Act could also be introduced to the effect that, if the court is satisfied, on an application made to it on behalf of either the Director of Public Prosecutions or the person from whom the sample was taken, that there is good reason why the relevant sample or profile should not be destroyed, the court may by order authorise the retention of the sample or profile for such purposes or period as it directs. This provision would ensure that the legislation is not a straitjacket on the authorities while investigating difficult and complex cases which may entail delays in bringing a prosecution. The Commission notes that under this proposal it would be possible, during the investigative stage, to place the suspect's profile on the database temporarily. If the suspect is convicted of any offence in respect of which a person could be detained under the 1939, 1984 or 1996 Acts, the profile would be retained on the database indefinitely; but if the suspect is not convicted, the profile would be removed from the database and both the profile and sample would be destroyed.

2.65 A vital element of any system of retention, removal and destruction of profiles and samples would be an official assurance that the profiles would be removed from the database on time and that a backlog would not be allowed to develop. Such a backlog developed in the UK in 2000, when 50,000 samples and profiles had been improperly retained on the

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<sup>77</sup> Available at <http://www.forensic.gov.uk>.

<sup>78</sup> The retention or destruction of the DNA sample is examined in Chapter 3 below.

database.<sup>79</sup> The use of matches between these improperly retained profiles and other crime scene profiles on the DNA database for the purpose of intelligence was considered by the House of Lords in *Attorney General's Reference No.3 of 1999*.<sup>80</sup> The House of Lords ruled that it should be left to the discretion of the trial judge as to whether to admit the evidence in these circumstances. The decision created an unsatisfactory anomaly “that the police are under a legal duty to destroy material, but are able to use it as evidence if they breach their duty by keeping it”.<sup>81</sup> Section 82 of the *Criminal Justice and Police Act 2001* addressed this problem by allowing the retention, with retrospective effect, of samples and profiles from individuals who have not been prosecuted, or who have been acquitted.

2.66 There are both advantages and disadvantages to the indefinite retention of suspect's profiles on a DNA database. An increase in the number of profiles retained on the database leads to increased detection rates. This argument could equally be used to justify the sampling of the entire population. However, questions of proportionality and necessity must be considered. While it may be argued that the retention is a justifiable interference with an individual's rights, given the number of limiting factors, procedures and safeguards which will be put in place, it may also be argued that the indefinite retention of the DNA profiles of innocent individuals is both a disproportionate and unnecessary interference with an individual's right to privacy. After careful consideration of the various issues, the Commission has concluded that a system of deletion of profiles from the database is preferable, though it acknowledges that this is a finely balanced issue rather than a conclusion mandated by the proportionality principle. In coming to this conclusion however, the Commission has been influenced by the high success rate in practice of the Scottish DNA database which currently operates in the context of deleting suspect profiles. The Commission accordingly recommends that when a suspect is arrested and detained under the relevant legislative provisions, and a DNA sample is taken, the DNA profile generated may be temporarily placed on the DNA database. As is the case with the Scottish DNA database, this profile can then be speculatively searched against the crime scene profiles on the database to facilitate a 'cold hit'. This profile must be removed from the

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<sup>79</sup> Home Office *Under the Microscope* HM Inspectorate of Constabulary Thematic Inspection Report July 2000 at 16. Available at <http://www.homeoffice.gov.uk/hmic/hmic.htm>.

<sup>80</sup> [2001] 1 All ER 577.

<sup>81</sup> The UK Parliamentary Joint Committee on Human Rights *First Report; Criminal Justice and Police Bill* 26 April 2001 at paragraph 87. Available at [http://www.parliament.uk/parliamentary\\_committees/joint\\_committee\\_on\\_human\\_rights.cfm](http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights.cfm).

database and both it, and the DNA sample should be destroyed as soon as practicable after:

- 12 months have elapsed since the sample was taken and proceedings for any offence in respect of which a person could be detained under section 30 of the *Offences Against the State Act 1939*, section 4 of the *Criminal Justice Act 1984* or section 2 of the *Criminal Justice (Drug Trafficking) Act 1996* have not been instituted against the suspect or
- Proceedings have been instituted and the person is acquitted or discharged or the proceedings are discontinued.

However, the Commission considers that if a court is satisfied, on an application made to it on behalf of either the Director of Public Prosecutions or the person from whom the sample was taken, that there is good reason why the relevant sample or profile should not be destroyed, the court may by order authorise the retention of the sample or profile for such purpose or period as it directs. Consequently, if a suspect is convicted of an offence in respect of which a person could be detained under the 1939, 1984 or 1996 Act, the DNA profile may be retained indefinitely on the DNA database. If, for whatever reason, the conviction is quashed, the DNA profile must be removed from the database and the sample destroyed as soon as practicable.

**(iii) Report Recommendation**

2.67 *The Commission recommends that the DNA profiles of suspects may be temporarily retained on the DNA database. A suspect's profile must be removed from the database and both it and the DNA sample destroyed as soon as practicable after:*

- *12 months have elapsed since the sample was taken and proceedings for any offence in respect of which a person could be detained under section 30 of the Offences Against the State Act 1939, section 4 of the Criminal Justice Act 1984 or section 2 of the Criminal Justice (Drug Trafficking) Act 1996 have not been instituted against the suspect or*
- *Proceedings have been instituted and the person is acquitted or discharged or the proceedings are discontinued.*

2.68 *In addition, the Commission recommends that if a court is satisfied, on an application being made to it on behalf of either the Director of Public Prosecutions or the person from whom the sample was taken, that there is good reason why the relevant sample or profile should not be destroyed, the court may by order authorise the retention of the sample or profile for such purpose or period as it directs.*

2.69 *If a suspect is convicted of an offence in respect of which a person could be detained under the 1939, 1984 or 1996 Act, the DNA profile may be retained indefinitely on the DNA database.*

**(b) Convicted Persons**

**(i) Consultation Paper Recommendation**

2.70 In the Consultation Paper, the Commission recommended that a person convicted of an offence, who is in prison, may be subject to DNA sampling without his or her consent. This sampling should be subject to the safeguards and rules set out in the *Criminal Justice Act 1984* and those proposed in the *Criminal Justice Bill 2004*. However, there should be no need, in the case of convicted persons in prison, to show that the taking of the samples was required to prove or disprove involvement in an offence or to prove that it is suspected that the convicted person committed an offence in addition to the offence which caused the incarceration.<sup>82</sup> The Commission also recommended that on the quashing of an accused's conviction, where the profile was obtained while he or she was in prison, the profile shall be deleted from the database.<sup>83</sup>

**(ii) Discussion**

2.71 In the Consultation Paper, the Commission provisionally recommended that a DNA sample may be obtained from all those convicted of an offence and in prison. The DNA profiles generated may be indefinitely retained on the DNA database. At present, section 2(2) of the *Criminal Justice (Forensic Evidence) Act 1990* provides that a sample may be taken where a 'person is in prison' and who would, but for that imprisonment, be liable to be arrested and taken into custody for an offence under the 1939, 1984 or 1996 Acts.<sup>84</sup> The offence investigated must not be the offence for which the person is in prison, or for which he or she could be convicted on indictment for that offence. This leaves open the possibility of using the power against persons in prison in respect of certain other arrestable or serious offences arising out of the same matter, or offences arising out of an entirely different matter, so long as they satisfy the basic criteria for the use of the power.<sup>85</sup> As a result, those in prison are in the same position in respect of the obligation to provide bodily samples as everyone else.

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<sup>82</sup> See Consultation Paper at paragraph 5.77.

<sup>83</sup> See Consultation Paper at paragraph 5.79.

<sup>84</sup> *Offences Against the State Act 1939, Criminal Justice Act 1984, Criminal Justice (Drug Trafficking) Act 1996.*

<sup>85</sup> Walsh *Criminal Procedure* (Thomson Round Hall 2002) at 346.

2.72 In the Consultation Paper, the Commission considered that the taking of DNA samples and the retention of DNA profiles on a DNA database of all those convicted of an offence and who were in prison would significantly assist in the investigation of crime. The Gardaí would be given the opportunity to check a convicted person's DNA profile against the crime scene profiles retained on the DNA database and potentially solve some "cold" cases. The Commission acknowledged in the Consultation Paper that it is easier to justify interference with a convicted person's rights than with the rights of suspects, and consequently proposed that while the threshold for obtaining samples from suspects is that of serious offences only, it is justifiable to sample all convicted persons who are in prison.<sup>86</sup> This recommendation was not extended to include convicted persons who are serving non-custodial and suspended sentences. Furthermore, this restriction on the group of individuals who may be sampled without consent was considered a proportionate response, bearing in mind that the convicted person's crime was serious enough for a prison sentence to be imposed.

2.73 It has been suggested to the Commission during the consultation process that limiting compulsory sampling to those who receive a custodial sentence is too restrictive and would result in a significant lessening of the scope of the database. An alternative would be to obtain samples from all those convicted of an offence for which the detention provisions of the *Offences Against the State Act 1939*, the *Criminal Justice Act 1984* or the *Criminal Justice (Drug Trafficking) Act 1996* apply, regardless of whether a sentence of imprisonment is imposed. Having considered this matter, the Commission agrees that such a sampling regime could be regarded as proportionate as only those convicted of serious offences would be subject to compulsory DNA sampling. In addition, the Commission considers that this proposed scheme for sampling convicted persons is consistent with the recommendations made with regard to the sampling of suspects.<sup>87</sup>

(I) *Authorisation for Sampling*

2.74 The Commission further recommends that the present situation, which requires that authorisation to take a sample may not be given unless a member of the Garda Síochána has reasonable grounds for suspecting the prisoner of having committed an offence under the 1939, 1984 or 1996 Act and only if the sample would tend to confirm or disprove the involvement of the person in the relevant offence, is not necessary.<sup>88</sup> The primary aim in obtaining a DNA profile from convicted persons is to add the DNA profiles

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<sup>86</sup> See Consultation Paper at paragraph 5.72.

<sup>87</sup> See paragraphs 2.67-2.69 above.

<sup>88</sup> Section 2(5) of the *Criminal Justice (Forensic Evidence) Act 1990*. See Consultation Paper at paragraph 5.73-5.75.

to the database in order to aid the investigation of past and future crimes. The Commission considers that the current requirements for obtaining samples are too restrictive and would greatly reduce the number of samples taken. As a result, the full potential of the database as an investigative tool would be diminished. Hence, it is preferable to permit the sampling of all those convicted of an offence, for which the detention provisions of the *Offences Against the State Act 1939*, the *Criminal Justice Act 1984* or the *Criminal Justice (Drug Trafficking) Act 1996* apply, regardless of whether or not they are suspected of an additional offence. The Commission also recommends that DNA profiles obtained from a convicted person should be destroyed if the conviction is subsequently quashed. If the defendant is not guilty of the crime, no justification exists for the taking of a DNA sample or for the retention of a DNA profile on the database.

(II) *Retrospective Sampling*

2.75 In addition, the Commission considers it necessary to examine the sampling of those convicted of a relevant offence, that is an offence for which the detention provisions of the *Offences Against the State Act 1939*, the *Criminal Justice Act 1984*, or the *Criminal Justice (Drug Trafficking) Act 1996* apply, prior to the entry into force of the legislation establishing the database. In this regard, the Commission has concluded that all those convicted of a relevant offence<sup>89</sup> and serving a prison sentence at the date of the introduction of the database may be subject to compulsory DNA sampling. The Commission has noted that similar retrospection is provided for in relation to sex offenders and the obligation to notify certain information under the *Sex Offenders Act 2001*. Section 7 of the 2001 Act provides that the notification requirements apply to a person if he or she has been convicted of a sexual offence before section 7 came into force and “either (a) the sentence to be imposed on the person in respect of the offence has yet to be determined, or (b) a sentence has been imposed on the person in respect of the offence and the person is serving the sentence in prison, the person is temporarily released under section 2 or 3 of the *Criminal Justice Act 1960*, or the sentence is otherwise still in force or current.”<sup>90</sup> Consequently, the Commission considers that, by analogy, the proposed scheme for sampling for the purposes of the database may be applied retrospectively to encompass all those who were convicted of a relevant offence and are serving sentences of imprisonment. The Commission acknowledges that this would require a significant investment in resources on a start-up basis for the database. The issue of funding is of course a

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<sup>89</sup> An offence for which the detention provisions of the *Offences Against the State Act 1939*, the *Criminal Justice Act 1984*, or the *Criminal Justice (Drug Trafficking) Act 1996* apply.

<sup>90</sup> Section 7 of the *Sex Offenders Act 2001*.

matter for Government but the Commission considers that this is worthy of note here.

**(iii) Report Recommendation**

2.76 *The Commission recommends that a person convicted of an offence for which the detention provisions of the Offences Against the State Act 1939, the Criminal Justice Act 1984 or the Criminal Justice (Drug Trafficking) Act 1996 apply, may be subject to DNA sampling without his or her consent. There should be no need to show that the taking of a sample was required to prove or disprove involvement in an offence or to prove that it is suspected that the convicted person committed an offence in addition to the offence which caused the incarceration. The corresponding profile may be indefinitely retained on the convicted persons index of the database. The Commission also recommends that, in the event of a DNA sample being obtained after the person is convicted, both the sample and the DNA profile should be destroyed if the conviction is subsequently quashed.*

2.77 *The Commission recommends that all those convicted of an offence for which the detention provisions of the Offences Against the State Act 1939, the Criminal Justice Act 1984 or the Criminal Justice (Drug Trafficking) Act 1996 apply, and who are serving a prison sentence at the date of the introduction of the database may be sampled.*

**(c) Volunteers**

**(i) Taking Volunteer Samples**

**(I) Consultation Paper Recommendation**

2.78 In the Consultation Paper, the Commission recommended that the taking of samples from volunteers should only occur under a legislative framework and, with the exception of the provision for, the compulsory taking of samples referred to below, only if the volunteers consent and the sample is likely to be useful for the investigation of a specific offence. Volunteers would be defined as persons from whom samples are taken who are not suspects or convicted persons.<sup>91</sup> The Commission also recommended that samples from persons other than suspects or convicted persons may only be taken without the consent of the person where a court order authorises the taking of the sample, on the basis that the person is endeavouring to obstruct the course of justice in refusing to give a sample and the sample is necessary for the investigation of a serious offence.<sup>92</sup>

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<sup>91</sup> See Consultation Paper at paragraph 5.90.

<sup>92</sup> See Consultation Paper at paragraph 5.94.

(II) Discussion

2.79 Taking samples from volunteers, that is, persons who are not suspects or convicted persons, is a complex area. The Commission accepts that it is necessary to take samples from volunteers for a range of reasons. It may be necessary to take samples from individuals for the purposes of eliminating them as a possible source of the DNA recovered from the crime scene. In other cases, volunteer sampling may be necessary as part of an intelligence-led screening or a mass screening.<sup>93</sup> The *Criminal Justice (Forensic Evidence) Act 1990* does not provide for the taking of samples from volunteers and this practice is carried out without adequate regulation or safeguards. It has been recommended by the Commission that the taking of all samples should be exclusively governed by legislation and should encompass all samples even those taken on a voluntary basis.<sup>94</sup> In the Consultation Paper, the Commission highlighted some objections to the unnecessary sampling of volunteers.<sup>95</sup> The Commission considers that an individual should only be requested to provide a bodily sample if the sample is likely to further the investigation of a specific offence because such an intrusive procedure should only be carried out if it is necessary.

2.80 The primary factor which must be considered when taking DNA samples from volunteers is consent. The Commission is in no doubt that the taking of a bodily sample from an individual who is not suspected of the commission of a crime without their informed consent, would constitute a significant infringement of their human rights, in particular, the right to bodily integrity. The Commission proposes that the definition of 'appropriate consent' set out in section 2(10) of the *Criminal Justice (Forensic Evidence) Act 1990* should form the basis of the consent required from volunteers under the proposed scheme. The definition of 'appropriate consent' under the 1990 Act includes the consent of individuals who are 17 years or over. However, in the case of an individual who is between the ages of 14 and 17, the consent of that person and a parent or guardian is necessary. But, in the case of a person under the age of 14, only the consent of a parent or guardian is necessary. Further safeguards were recommended by the Commission in the Consultation Paper in order to ensure the validity of consent. These include the requirements that consent be informed and in writing. The Commission also added that an opportunity be given to consult a legal practitioner before agreeing to provide a sample and notification must be given of the purpose for which the sample is provided, the use that will be made of it and the fact that the volunteer is under no obligation to provide a

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<sup>93</sup> See paragraphs 2.93-2.98 below.

<sup>94</sup> See paragraph 2.21 above.

<sup>95</sup> See Consultation Paper at paragraph 5.88.

sample. The Commission continues to support the recommendation that consent should be informed and in writing. However, in respect of obtaining legal advice and notification of the purpose for which the sample is provided, the Commission has concluded that these detailed matters may be more suitable for consideration in any detailed regulations or code of practice which may be made or published after consultation with relevant bodies.<sup>96</sup>

2.81 *The Commission recommends that the taking of samples from volunteers, that is, persons who are not suspects or convicted persons, should only occur under legislative cover and only if the appropriate consent is given in writing. The Commission recommends that an individual should only be requested to provide a bodily sample if the sample is likely to further the investigation of a specific offence.*

2.82 In addition, the Consultation Paper recommended that failure to consent should never be a ground for suspecting a person's involvement in an offence so as to justify the compulsory taking of a sample under section 2 of the *Criminal Justice (Forensic Evidence) Act 1990*.<sup>97</sup> The Commission considers that this safeguard would minimise the breach of an individual's privilege against self-incrimination. It has been suggested to the Commission during the consultation process that the proposed wording of any legislation to give effect to this recommendation should indicate that a refusal, on its own, does not constitute a reasonable ground for arrest. The Commission accepts that the Gardaí may have other suspicions regarding the person whom they wish to volunteer a sample, which fall short of reasonable grounds for arrest. But, the Commission does not consider that these suspicions, taken together with a refusal, should constitute reasonable grounds for arrest. The Commission recognises the importance of personal autonomy and free choice. The coercive nature of a criminal investigation already seriously weakens an individual's capacity to give free and informed consent. It is probable that volunteers would feel under pressure to provide a sample when they are requested to do so by the Gardaí. Further pressure would be placed on an individual if a refusal to consent to sampling, coupled with other evidence, could constitute a reasonable ground for arrest. The voluntary nature of the entire procedure could be jeopardised.

2.83 *The Commission recommends that failure to consent should be precluded from constituting a reasonable ground for suspecting a person's involvement in an offence so as to justify the compulsory taking of a sample under section 2 of the Criminal Justice (Forensic Evidence) Act 1990.*

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<sup>96</sup> For example, the Irish Human Rights Commission.

<sup>97</sup> See Consultation Paper at paragraph 5.89.

2.84 Finally, in the Consultation Paper, the Commission proposed that samples from persons other than suspects or convicted persons may be taken without the consent of the person where a court order authorises the taking of the sample on the basis that the person is endeavouring to obstruct the course of justice in refusing to give the sample and the sample is necessary for the investigation of a serious offence.<sup>98</sup> After further consideration, the Commission considers that provision for the compulsory sampling of such ‘volunteers’ is not desirable under any circumstances. As a result, the Commission recommends that the provision of a DNA sample in the absence of consent should be limited to suspects who are detained under the relevant provisions and to certain convicted persons.

2.85 *The Commission recommends that samples from persons other than suspects or convicted persons may not be taken without the consent of the person.*

**(ii) Retaining Volunteer Profiles on the DNA Database.**

*(I) Consultation Paper Recommendation*

2.86 In the Consultation Paper, the Commission recommended that a volunteer’s profile may only be retained on the DNA database where an informed consent has been given for this and that he or she should be advised of the implications that this will involve, including that it may be used for the purpose of future searches.<sup>99</sup> The Commission also recommended that any individual, even a person unconnected with a particular investigation, should be permitted to have his or her profile retained on the DNA database, and that volunteers be permitted to withdraw a consent.<sup>100</sup> The Commission also recommended that if a volunteer consents to the retention of a profile on the DNA database, it may be used for any of the purposes permitted.<sup>101</sup>

*(II) Discussion*

2.87 The Commission will now consider the detail of the arrangements for dealing with volunteer profiles and the database. The Commission considers that a volunteer’s profile may only be retained on the database where an informed consent has been given for this retention. But equally important, the Commission considers that when a volunteer provides a sample, it should not automatically be assumed that such a sample may be retained on the DNA database. While an individual may consent to the

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<sup>98</sup> See Consultation Paper at paragraph 5.94.

<sup>99</sup> See Consultation Paper at paragraph 5.96.

<sup>100</sup> See Consultation Paper at paragraph 5.98.

<sup>101</sup> See Consultation Paper at paragraph 5.105.

taking of a sample where it will assist a particular investigation, this might not extend to allowing a profile to be placed on a database for an indefinite period. A volunteer should be informed of the implications involved in the retention of a profile on the database, including that it may be used for the purpose of future searches. For these reasons, the Commission recommends that legislation should provide for at least two types of consent. The first is a limited form of consent which would confine the use of the sample to a particular investigation. The second form of consent would allow the sample to be used to assist a particular investigation and for the profile to be placed on the DNA database to assist in the investigation of other past and future crimes. The UK Human Genetics Commission has voiced some concern that two consent signatures may be requested without proper advice on the long-term implications.<sup>102</sup> Furthermore, it was noted that there is a danger that the two separate consents will become conflated in the mind of the public and that this will reduce willingness to co-operate. It has been suggested that the consent forms given should set out the important differences between the two consents that are being obtained. Where possible, the obtaining of consent to provide the initial elimination sample should be separated physically and/or temporally from consent to retention on a database. These concerns are particularly significant when, as is the case in the United Kingdom, consent for the retention of a profile on the DNA database is irrevocable. The Commission agrees with this approach and recommends that the consent forms clearly indicate the implications of consent.

*2.88 The Commission recommends that a volunteer's profile may only be retained on the database where an informed consent has been given for this. At least two types of consent must be legislated for; the first is a limited form of consent that would confine the use of the sample to a particular investigation. The second form of consent would allow the sample to be used to assist a particular investigation and for the profile to be placed on the DNA database. A volunteer should be advised on all the implications of each form of consent.*

*2.89* In the Consultation Paper, the Commission recommended that an individual, even a person unconnected with a particular investigation, would be permitted to have his or her profile retained on the database. This was based on the principle that some people may believe that the retention of a profile on the database effectively secures them from unjustified suspicion, and that there can be no objection to enabling these individuals to submit their profiles for retention on the database. It has been suggested to the Commission, however, that this proposal may prove problematic. Concern

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<sup>102</sup> Human Genetics Commission *Inside Information-Balancing Interests in the Use of Personal Genetic Data* May 2002 at 151-152. Available at <http://www.hgc.gov.uk>.

has been expressed that this provision may put pressure on individuals to ‘volunteer’ their profiles to be retained on the DNA database. For example, it has been suggested that employers may look more favourably on employees who have volunteered their profiles. Consequently, the Commission considers that it may be necessary to extend the scope of the employment equality legislation to prohibit discrimination on this ground. In any event, the Commission is confident that the consent form proposals it has made in this respect will ensure that concerns expressed in more general terms will not arise.

2.90 *The Commission recommends that any individual, even a person unconnected with a particular investigation, should be permitted to have his or her profile retained on the DNA database.*

2.91 The Commission maintains its unequivocal position that volunteers be permitted to withdraw consent to the retention of profiles on the database. Retaining the profiles of volunteers after they have ceased to consent would, in the Commission’s view, involve an unjustifiable interference with privacy and bodily integrity. Consequently, the Commission recommends that the legislative framework would not include any notion of irrevocable consent. It has been suggested, however, that once the volunteer gives the initial written, informed consent, the DNA profile should be retained for the duration of the investigation or prosecution for which it was sought. The Commission agrees with this view. The volunteer may withdraw consent when the process is completed and then both the sample and the profile must be destroyed. This would involve a proportionate interference with an individual’s rights in order to assist in the investigation of crime.

2.92 *The Commission recommends that volunteers be permitted to withdraw consent to the retention of profiles on the database.*

**(iii) Mass Screening**

*(I) Consultation Paper Recommendation*

2.93 In the Consultation Paper, the Commission recommended that a Garda Superintendent or acting Superintendent be required to approve in writing a mass screening before it may be conducted. In addition to this, the Commission recommended that evidence of a person’s failure to consent to testing during a mass screening should not be admissible in court.<sup>103</sup>

*(II) Discussion*

2.94 A mass screening involves inviting a group of individuals, sometimes only those of a specified sex and age, within a particular area, to

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<sup>103</sup> See Consultation Paper at paragraph 5.111.

submit to DNA testing in an attempt to find the perpetrator of a crime. In the Consultation Paper, the Commission examined the advantages and disadvantages of mass testing a population as part of a criminal investigation.<sup>104</sup> The Commission concluded that mass screening is both intrusive and costly, and therefore should be used sparingly and after due consideration.

2.95 In the Consultation Paper, the Commission concluded that the necessity to resort to mass screening should be an operational decision for investigating Gardaí.<sup>105</sup> The Commission considered that the Garda Síochána are in a better position than the courts to evaluate the usefulness of conducting such a screening. The Commission continues to support this view. However, in the Consultation Paper, the Commission considered that conducting a mass screening should be subject to the approval of a Garda Superintendent in the district where it is proposed to carry out the testing. After further consideration and consultation, the Commission has concluded that the authorisation of a mass screening merits, at a minimum, the approval of a Chief Superintendent. The Commission has noted that a request to a telecommunications provider for the telephone records of an individual must be signed by a Garda Chief Superintendent or a Colonel of the Defence Forces as provided by the *Postal and Telecommunications Services Act 1983* and the *Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993*. In addition, the Commission is aware that where a person is arrested under section 30 of the *Offences Against the State Act 1939*, he or she may be removed to and detained in custody in a Garda Síochána station, a prison, or some other convenient place for a period of 24 hours from the time of arrest and may, if an officer of the Garda Síochána not below the rank of Chief Superintendent so directs, be so detained for a further period of 24 hours. The Commission considers that a mass screening is a major step to take in an investigation and that the authorisation of a Chief Superintendent is both appropriate and necessary.

2.96 The Commission recommends that the Chief Superintendent concerned should consider a number of factors in deciding whether to permit the testing to be carried out. In particular, permission for a mass screening should only be given if it is necessary for the proper investigation of an offence. Consideration should be given as to whether the same objective could, in practice, be achieved by less intrusive and costly means. Care should also be taken to ensure in sanctioning the mass test that the range of people who may be requested to provide a DNA sample is as narrowly defined as possible. The potential impact of the mass screening on a

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<sup>104</sup> See Consultation Paper at paragraphs 5.106-5.110.

<sup>105</sup> See Consultation Paper at paragraph 5.109.

person's rights to bodily integrity and privacy should also be a consideration in the decision.

2.97 The Commission has already suggested in respect of volunteers that a failure to consent to a forensic procedure should not be capable of constituting a reasonable ground for suspecting the involvement of a person in an offence so as to justify requiring them to give a sample under section 2 of the 1990 Act.<sup>106</sup> This recommendation would also apply to those requested to provide a sample in a mass screening and would guarantee that the interference with the individual's privilege against self-incrimination is minimal.

*(III) Report Recommendation*

2.98 *The Commission recommends that a Chief Superintendent be required to approve in writing a mass screening before it may be conducted. In particular, permission should only be given by the Chief Superintendent after having regard to factors such as whether it is necessary for the proper investigation of an offence and whether the same objectives could be achieved by less intrusive or costly means. The Commission also recommends that evidence of a person's failure to consent to testing during a mass screening should not be admissible in court.*

## **D Missing Persons**

2.99 Families of missing persons face tremendous emotional turmoil when they are unable to learn about the fate of their loved ones. Through the use of DNA technology, it is now technically possible in many cases to make a positive identification of remains, either by matching the DNA profile of the remains with a DNA profile derived from the personal effects of a missing person, or by comparing the DNA profile of the remains with the DNA profile of close biological relatives of a missing person. It has been suggested to the Commission during the consultation process that the inclusion of the DNA profiles of missing persons on a DNA database would greatly assist in this identification process.

2.100 The Commission considers that the inclusion of a missing persons index and an unidentified persons index in the DNA database would be appropriate for this identification purpose. The Commission suggests that the missing persons index contain the DNA profiles of missing persons which may be derived from the personal effects of missing persons or alternatively the DNA profiles of the relatives of missing persons. As volunteers, relatives of missing persons would have the right to withdraw consent to the retention of their forensic material at any time. The

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<sup>106</sup> See paragraph 2.83 above.

unidentified persons index would contain the DNA profiles of unidentified human remains. This index may also contain the DNA profiles of individuals who are so severely injured as to be unable to indicate their identity.

2.101 The Commission proposes that the missing persons index would be matched against the convicted persons, suspects, volunteers and unidentified persons indexes of the database for identification purposes only. However, the Commission is anxious to emphasise that the missing persons index (which may include the DNA profiles of the relatives of missing persons) may not be speculatively searched against the crime scene index of the database.<sup>107</sup> The Commission is conscious of the strong public interest in the resolution of crime. However, the Commission considers that this interest needs to be balanced against the public interest in ensuring that persons are not reluctant to notify the Garda Síochána of a disappearance, or to assist in identifying victims of mass disasters and other missing persons, through fear of implicating themselves in outstanding or future offences.

2.102 *The Commission recommends the inclusion of a missing persons index and an unidentified persons index in the DNA database. The missing persons index would contain the DNA profiles of missing persons or the relatives of missing persons, and the unidentified persons index would contain the DNA profiles of unidentified human remains and the DNA profiles of severely injured people who are unable to indicate their identity. The Commission recommends that the missing persons index may be matched against the convicted persons, suspects, volunteers and unidentified persons indexes of the database for identification purposes only.*

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<sup>107</sup> The Commission has already recommended that the DNA profiles of unidentified human remains, which would be included in the unidentified persons index, may be matched against the crime scene index of the database where a court authorises this on the basis that there are reasonable grounds for suspicion that the deceased was responsible for a crime and it is an appropriate order to make having regard to all the circumstances of the case (See paragraph 2.14 below).



## **CHAPTER 3      RETENTION, DESTRUCTION AND ANALYSIS OF SAMPLES**

### **A            Introduction**

3.01      Chapter 2 examined the taking of DNA samples and the retention of DNA profiles on a newly established DNA database. This chapter focuses on the DNA sample as opposed to the profile. The chapter is divided into two parts. Part B examines the benefits of retention or destruction of the biological sample once the DNA profile has been generated. A distinction is drawn between crime scene samples and comparator samples. Part C considers the permissible analysis of biological samples. Consideration is given to what type of analysis of crime scene samples and comparator samples, beyond the generation of a profile, should be permissible for example, whether analysis of coding regions in order to determine phenotype or genotype information should be permitted.

### **B            Retention Versus Destruction of Samples**

3.02      The distinction between biological samples and the DNA profiles derived from them is a common feature in any debate regarding DNA retention and databases. This distinction was examined in detail in the Consultation Paper,<sup>1</sup> so it will only be briefly described here by way of clarification. A DNA sample consists of an actual tissue sample such as blood, semen, saliva, skin, hair root etc. It contains the full genetic information of the individual. The DNA profile, derived from the tissue sample, is a numerical representation of 10 regions of repetitive DNA sequence which lie in the ‘junk’ DNA between a person’s genes. The DNA profile contains very little personal genetic information but it can show strong proof of parentage and relatedness.<sup>2</sup> The database of DNA profiles

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<sup>1</sup> See Consultation Paper at paragraphs 1.32 – 1.44 and 5.05 – 5.09.

<sup>2</sup> It is the non-coding areas of the DNA molecule (areas of DNA where there aren’t any genes) that are used in forensic work. The non-coding areas provide a more suitable basis for identification as there is more variation between individuals in these areas. However, there are examples where STR loci originally thought to be non-coding may be shown to reveal quite personal information about the source. Thus, the prospect that a forensic profile may be interpreted and that sensitive information may be derived is not an entirely remote prospect. One must be cautious in claiming that a forensic profile will never give rise to privacy concerns.

should not be confused with the original samples. The sample is data rich; the profile is not. For these reasons, the Commission acknowledges that the extent of concern regarding the retention of DNA profiles remains significantly less than that of the storage of DNA samples.

3.03 In the Consultation Paper, the Commission drew a further distinction between the two categories of biological samples that primarily feature in this field, namely a crime scene sample and a comparator sample.<sup>3</sup> A crime scene sample has usually been left or discarded and is part of the evidence collected from the crime scene by the Gardaí, whereas a comparator sample is provided for the purpose of excluding or implicating the source of the sample in some way or otherwise assisting the investigation. Although, both could potentially contain much or all the genetic information about the source of the sample, the purpose and the position of each in a criminal investigation are strikingly different. The Commission remains confident that each category of sample may be considered in isolation.

**(1) Crime Scene Samples**

**(a) Consultation Paper Recommendation**

3.04 In the Consultation Paper, the Commission recommended that where biological samples are found at the scene of a crime they should be retained, principally as a safeguard in the event that an individual convicted of the offence to which the sample relates alleges that a miscarriage of justice has occurred and wishes to challenge the veracity of the original evidence.<sup>4</sup>

**(b) Discussion**

3.05 There is a long line of judicial authority that imposes a legal duty on the investigatory authorities to preserve material evidence up to the conclusion of the trial.<sup>5</sup> In this respect, the Commission notes that in practice, biological samples found at the scene of a crime are usually kept even where the crime has been solved and the perpetrator convicted. The retention is principally as a safeguard in the event that an individual convicted of the offence to which the sample relates alleges that a miscarriage of justice has occurred and wishes to challenge the veracity of the original evidence. In the Consultation Paper, the Commission recognised the importance of this safeguard and provisionally recommended that all crime scene samples should be retained, even when the person who has provided the sample is acquitted or not prosecuted. This proposal has

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<sup>3</sup> See Consultation Paper at paragraph 6.01.

<sup>4</sup> See Consultation Paper at paragraph 6.07.

<sup>5</sup> See *Murphy v DPP* [1989] ILRM 71 and *Braddish v DPP* [2002] 1 ILRM 151.

generally been welcomed.<sup>6</sup> The UK Human Genetics Commission agrees that “it is important that such samples should be retained under the existing rules relating to evidence.”<sup>7</sup> The Commission recommends that the scene of crime profile should be removed from the database following the conviction of the person but that the scene of crime sample should be retained indefinitely.

**(c) Report Recommendation**

3.06 *The Commission recommends that where biological samples are found at the scene of a crime they should be retained indefinitely.*

**(2) Comparator Samples**

**(a) Consultation Paper Recommendation**

3.07 In the Consultation Paper, the Commission recommended the destruction of comparator samples once a profile has been generated, verified and stored and the trial in respect of which the sample was obtained has concluded. The Commission proposed that limited and anonymous samples should be retained for longer periods of time, but not indefinitely, in order to ensure that the profiling methods are accurate for quality assurance purposes and to assist in the regulation and accreditation of providers of forensic profiles and the custodian of any database.<sup>8</sup>

**(b) Discussion**

3.08 The Commission is aware that the retention of comparator samples as opposed to crime scene samples raises more complex and controversial issues. Comparator sample retention or destruction has practical as well as legal implications. A number of countries choose to retain samples for database-hit confirmation or future testing in the case of errors or advancing technology.<sup>9</sup> Others choose to destroy comparator samples once a profile has been generated, so as to remove any possibility or

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<sup>6</sup> GeneWatch UK *The Police National DNA Database* January 2005 at 44 suggests that scene of crime samples should be destroyed as soon as the relevant prescriptive period has passed. This recommendation would be of very limited relevance to the situation in Ireland, as the primary offences for which DNA analysis would be employed are arrestable offences. These offences would mainly be prosecuted on indictment, which by tradition, the common law provides for no limitation period.

<sup>7</sup> Human Genetics Commission *Inside Information-Balancing Interests in the Use of Personal Genetic Data* May 2002 at 154. Available at: <http://www.hgc.gov.uk>.

<sup>8</sup> See Consultation Paper at paragraph 6.25.

<sup>9</sup> Austria, France, Hungary, England and Wales, retain samples as well as profiles. See further the European Network of Forensic Science Institutes DNA Working Group *Report on ENFSI Member Countries' DNA Database Legislative Survey* prepared by Christopher H. Asplen, Smith Alling Lane, PC. Available at <http://www.enfsi.org/>.

perception that inappropriate or illegal testing will be performed on the sample.<sup>10</sup> In the Consultation Paper, the Commission acknowledged the various concerns that exist with regard to the retention of DNA profiles and samples.<sup>11</sup> A principal concern is that retained DNA samples could be accessed in the future and subjected to the type of testing that would violate the privacy of the source of the sample by revealing deeply sensitive personal information.

3.09 Hence, the retention or destruction of comparator samples remains a controversial and divisive area. Strong views have been expressed on both sides of the debate. Many organisations are inherently opposed to the retention of samples. Liberty has emphasised the distinction between samples and profiles, and noted that samples provide more information than is necessary for identification purposes.<sup>12</sup> Liberty warns that the ‘knowledge’ in relation to an individual’s life that can be gleaned from DNA samples has no parallel in the history of science and raises profound questions about the protection of privacy in the 21<sup>st</sup> Century.<sup>13</sup> Lord Waller in the Court of Appeal in the Marper case sought to respond to Liberty’s objections. He explained that the retention of samples permits: (a) the checking of the integrity and future utility of the DNA database system; (b) a re-analysis for the up-grading of DNA profiles where new technology can improve the discriminating power of the DNA matching process; (c) re-analysis and an ability to extract other DNA markers and thus, offer benefits in terms of speed, sensitivity and cost of searches of the database; (d) further analysis in investigations of alleged miscarriages of justice; and (e) further analysis so as to be able to identify any analytical or process errors.<sup>14</sup> It is these benefits that must be balanced against the risks identified by Liberty. The House of Lords, particularly Lord Steyn, was confident that Liberty’s fears of what may happen in the future in the light of the expanding frontiers of science were not relevant in respect of the contemporary use of retained samples in connection with the detection and prosecution of crime. He observed that if future scientific developments require it, judicial decisions

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<sup>10</sup> In Belgium, Germany and Norway, various provisions exist requiring samples to be destroyed. See further the European Network of Forensic Science Institutes DNA Working Group *Report on ENFSI Member Countries’ DNA Database Legislative Survey* prepared by Christopher H. Asplen, Smith Alling Lane, PC. Available at <http://www.enfsi.org/>.

<sup>11</sup> See Consultation Paper at paragraphs 2.25 – 2.29.

<sup>12</sup> Liberty (2002) Third Party Intervention in *R (S and Marper) v Chief Constable of South Yorkshire and Secretary of State for the Home Department* Court of Appeal (Civil Division).

<sup>13</sup> *Ibid* at paragraph 3.4.3.

<sup>14</sup> *R (S and Marper) v Chief Constable of South Yorkshire and Secretary of State for the Home Department* [2003] 1 Cr App R 16 247, paragraph 61.

can be made when the need occurs, to ensure compatibility with the European Convention on Human Rights.<sup>15</sup>

3.10 The UK Human Genetics Commission (HGC) has voiced some concerns about the unnecessary retention of samples and has suggested that comparator samples should be given greater independent protection, or even be destroyed, once the DNA profile has been generated.<sup>16</sup> The HGC in its report on the use of personal genetic information also highlighted the principal reasons why samples are retained. These include (a) quality assurance purposes, to monitor the performance of the profile supplier; (b) in the event of a database match to check the veracity of the match using the original sample; (c) to retest the sample with newer and more discriminating methods; (d) to investigate challenges to, or errors in, the original profile.<sup>17</sup> The HGC does not find these reasons for the retention of samples compelling. The report explains how these aims may be achieved without the need to retain all biological samples. It would seem possible to conduct adequate quality assurance procedures on a smaller proportion or on anonymous samples. The need to retest samples using modern methods or to confirm a match or to correct errors could all be done by using new comparator samples taken from the suspect. The HGC warns that the financial cost should not be looked at in isolation from the wider public concern about the retention of deeply personal information.<sup>18</sup>

3.11 In the Consultation Paper, the Commission examined each of these arguments and concluded that the destruction of samples was preferable. The Commission was of the opinion that destroying the comparator sample after a profile has been generated and verified and a final decision in a particular case has been made, would go a long way in allaying concerns about misuse and possible future analysis, as well as inspiring public confidence in DNA profiling and the establishment of a profile database. This recommendation has met with some criticism during the consultation process. This criticism has been primarily based on two separate grounds. The first is the preservation of evidence. It has been submitted that the practice of ordinary appeals by an accused person, and the procedure provided by the *Criminal Procedure Act 1993* (miscarriage of justice),<sup>19</sup> place an obligation on the Gardaí not only to seek out, but to

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<sup>15</sup> *R (S and Marper) v Chief Constable of South Yorkshire and Secretary of State for the Home Department* [2004] 4 All ER 193, paragraph 28.

<sup>16</sup> Human Genetics Commission UK *Inside Information-Balancing Interests in the Use of Personal Genetic Data* May 2002 at 154-155. Available at <http://www.hgc.gov.uk>.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> See section 2 of the *Criminal Procedure Act 1993*.

preserve, all items of evidential value in such cases. The destruction of comparator samples may destroy vital evidence necessary in cases alleging miscarriage of justice. The Commission pointed out in the Consultation Paper that any person convicted on the basis of DNA evidence who wishes to challenge the veracity of the profile would no doubt be more than willing to provide a fresh sample in order to generate a new profile. Submissions received by the Commission during the consultation process have been critical of this assumption. It has been suggested that the Commission's approach is overly simplistic. The Commission acknowledges that circumstances may arise where there could be some difficulty in obtaining a second sample for analysis from an individual. The person in question may have died, or third party samples taken during the initial investigation, which have since been destroyed, may prove necessary in order to prove innocence in a miscarriage of justice case. These third parties may be difficult to trace or may be unwilling to provide a second sample.

3.12 The second and more substantial criticism of the recommendation made by the Commission in the Consultation Paper focuses on technological changes. The Commission is aware that major change has occurred in the forensic DNA field in the past when the technology moved from analysing RFLPs to STRs. The most likely drive for change will be the development of a technology which is faster and cheaper, such as SNPs.<sup>20</sup> Such a system would not be compatible with the present system. Submissions received by the Commission during the consultation process warn that by destroying the samples, the database is not 'future proofed'. Without 'future proofing', we risk restricting ourselves to a slower and more expensive type of analysis. The database would be locked, by legislation, into current technology. It has been suggested that the Commission should concentrate on sample security rather than on the destruction of samples. Samples will most likely be in the form of saliva that has been dried onto paper. Storage of paper at room temperature lends itself to easier security than samples in a freezer. The samples themselves will not be identifiable. Each could be given a bar code. Thus, the profiles will not be traceable to an individual sample without the computer code to link the bar code to the database of names. It would be possible to devise a system that can be checked and audited by an external body to ensure that no abuse has taken place.

3.13 The Commission considers that the question of the retention or the destruction of samples is a question of necessity, proportionality and

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<sup>20</sup> A new DNA identification technique that does not rely on STRs but looks at different areas of the DNA called single nucleotide polymorphisms (SNPs) has been developed. SNPs are differences at single base pair positions along the DNA strand. The advantages of using SNPs as a means of DNA profiling are that they can be detected in very small amounts of DNA and are therefore useful to analyse degraded samples, particularly those from crime scenes.

reasonableness. Both the House of Lords and the Court of Appeal in the UK have confirmed that the retention of samples is both necessary for, and proportionate to, the legitimate aim of crime prevention. However, the Commission acknowledges that the retention of samples is particularly significant when one considers the taking and temporary retention of suspects samples without consent. However, the Commission considers that the practical implications of sample destruction cannot be ignored. The science in this area is continually developing and improving. The law is often criticised for failing to keep up-to-date with scientific advances. The Commission is concerned that if the database is tied by legislation to the current technology, the Gardaí would be unable to take full advantage of developments in the field of forensic science until the legislation is amended. Even then, the use of the database for speculative searches could be significantly hampered until a new sample is obtained from all those on the database and a profile developed using the current technology. For these reasons, the Commission recommends that in this current climate of change, it is desirable to retain the comparator samples under strict security measures.<sup>21</sup> Therefore, when the profile of a suspect, convicted person or volunteer is placed on the database, the comparator sample will also be retained and stored by the custodian of the database. If, for whatever reason, the profile is removed from the database and destroyed, the sample must also be destroyed. This situation could be reassessed in five years' time in order to determine whether the retention of samples is still necessary.

**(c) Report Recommendation**

*3.14 The Commission recommends the retention of comparator samples under strict security measures set out in legislation. If, for whatever reason, a DNA profile is removed from the database and destroyed, the corresponding DNA sample must also be destroyed. The Commission recommends that this situation be reassessed in five years' time in order to determine whether the retention of samples, in addition to profiles, is still necessary.*

**C Permissible Analysis of Biological Samples**

3.15 Next, we examine the permissible purposes for which the biological samples may be used once a DNA profile has been generated. The permissible purposes for which the DNA profiles (which are retained on the database) may be used are examined as part of the purposes and permitted uses of the database in Chapter 2. This chapter sets out explicit parameters for the analysis of the retained biological samples. The

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<sup>21</sup> These security measures will be examined in Chapter 4 along with the custodianship of the database.

expectation is that the Human Genome Project will eventually identify the genes that influence physical characteristics such as skin and eye colour, height, weight and facial features. Researchers are also exploring ways to predict a person's health status or behavioural traits from genetic make-up. Some of these applications may be unachievable and others are a long way off, but some relatively rare genetic disorders can be predicted from a person's genes. Again, the Commission considers it appropriate to draw a distinction between the biological samples taken from a scene of a crime and comparator samples formally supplied by individuals with or without their consent.

**(1) Crime Scene Samples**

**(a) Consultation Paper Recommendation**

3.16 In the Consultation Paper, the Commission recommended that the analysis of biological samples taken from a crime scene should be limited to the purposes that further the criminal investigation and that the results of any analysis should be kept under the most careful custody. Analysis of coding regions should be allowed to determine non-sensitive phenotype information in respect of common characteristics, such as eye colour and skin colour.<sup>22</sup>

**(b) Discussion**

3.17 The Commission considers that there is a clear distinction between using a DNA sample for comparison or identification purposes (by generating a DNA profile) and using it to predict the characteristics of a person. In the Consultation Paper, the Commission considered that any analysis of a crime scene sample beyond the generation of a profile should only be contemplated in the most exceptional cases and where it is believed that the crime scene sample comes from the perpetrator of the offence. In addition, the Commission recommended that any analysis of samples taken from a scene of crime should always be limited to purposes that further the criminal investigation. The Commission continues to support these views.

3.18 Bearing these restrictions in mind, the Commission in the Consultation Paper recommended that analysis of coding regions should be permissible to determine non-sensitive phenotype information in respect of common characteristics, such as eye colour and skin colour. The Consultation Paper explains that at present, this type of analysis is restricted to the identification of hair colour and varying inferences concerning 'genetic ancestry'.<sup>23</sup> These are used to aid the police in defining a target population of suspects. The Forensic Science Service in the UK is attempting to find ways of identifying commonplace characteristics so that

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<sup>22</sup> See Consultation Paper at paragraph 7.14.

<sup>23</sup> See Consultation Paper at paragraph 7.05 – 7.07.

in the future a ‘genetic photo-fit’ of a suspect could be built up. The aim of this work is to provide intelligence information on unknown offenders from scenes of crime or to narrow down a mass screening. Examples of common place characteristics would be race, skin/hair/eye colour, stature, weight, age and facial characteristics. The Forensic Science Service already provides an ethnic inference service and a red hair prediction service which detects about 80% of ‘redheads’. However, with environmental and lifestyle factors it is impossible to predict many of these common characteristics with 100% certainty. The Commission continues to support the views expressed in the Consultation Paper that analysis of coding regions should be permitted, where possible, to determine non-sensitive phenotype information. This information is not considered sensitive and it could be of great benefit to the Gardaí when investigating serious crime.

3.19 The Commission is aware that expansion of the permissible analysis of crime scene samples from predictions about non-sensitive phenotype information, to predictions regarding behavioural traits or medical information is very controversial. In the Consultation Paper, the Commission considered that the existence of public sensitivity concerning genetic privacy demanded that compelling justifications exist for conducting any further analysis beyond inferring physical characteristics.<sup>24</sup> It has been suggested to the Commission during the consultation process, that in the investigation of specific crimes where the only lead may be a DNA sample recovered from the scene, it is considered that full use should be made of the available information in the DNA sample. It was observed that obtaining full intelligence from such a sample may be the only way to provide a useful basis upon which to proceed in the investigation and ultimately solve the crime, while preventing serious re-offending by the same individual. This is particularly relevant where there is no obvious link between the perpetrator and the victim. It was pointed out that any extra information in such cases, in the form of genetic disorders, personality traits and predispositions obtained could be useful, if not crucial, in generating an offender profile as distinct from a DNA profile.

3.20 The Commission acknowledges that this field of science is at an early stage of development and it is not possible to be categorical about the advisability or acceptability of this form of intelligence gathering. Any proposal to use sensitive personal genetic information for forensic purposes should be subject to a full debate in order to examine the ethical, consent and confidentiality issues. In any event, the Commission recommends that the results of any analysis should be kept under the most careful custody and that the results should not be disseminated further than is necessary for the investigation and prosecution of the offence.

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<sup>24</sup> See Consultation Paper at paragraph 7.12.

**(c) Report Recommendation**

3.21 *The Commission recommends that the analysis of biological samples taken from the scene of a crime, beyond the generation of a profile, should be limited to exceptional cases and where it is believed that the scene of the crime stain comes from the perpetrator of the offence. Such analysis of samples taken from the scene of crime should always be limited to purposes that further the criminal investigation and the results of any analysis should be kept under the most careful custody. Analysis of coding regions should be allowed to determine non-sensitive phenotype information.*

**(2) Comparator Samples**

**(a) Consultation Paper Recommendation**

3.22 In the Consultation Paper, the Commission recommended that any legislation providing for the analysis of comparator samples should exclude testing which might reveal information about genetic disorders, personality and behavioural traits and predispositions. The Commission does not recommend that analysis of these DNA samples should be restricted explicitly to the non-coding regions.<sup>25</sup>

**(b) Discussion**

3.23 In the Consultation Paper, the Commission established that crime scene samples could legitimately be treated differently from comparator samples with regard to further scientific analysis beyond the generation of a profile. The Commission noted that in contrast to crime scene samples, comparator samples are provided for a specific purpose namely for comparison with a biological sample left at the scene of a crime. Hence the Commission concluded that the permissible analysis of comparator samples beyond the generation of a profile should be strictly limited. The Commission continues to support these views.

3.24 In the Consultation Paper, the Commission acknowledged that the generation of physical descriptions from DNA samples will most likely be restricted to use on unidentified DNA samples recovered from crime scenes.<sup>26</sup> Little purpose would be served in predicting physical descriptions from a comparator sample where the person is already known to the police. However, the Commission notes that there could be an interest in using personal genetic information to predict unobservable characteristics for forensic purposes. In this regard, the Commission considers that, unlike a scene of crime stain, a comparator sample should not be subject to analysis beyond that which is necessary to establish the likelihood that the donor of

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<sup>25</sup> See Consultation Paper at paragraph 7.20.

<sup>26</sup> See Consultation Paper at paragraph 7.17.

the comparator sample is the source of the scene of crime stain. Thus, testing which might reveal information about genetic disorders, personality traits and predispositions on comparator samples should be expressly prohibited. The objective of providing a comparator sample is either to exculpate or to point towards presence at the scene of a crime. This objective can be achieved by generating a DNA profile from the biological sample and comparing this profile to a profile generated from the crime scene sample. The Commission considers that further analysis of the sample is unnecessary and would result in a gross interference with an individual's right to privacy.

3.25 In the Consultation Paper, the Commission did not recommend that analysis of DNA samples should be restricted explicitly to the non-coding regions in order to avoid limiting or precluding future scientific developments.<sup>27</sup> The Commission continues to support this recommendation whilst noting that should it be discovered in future that the non-coding regions, and in particular the loci used in forensic profiling, are not truly 'non-coding', then it may become necessary to discontinue use of these areas.

**(c) Report Recommendation**

3.26 *The Commission recommends that any analysis of comparator samples beyond the generation of a profile should be forbidden.*

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<sup>27</sup> See Consultation Paper at paragraph 7.19.



## **CHAPTER 4 CUSTODIAN OF THE DATABASE AND INFORMATION SHARING**

### **A Introduction**

4.01 In this chapter the Commission examines key issues concerning the role of the custodian of the DNA database, security of the database and the international exchange of DNA information. The most important of these is the custodianship of the database. This is discussed in Part B as part of the general oversight and regulation of the DNA samples and database. The principal function of the custodian is to maintain the integrity of the DNA database. The custodian will be responsible for the loading of profiles on to the DNA database, carrying out speculative searches and the issuing of match reports. This body will be given the responsibility of ensuring the security of the database and the accuracy of the information on it. The security of the retained DNA samples and procedures for the destruction of DNA profiles and samples are also considered. Part C focuses on DNA evidence and contamination. Issues such as laboratory performance in relation to DNA analysis, crime scene management and the establishment of elimination databases are discussed. Finally, in Part D the international exchange of DNA information is examined.

### **B Oversight and Regulation of the DNA Samples and Database**

#### **(1) *Custodian of the Database***

##### **(a) *Consultation Paper Recommendation***

4.02 In the Consultation Paper, the Commission recommended the enactment of legislation under which the Forensic Science Laboratory would be incorporated as an independent statutory body called the Forensic Science Agency. It would be governed by a Board composed of a number of individuals with relevant and varied expertise but who are all independent of the Government. This body would be responsible for both the profiling and storage of crime scene and comparator samples. Its functions in this regard would be subject to review by the Irish National Accreditation Board. A department of the Forensic Science Agency would be in charge of custody of the database. Matches obtained through this database should be communicated to the Gardaí by virtue of a secure computerised system. The

body's function of managing the database would be subject to external oversight from an oversight commissioner.<sup>1</sup>

**(b) Discussion**

4.03 The Commission reiterates the view expressed in the Consultation Paper that a key factor to be considered when establishing a DNA database is the custodianship of the database. Custodianship of the database denotes responsibility for the routine storage of DNA profiles, the comparison of profiles with one another, and the release of information about matches. In the Consultation Paper, the Commission concluded that the custodian would have the vital function of ensuring the security of the database and also guaranteeing the accuracy of the information on it. The custodian would also be required to manage the destruction of the profiles where appropriate. The Commission also considered it crucial that this custodian would be independent and competent so that the public would have confidence in its ability to carry out its task. It was in this context that the Commission recommended the establishment of a new independent statutory body called the Forensic Science Agency which would incorporate both the existing Forensic Science Laboratory and be the custodian of the DNA database.

4.04 In the Consultation Paper, the Commission examined the situation in various countries, including the US, Canada, Australia and the UK, with regard to the custodianship of DNA databases.<sup>2</sup> In addition, the Commission carefully reviewed the current position of the Forensic Science Laboratory (FSL) in Ireland.<sup>3</sup> The Commission acknowledged the competence and efficiency of the FSL, which was established in Ireland in 1975 as an associated office of the Department of Justice, Equality and Law Reform. The purpose of the FSL is to provide a scientific analytical service to the Garda Síochána in the investigation of crime. The same service is also provided to other Government agencies when investigating crime – such as Customs and Excise, Military Police and the Department of Agriculture. The Commission noted that the FSL is located in Garda Headquarters but it is staffed by civil servants of the Department of Justice, Equality and Law Reform.

4.05 The Commission has considered various options for the custodianship of the newly established DNA database. The numerous submissions received by the Commission during on this issue highlight the necessity of choosing an appropriate custodian for the database. The justifications for establishing and maintaining a DNA database and the recommendations regarding the categories of persons whose profiles and

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<sup>1</sup> See Consultation Paper at paragraph 8.20.

<sup>2</sup> See Consultation Paper at paragraphs 8.07 – 8.13.

<sup>3</sup> See Consultation Paper at paragraphs 8.05 – 8.06.

samples may be retained are premised on the guaranteed security of the DNA database and the stored DNA samples. The sensitive personal information contained on the database and in the DNA samples must not become an object of abuse. Hence, the Commission is determined that the database be overseen and regulated by a competent, efficient and independent body.

4.06 In the Consultation Paper, the Commission examined three options for custodianship of the database. The first suggestion relies on the existing FSL acting as the custodian of the database. In the Consultation Paper, the Commission noted that if the FSL analysed the DNA samples and acted as custodian of the database, the cost of maintaining such a database would be significantly reduced as there would be no need to establish a new body to act as custodian.<sup>4</sup> However, the Commission was concerned that given the necessary cooperation and close coordination that exists between the Gardaí and the FSL, the FSL may not be perceived publicly as being distinct from and independent of the Garda Síochána.<sup>5</sup> In addition, the Commission considers that allowing this body to both supply the profiles and act as custodian of the database could lead to a potential conflict of interests.<sup>6</sup> In the submissions received by the Commission during the consultation process, the FSL was commended for its independence. The Commission was assured that the independence and integrity of the laboratory in operational matters (examination of items submitted, interpretation of results) has always been respected by the Department of Justice, Equality and Law Reform and the Garda Síochána. It was suggested to the Commission that resources needed for a new body would be more beneficially spent in strengthening the resources of the present organisation. On the other hand, it was also noted that, although the arrangements between the Department of Justice, the Gardaí and the FSL were appropriate in the 1970s when the FSL had just four or five staff and the potential of science in criminal investigation was just beginning to be appreciated, these arrangements are no longer appropriate in the 21<sup>st</sup> century when the FSL has a staff of approximately 70. The Commission considers that if the onerous responsibility of administering a DNA database were to be assigned to the FSL in its present form, a fundamental restructuring process would be necessary in order to assure the total independence and integrity of the

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<sup>4</sup> See Consultation Paper at paragraph 8.05.

<sup>5</sup> See Consultation Paper at paragraph 8.06. The Commission notes that section 33 of the *Criminal Justice Bill 2004* as initiated, refers to the “Forensic Science Laboratory of the Department of Justice, Equality and Law Reform.”

<sup>6</sup> The Commission agrees with the views expressed by the UK Human Genetics Commission on this point. See Human Genetics Commission UK *Inside Information-Balancing Interests in the Use of Personal Genetic Data* May 2002 at paragraph 9.27. Available at <http://www.hgc.gov.uk>.

proposed DNA database. The Commission has concluded that it is more appropriate to establish a new, independent, statutory body to oversee the establishment and management of this powerful investigative tool.

4.07 A second option for the custodianship of the DNA database discussed in the Consultation Paper involves maintaining the existing FSL and establishing a new independent agency to act as custodian of the database.<sup>7</sup> The FSL would continue to generate DNA profiles, which would then be submitted to the agency for entry onto the database. This agency would have the sole responsibility for managing the database and would give either a ‘match’ or a ‘no match’ response to a request for hits. This option would eliminate any suggestion of a conflict of interest between the supplier of DNA profiles and the custodian of the database. However, the Commission is concerned about the practicalities of this proposal. The Commission is not convinced of the necessity of operating two independent forensic bodies in a jurisdiction the size of Ireland. In addition, the Commission is conscious that this approach would not alleviate the perception about how profiles are generated, as the FSL may still be perceived to be closely associated with the Garda Síochána.

4.08 A third option discussed in the Consultation Paper was the establishment of an independent statutory body which would incorporate the Forensic Science Laboratory and the DNA database. This body could be known as the Forensic Science Agency.<sup>8</sup> The database would be administered in a separate department from the existing four sections (chemistry, drugs, biology, DNA) of the Forensic Science Laboratory and would have a separate identity under the proposed legislative framework.

**(i) *An Independent Forensic Science Agency***

4.09 The Commission remains of the view that this third model is the preferable one. Establishing such a body would, in the Commission’s view, ensure that both the obtaining and matching of the DNA profiles is carried out by a body perceived publicly as independent. The Commission anticipates that the Forensic Science Agency would be an independent statutory body which, broadly speaking, denotes an authority which discharges specialised, central functions, yet which is set at a distance from the Government and Ministers. Typically, the relevant Minister defines the body’s policy objectives but it is left free from interference in its day to day matters. Legislation establishing the body would outline its roles and responsibilities. The Commission suggests that the Courts Service<sup>9</sup> would

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<sup>7</sup> See Consultation Paper at paragraph 8.14.

<sup>8</sup> See Consultation Paper at paragraphs 8.15 – 8.19.

<sup>9</sup> The Courts Service was established as an independent corporate body following the enactment of the *Courts Service Act 1998*.

be an appropriate model for the new Agency. The Commission proposes that this newly established body would be governed by a Board. The members of the Board would be appointed by the relevant Minister, and in appointing persons to be members of the Board, the Minister would have regard to the desirability of their having knowledge or experience of forensics, data protection, crime investigation, human rights or any other subject which would in his or her opinion, be of assistance to the Agency in performing its functions. For example, the Commission considers that the Board should include a representative of a human rights organisation, a person who has experience in forensics but who is independent of the present Forensic Science Laboratory and the Government, a person who has expertise in the area of data protection and a representative of both the Gardaí and the profiling laboratory. The Chief Executive Officer would be the accounting officer for the appropriate accounts of the Agency and a member of the staff of the Agency would be a civil servant in the Civil Service of the State.<sup>10</sup> In addition, the Commission is of the view that provision should be made for a five year review by the Board of the Agency of the efficacy of the database in light of scientific advances and experience gained from practice.

**(ii) External Review**

4.10 In the Consultation Paper, the Commission provided for the independent external review of the functions of this independent body.<sup>11</sup> It was recommended that an external review should be conducted on a regular basis to examine the operation of the database and to make recommendations for any changes that should be implemented. This practice would ensure that the security and integrity of the database was maintained. It was suggested that this review could be carried out by the Office of the Data Protection Commissioner or another oversight Commissioner. This recommendation has been universally welcomed but it has been noted that an independent oversight Commissioner would require a wide range of expertise to fully supervise the database. This should be borne in mind when allocating resources for the external review of the database.

4.11 In addition, the Commission recommended that the work of the laboratory in profiling and storing the DNA samples should be overseen by a separate external body. The laboratory which would be responsible for profiling and storing the DNA samples should be accredited under the ISO 17025 standard and would therefore be subject to reviews by the Irish National Accreditation Board.<sup>12</sup> The Commission considers that laboratory

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<sup>10</sup> Similar to the staff of the Courts Service as determined by section 23 of the *Courts Service Act 1998*.

<sup>11</sup> See Consultation Paper at paragraphs 8.18 – 8.19.

<sup>12</sup> For information on the Irish National Accreditation Board see <http://www.inab.ie>.

accreditation programmes are a particularly useful technique for ensuring quality control and assurance in the DNA analysis process. These programmes set high standards and procedures and ensure that there is external oversight of compliance with them. The Irish National Accreditation Board (INAB) is the national body with responsibility for accreditation in accordance with the relevant International Organisation for Standardisation ISO 17000 series of standards and guides and the harmonised EN45000 series of European standards. The existing FSL has obtained ISO 17025 accreditation in relation to the work practices and procedures in the processing of cases involving DNA. Consequently, the work of the FSL must comply with the minimum standards set by this programme in analysing DNA. This accreditation programme involves establishing and inspecting protocols and procedures for matters such as documentation, security, methodology, laboratory equipment, calibration, evidence management, reporting, validation methods and training. External auditing is conducted by the INAB. Independent experts in the relevant fields assess the laboratories to ensure compliance with these procedures and regulations. INAB can withdraw accreditation if it finds a lack of compliance with the appropriate standards. The Commission is confident that these independent external reviews of both the laboratory and the database are appropriate and necessary for maintaining an efficient and competent service and thus, reaffirms the view expressed in this respect in the Consultation Paper.

**(iii) Funding and Payments**

4.12 In the Consultation Paper, the Commission suggested that the Gardaí may be required to pay the independent laboratory directly for its services.<sup>13</sup> This, the Commission considered, would ensure that the Gardaí only seek tests from the proposed Forensic Science Agency where it is necessary to do so. In light of submissions received and after further consideration, the Commission considers that a commercial model for the proposed Forensic Science Agency is undesirable. The Commission is of the opinion that any such model would require focused and detailed debate regarding the advantages and disadvantages of what would be a far-reaching transformation of the forensic science service in Ireland. Nonetheless, the Commission considers that adequate funding is vital to the success of the proposed Forensic Science Agency. The Commission understands that its recommendations could produce up to 12,000 samples per year for profiling. In addition, it is expected that the Gardaí will submit an increased amount of stains from crime scenes for profiling and checking against the database. Therefore, extra resources will be needed for the present DNA service in addition to the establishment of a DNA database.

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<sup>13</sup> See Consultation Paper at paragraph 8.15.

**(c) Report Recommendation**

4.13 *The Commission recommends the enactment of legislation to establish an independent statutory body, called the Forensic Science Agency, which would incorporate the Forensic Science Laboratory and be the custodian of the DNA database. This body should be governed by a Board comprising a number of individuals with relevant and varied expertise but who are independent of the Government. This body would be responsible for both the profiling and storage of the crime scene and comparator samples. Its functions in this regard would be subject to review by the Irish National Accreditation Board. A department of the Forensic Science Agency would be in charge of the custody of the DNA database. This body's function of managing the database would be subject to external oversight by an oversight commissioner.*

**(2) Security of the Database and Samples**

4.14 The Commission considers that the security of the retained DNA profiles and samples is of paramount importance when establishing and maintaining a DNA database. Strong security measures must be implemented to ensure that the database and the stored DNA samples are used only for the permitted purposes set out in the legislation.

**(a) Security of the Database**

4.15 In the Consultation Paper, the Commission examined the application of the *Data Protection Act 1988* and the *Data Protection (Amendment) Act 2003* to the information contained on a DNA database.<sup>14</sup> Section 2(a)(ii) of the 2003 Act defines “data” as including “automated data and manual data”. The Commission is satisfied that the definition of “data” in the Acts includes the information contained on a DNA database. Furthermore, the Commission considers that the information contained on a DNA database is “personal data” within the meaning of section 2(a)(iv) of the 2003 Act. This section provides that “personal data means data relating to a living individual who is or can be identified either from the data or from the data in conjunction with other information that is in, or is likely to come into, the possession of the data controller”.<sup>15</sup> In fact, this data could constitute “sensitive personal data” under section 2(a)(i) as it could contain information regarding the racial or ethnic origin of the individual concerned. At present, it seems that the retained biological sample is not considered to be personal data under the 1988 and 2003 Acts. In any event, the Commission considers that there must be compliance with the requirements of the 1988 and 2003 Acts when establishing a DNA database. There are

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<sup>14</sup> See Consultation Paper at paragraphs 8.26 – 8.27.

<sup>15</sup> Section 2(a)(iv) of the *Data Protection (Amendment) Act 2003*.

necessary exceptions in the Acts for the prevention, investigation and prosecution of offences but these are subject to a case by case prejudice test. There is a general exemption in section 8(e) of the 1988 Act from some restrictions provided for in the Acts where processing is required under an enactment. However, the Commission considers that DNA database processing should comply with the *Data Protection Acts 1988 and 2003* and should only rely on the fact that the processing is required under an enactment to a minimum extent.

4.16 The *Data Protection Acts 1988 and 2003* provide that personal data must be obtained and processed fairly. The data must be accurate, complete and where necessary, kept up to date. It must have been obtained for one or more specified, explicit and legitimate purpose and it cannot be further processed in a manner incompatible with that purpose. The data must be adequate, relevant and not excessive in relation to the purposes for which it is provided and should not be kept any longer than is necessary for that purpose.<sup>16</sup> The *Data Protection Acts 1988 and 2003* also specifically provide that “appropriate security measures shall be taken against unauthorised access to, or unauthorised alteration, disclosure or destruction of the data”.<sup>17</sup> Section 2A(1)(c)(i) of the 1988 Act as inserted by section 4 of the 2003 Act allows the processing of this data where it is necessary for the administration of justice. The processing of information on a DNA database would fall within this provision.

4.17 One of the key rights afforded to a person under data protection is the right to access their personal data. Section 5(1)(a) of the 1988 Act exempts access to data “kept for the purpose of preventing, detecting or investigating offences, apprehending or prosecuting offenders...” where the compliance with an access request would be likely to prejudice these matters. It has been pointed out to the Commission during the consultation process that this exemption is not a blanket one and granting access to a person who volunteered a sample would not always be likely to prejudice the investigation of an offence. The same could apply to samples that were taken from convicted persons. Consequently, the Commission considers that the right of access will apply in some cases and provision will have to be made for this by the custodian of the DNA database. The Commission is strongly of the view that the protection afforded by the *Data Protection Acts* is to be welcomed. However, the Commission considers that the retention of genetic information brings with it new challenges to the right to privacy;

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<sup>16</sup> Sections 2(1)(a), 2(1)(b) and 2(1)(c) of the *Data Protection Act 1988* as inserted by section 3 of the *Data Protection (Amendment) Act 2003*.

<sup>17</sup> Section 2(1)(d) of the *Data Protection Act 1988* as inserted by section 3 of the *Data Protection (Amendment) Act 2003*.

consequently, a review of data protection legislation may be necessary in light of the establishment of a DNA database.

4.18 The custodian of the database would have the important function of safeguarding the database by providing appropriate security measures. The Commission does not intend to be prescriptive about the precise measures which should be adopted for this purpose. Instead, the Commission recommends that expert advice be obtained with a view to acquiring information on the most secure mechanism for safeguarding the integrity of the database. Nonetheless, in the Consultation Paper, the Commission provided a number of examples of security mechanisms considered necessary in order to safeguard the database.<sup>18</sup> These include a limitation on the number of people who have access to the database, the use of magnetic strip cards, passwords, fingerprint scanning and possibly even iris or other biometric scanning. In addition, the Commission considers that expert advice on the secure transfer of DNA samples to the proposed Forensic Science Agency from the Garda Síochána and the transfer of match information back to the Garda Síochána is necessary. The Commission accordingly reiterates its recommendations in the Consultation Paper that strong security measures be in place to ensure that the information on the database is used for the permitted purposes and that the custodian of the DNA database be properly resourced for this purpose.

*4.19 The Commission recommends that strong security measures be implemented to ensure that the information on the database is used only for the permitted purposes set out in the legislation. The Commission recommends that in setting up the database, provision should be made for adequate resources to carry out an expert study to determine the precise form that these measures should take. This would include an examination of the transfer of DNA samples to the proposed Forensic Science Agency and the transfer of match information back to the Garda Síochána.*

**(b) Security of the DNA Samples**

4.20 Similarly, the Commission considers it imperative that the crime scene and comparator samples are securely guarded against intrusion. Failure to provide adequate security might result in tampering with samples, thereby leading to the implication of an innocent person in a crime or the exculpation of a perpetrator. The Commission is also concerned that the lack of appropriate security measures could lead to unauthorised agencies accessing the samples and subjecting them to further testing, thereby infringing the individual's privacy rights. The Commission would draw particular attention to the point that the biological sample contains the whole of an individual's DNA and could potentially contain a large amount of very

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<sup>18</sup> See Consultation Paper at paragraph 8.28.

personal information about an individual. The Commission proposes that all DNA samples should be retained by an independent body, namely the proposed Forensic Science Agency. These samples should be retained in secure and appropriate accommodation within the laboratory of the independent agency.

4.21 In the Consultation paper, the Commission provided a number of examples of security mechanisms considered necessary in order to safeguard the retained DNA samples.<sup>19</sup> Suggestions of security measures include the use of identification codes rather than a person's name to catalogue the samples, the storage of the samples in a room that is accessible only by a magnetic strip card and a PIN, and a limitation on the number of people who have access to the samples. The Commission sees no reason to alter this general view. The Commission also recommends that an expert study be carried out in order to make specific recommendations as to precise security mechanisms that should be adopted to guarantee the security of the samples.

4.22 *The Commission recommends that stringent and effective safeguards be put in place to ensure that all biological samples are stored under appropriately secure conditions. An expert study should be carried out to determine the precise form that these measures should take.*

**(c) Criminal Liability**

4.23 In the Consultation Paper, the Commission recommended that an offence of intentionally or recklessly causing the disclosure of the information derived from the samples or the information contained on the database for purposes other than those provided for by legislation should be enacted into law. The Commission strongly reiterates this view here. Such an offence would deter staff of the proposed Forensic Science Agency and others from using information derived from either the DNA sample or DNA profile for purposes other than those permitted by the legislation. An analogy can be drawn with the *Data Protection Acts 1988 and 2003*, which provide that the unlawful disclosure of information is a criminal offence. However, the Commission considers that a specific offence in respect of DNA is necessary. The Commission does not consider that a strict liability regime is required and that an offence of intentionally or recklessly misusing the DNA database would operate as a strong deterrent, thus safeguarding the information contained on the database. This offence should give rise to either a summary conviction or a conviction on indictment. The Commission recommends that a summary conviction could carry a maximum penalty of a fine of €3000 or 6 months imprisonment, or both. The Commission recommends that a conviction on indictment could carry a maximum penalty of a fine of €10,000 or five years imprisonment, or both.

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<sup>19</sup> See Consultation Paper at paragraph 8.32.

The Commission has considered the related question of intentionally or recklessly damaging the retained DNA profiles and samples. In such an unlikely event, the Commission notes that the offence of damaging any property belonging to another in section 2(1) of the *Criminal Damage Act 1991* would adequately deal with this issue. On conviction on indictment, a person is liable to a fine not exceeding £10,000 or a term of imprisonment not exceeding 10 years or both. Accordingly, the Commission has concluded that there is no need to recommend the enactment of a separate offence of intentionally or recklessly damaging DNA profiles/samples.<sup>20</sup>

4.24 *The Commission recommends the enactment of an offence of intentionally or recklessly causing the disclosure of the information derived from the samples or the information contained on the DNA database for purposes other than those provided for by the legislation establishing the DNA database.*

**(d) Destruction of DNA Profiles and Samples**

4.25 The Commission has already recommended that certain categories of profiles and samples should be destroyed in certain specified circumstances.<sup>21</sup> This entails destroying the sample and deleting the profile from the electronic database. Under these recommendations, DNA samples/profiles obtained from a suspect must be destroyed as soon as practicable where proceedings are not instituted against the suspect within 12 months from the taking of the sample and a court order has not been made authorising the continued retention of the profile or sample. Additionally, the DNA profile must be removed from the database and the sample destroyed where proceedings have been instituted and the suspect is acquitted, discharged or the proceedings have been discontinued. DNA samples and profiles obtained from convicted persons must be destroyed as soon as practicable if the conviction is quashed. Furthermore, DNA samples and profiles must be destroyed if a volunteer expressly withdraws consent to the retention of their profile on the DNA database.

4.26 An additional matter to be considered when contemplating the removal of DNA profiles from the database and the destruction of DNA samples is the definition of ‘destruction’. Some definitions of destruction allow for de-identification rather than physical destruction. For example, the term ‘destroy’ in relation to forensic material or information is defined in

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<sup>20</sup> The Commission is conscious of the views expressed in the *Report of the Expert Group on Codification of the Criminal Law*, Department of Justice, Equality and Law Reform (November 2004) on the avoidance of the creation of new specific offences which are already part of the criminal calendar.

<sup>21</sup> See paragraphs 2.67, 2.76, and 2.92 above.

section 3(5) of the New South Wales *Crimes (Forensic Procedures) Act 2000* as

“A person destroys forensic material taken from another person by a forensic procedure, the results of the analysis of the material or other information gained from it (including information placed on the DNA database system) if the person destroys any means of identifying the forensic material or information with the person from whom it was taken or to whom it relates.”<sup>22</sup>

4.27 This definition of destruction has led to some controversy.<sup>23</sup> It is suggested that the destruction of forensic samples and data should mean the thorough destruction of all material and data known to come from the person who is eligible to have their forensic material destroyed. However, the definition of destruction in New South Wales arose on the advice of forensic scientists who explained that once samples have been subjected to the various processes of analysis in a forensic laboratory, it would be extremely difficult to trace all remnants of the samples and destroy them. In addition, DNA analysis is often carried out in batches and difficulties can arise when attempting to destroy a single sample. Alternatively, the numerical code identifying the forensic material could be destroyed, making it impossible to identify the source of the sample or profile. The Commission considers that the privacy of the individual is paramount. If de-identification does not sufficiently protect the privacy of the person from whom the forensic material is obtained, physical destruction may be the most secure option. However, the Commission recommends that this matter be investigated further by an expert group established for this purpose.

4.28 In any event, the Commission considers it imperative that an efficient system be designed to ensure that DNA profiles and samples are destroyed when so required by legislation. Ensuring the destruction of the profiles and samples when required by law avoids the situation that arose in the *Attorney Generals Reference (No. 3 of 1999)*.<sup>24</sup> In the Consultation Paper, the Commission examined the situation in Australia, where suspects’ profiles are entered onto the database system with a default destruction date of 12 months from the date at which the sample was obtained.<sup>25</sup> Two

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<sup>22</sup> Section 3(5) of the *Crimes (Forensic Procedures) Act 2000*.

<sup>23</sup> Australian Law Reform Commission and the National Health & Medical Research Council Report *Essentially Yours; The Protection of Human Genetic Information in Australia* (Report 96, March 2003) recommended that legislation in Australia should be amended to define the destruction of forensic material and information obtained from it in terms of physical destruction of samples and permanent and irreversible de-identification of profiles (Recommendation 41-10).

<sup>24</sup> [2001] 1 All ER 577. See paragraph 2.65 above.

<sup>25</sup> See Consultation Paper at paragraph 8.40.

months before the destruction date, the computer reminds the laboratory of the need to destroy the profile and sample. The laboratory must then contact the police investigators involved to check as to the status of the case. If no extension has been granted under the relevant provision, the sample must be destroyed. The Commission considers that this is a workable approach. In this context, the Australian Law Reform Commission recommended that in the event of a person being eliminated from suspicion or where the decision has been made not to proceed with the prosecution of a person, the police investigators should inform the laboratory of this and the profile and sample should be promptly destroyed.<sup>26</sup> This ensures that the profile and sample are not kept for any longer than absolutely necessary. The proposed Forensic Science Agency would be responsible for the destruction of the profiles and samples in this jurisdiction. The external oversight recommended by the Commission would ensure that this procedure is carried out successfully and efficiently. The Commission accordingly recommends that a system for the destruction of DNA samples and profiles be provided for in the legislation establishing the DNA database.

4.29 *The Commission recommends that an efficient system be designed to ensure that both the DNA profiles and samples are destroyed as provided for by legislation.*

### **C DNA Evidence and Contamination**

4.30 The technical reliability of DNA evidence depends on a number of factors including the quantity and quality of the sample analysed, the laboratory performance in analysing the sample, sample handling, and alternative explanations for a match, including error, kinship, tampering or coincidence. Each of these factors must be taken into account when presenting DNA evidence in court.<sup>27</sup> The Commission is aware that one of the major problems which influence the probative value of DNA evidence is contamination. As DNA testing becomes more sensitive, with the consequence that less biological material is required for a result to be obtained, the likelihood of contamination of a sample by other biological material increases. Contamination may occur at any stage of the collection, transport or analysis of a DNA sample and it is one of the primary reasons for the exclusion of DNA evidence at trial. It is, therefore, imperative to ensure that procedures are in operation that both guarantee and demonstrate

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<sup>26</sup> Australian Law Reform Commission and the National Health & Medical Research Council Report *Essentially Yours; The Protection of Human Genetic Information in Australia* (Report 96, March 2003) Recommendation 43-1.

<sup>27</sup> A more extensive analysis of the use of DNA evidence in court is contained in Chapter 5 below.

the veracity of the DNA analysis. These procedures are necessary at the various stages of the process from crime scene to laboratory to courtroom.

**(1) Laboratory Performance**

4.31 The Commission understands that it is now standard practice for laboratories doing DNA analysis to follow, and to be able to demonstrate that they have followed, appropriate and defensible laboratory procedures and be accredited by an appropriate accreditation authority. The accuracy of DNA analysis depends on the quality control and quality assurance procedures in the FSL. Laboratory accreditation programmes provide an important means of ensuring quality control and assurance in the DNA analysis process, by setting minimum standards and procedures and providing external oversight of adherence to them. The accreditation programme has already been discussed by the Commission in relation to the independent external review of the laboratory.<sup>28</sup> In addition to the external auditing conducted by the Irish National Accreditation Board, the Commission has noted that both internal audits conducted within the FSL and external proficiency trials conducted by outside organisations, monitor the performance of the FSL and ensure compliance with procedures.<sup>29</sup> For these reasons, the Commission is confident that the procedures which provide for oversight of the FSL's performance, in particular those under the Irish National Accreditation Board, comply with best international standards. The Commission accordingly recommends that the proposed independent Forensic Science Agency should be required to follow the same procedures.

4.32 *The Commission recommends that the proposed Forensic Science Agency be required to follow oversight procedures similar to those followed by the current FSL, in particular those provided by the Irish National Accreditation Board. The Commission recommends that the quality control and quality assurance procedures be kept under review to ensure that the appropriate high standards are maintained.*

**(2) Crime Scene Management**

4.33 A former Director of the FSL remarked that:

“The scene of any crime has always been of considerable importance from the point of view of collecting evidence and attempting to recreate what had happened. However, modern technologies which can produce a lot of information from very

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<sup>28</sup> See paragraphs 4.10-4.11 above.

<sup>29</sup> See Consultation Paper at paragraphs 8.49 – 8.51.

small particles of matter have made procedures at a scene very important.”<sup>30</sup>

4.34 In the Consultation Paper, the Commission commended the standard of the procedures adopted by the Gardaí in respect of crime scene examinations.<sup>31</sup> However, the Commission is anxious that these procedures be kept under review to ensure that appropriate standards are being maintained. In the Consultation Paper, the Commission was reluctant to propose any detailed recommendations as to the exact procedures which should be followed in obtaining crime scene samples. However, some suggestions were made. These include the use of barrier clothing, specially designed sampling kits, sealed packaging and labelling. The importance of the Gardaí and the Forensic Science Agency maintaining an accurate record of the chain of evidence in respect of each item was also emphasised.<sup>32</sup> The Commission is aware that an Advisory Forum has been established by the Garda Síochána for the purpose of ensuring that the benefits of forensic science for crime investigation purposes are maximised. It was anticipated that any review of the crime scene examination procedures could be conducted by this Forum or its successor.

4.35 In the Consultation Paper, the Commission emphasised the necessity of adequate training for those involved in the collection and preservation of DNA evidence. The Commission stressed the importance of adequate training for every Garda involved in the process from discovery of the crime scene to the relinquishment of evidence to the Forensic Science Laboratory. The Commission has been informed that improvements have been made in the training of crime scene examiners with new courses being provided and that enhanced training courses in scenes of crime examination will eventually lead to the awarding of diplomas or degrees to suitably trained personnel, when the courses are accredited by third-level institutions. The Commission would naturally welcome such developments and reiterates its recommendations in this respect. The Commission also considers that ordinary Gardaí who may be the first to arrive at a crime scene should be given appropriate training on the basic principles of DNA evidence. This training must include an understanding of DNA profiling, capabilities and limitations. Ideally, training programmes should be competency based with formal assessment and formal authorisation to conduct that work on successful mastery of the competencies tested.<sup>33</sup> Continuing professional

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<sup>30</sup> James Donovan “Recent Developments in Forensic Science” in Paul O’Mahony (ed) *Criminal Justice in Ireland* (Institute of Public Administration 2002) at 473.

<sup>31</sup> See Consultation Paper at paragraph 8.55.

<sup>32</sup> See Consultation Paper at paragraph 8.57.

<sup>33</sup> See *Interpol Handbook on DNA Data Exchange and Practice*. Available at: <http://www.interpol.int/Public/Forensic/dna/handbook.asp>.

development training courses are necessary to maintain an appropriate level of DNA awareness within the Garda Síochána. The Commission is conscious of the fact that DNA evidence is only as good as the individuals who collect, analyse and present the information in court. The Commission notes the need for adequate resources for such training.

4.36 *The Commission recommends that adequate, competency-based training in the identification, preservation and collection of DNA evidence be provided for all members of the Garda Síochána who arrive at the scene of the crime and that higher level training should be provided for specialist crime scene examiners.*

**(3) Elimination Databases**

4.37 The Commission is confident that the establishment of elimination databases would be a significant tool for the detection of innocent or accidental contamination of crime scene samples. One of the major risks of contamination of crime scene samples is from the individuals involved in their collection and analysis. The Commission has been advised that this contamination is best detected by reference to databases containing the DNA profiles of the relevant personnel.

4.38 In the UK, a Police Elimination Database (PED) has been established to help identify contamination in specific cases where it is suspected by the Senior Investigating Officer in the case or the Scientific Support Manager to have occurred. Since the *Police (Amendment) Regulations 2002*, all new police officers are required to provide a DNA sample as a condition of their appointment. The sample is retained for the period of their service with the force. Officers who joined the force before the 2002 Regulations came into force are asked to provide samples for the PED on a voluntary basis. These officers can request the removal of their profiles from the PED at any time without giving a reason. The PED is entirely separate and distinct from the National DNA Database in the UK. It is not subject to speculative searches. The elimination procedure will consist of the comparison of a specific crime scene stain against the specific profile of a named member of staff where there is a genuine belief on the part of the Senior Investigating Officer or the Scientific Support Manager that innocent contamination of that crime scene stain may have taken place. Speculative searches of profiles on the PED against profiles from outstanding crimes in order to identify contamination, or for any other reason, are not carried out.

4.39 By early 2004, 82,094 police personal had provided samples to the PED.<sup>34</sup> Since its inception, profiles from 155 crime scenes have been checked against 709 named individuals on the PED. This has resulted in full

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<sup>34</sup> Forensic Science Service *The National DNA Database Annual Report 2003-2004* at 13. Available at: <http://www.forensic.gov.uk>.

matches being identified with profiles from police personnel for 22 of the scenes and the consequent elimination of the profiles from further investigation.<sup>35</sup> The Commission considers that it would be of great utility to establish such an elimination database in this jurisdiction to reduce loss of time and effort when the DNA profile of a Garda turns up from an accidental crime scene sample.

4.40 In the UK, each supplier to the National DNA Database also maintains a Staff Elimination Database to assist in the detection of inadvertent contamination by personnel in the laboratory during examination of items and DNA analysis. In the Commission's view, such a system is commendable and it is anticipated that staff members of the proposed Forensic Science Agency, who are in a position to cause contamination inadvertently, would be required to provide a DNA sample to a Staff Elimination Database. In addition, the Forensic Science Service in the UK has identified an additional contamination risk from the persons involved in the production of the consumables (tubs, swabs *etc*) used in laboratory analysis.<sup>36</sup> Such contamination tends to be sporadic and affects very few samples. But when it does occur, it could result in misleading information being provided to the police. Staff are encouraged to provide DNA samples for a Manufacturers Elimination Database to assist in identifying the source of such contamination. Similarly, persons involved in work at the scenes of crime, for example, emergency services and ambulance personnel, are encouraged to volunteer a DNA profile to an elimination database. The Commission considers that these are appropriate arrangements and recommends that they be introduced.

4.41 *The Commission recommends the establishment of elimination databases, similar to the Police Elimination Database in the UK. All members of the Garda Síochána and the proposed Forensic Science Agency should be required to contribute their DNA profile to these databases. Additionally, the Commission recommends that persons who work at the scenes of crime and relevant manufacturing staff should be encouraged to volunteer their DNA profiles to an elimination database.*

## **D Information Sharing and the International Dimension**

### **(1) Consultation Paper Recommendation**

4.42 The Commission recommended that the State should only obtain profiles from other jurisdictions where these profiles have been collected and retained in a manner compatible with Irish law. It also recommended that

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<sup>35</sup> Forensic Science Service *The National DNA Database Annual Report 2003-2004* at 13. Available at: <http://www.forensic.gov.uk>.

<sup>36</sup> *Ibid.*

the State should accede to an international database if the profiles present on the database may be lawfully used for these purposes under Irish law. In the event of any profiles being submitted to an international database or exchanged with another jurisdiction, reasonable steps should be taken to ensure that the information disclosed is not used in a manner which infringes Irish law.<sup>37</sup>

**(2) Discussion**

4.43 The recommendations made in the Consultation Paper reflect the Commission's desire to safeguard the right to privacy of individuals whose DNA profiles have been collected and retained. However, the consultation process has highlighted some practical difficulties with the Commission's provisional proposals. It has been suggested that the Commission's recommendations on information sharing are unduly restrictive given that the exchange of information is for intelligence purposes only. It has been emphasised in this respect that it will be necessary to obtain and analyse a further sample before the DNA evidence is admissible in court. It was also suggested that the Commission's recommendations run contrary to the move towards greater co-operation between law enforcement agencies and the emergence of a principle of mutual recognition in the international sphere.

4.44 The Commission is conscious that crime has become an international issue. Close co-operation with other states is necessary in order to solve the increasing levels of transnational crime. It is anticipated that Ireland will be given the opportunity to check unsolved cases against another country's database and to check unsolved cases in other jurisdictions against the Irish database. It is also anticipated that Ireland would contribute towards an international database, once adequate levels of protection are established. Issues regarding DNA profiling and the exchange of information have been debated at both European and international levels. In June 2003, Interpol established an international DNA database of attributable and non attributable DNA profiles (that is from crime scene samples and reference samples) for use by its member states. Countries can add profiles from their national or regional databases and compare these profiles with those supplied by participating Interpol member states. If a matching profile is found, the system alerts the member states involved. It is the responsibility of the member states receiving positive replies to act on the information provided. Access to the Interpol DNA database is agreed by member states in compliance with national legislation, including *Data Protection Acts* and police codes of practice. Member states are also able to restrict access to their DNA profiles to specified countries or law enforcement agencies where appropriate. Participating member states are responsible for the maintenance of the data including the regular removal of

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<sup>37</sup> See Consultation Paper at paragraph 7.54.

profiles. The Interpol database is not intended to be a substitute for countries' national databases. The only profiles submitted should be those of known criminals operating internationally or those of unknown stains found at crime scenes where it is suspected that the offender might be a foreign national.<sup>38</sup> The Commission considers that this international DNA database, established by Interpol, will facilitate the exchange of DNA information between member states and thus, provide a valuable police tool. It is envisaged that once the Irish DNA database is established, consideration should be given to submitting DNA profiles to Interpol, provided that appropriate security measures continue to be guaranteed.

4.45 A range of organisations are currently involved in developing and promoting DNA databases across Europe.<sup>39</sup> Europol has suggested the establishment of a European DNA database. It is important that national databases are compatible with each other if this objective is to be achieved. This involves ensuring countries all use the same fixed set of loci for the purpose of formulating a DNA profile. Compatible systems are a precondition before any international cooperation in respect of DNA can occur in practical terms. In June 1997, the EU Council of Ministers passed a resolution inviting member states to consider establishing national DNA databases.<sup>40</sup> With a view to the exchange of DNA analysis results between member states, the resolution urged member states to build up their databases in accordance with the same standards and in a compatible manner. The Council urged that further study of a system for information exchange should be carried out and the need to establish a European DNA database should be considered once the conditions for the exchange of the DNA analysis results were realised. An appropriate role for Europol would then be considered. In June 2001, the Council of Ministers passed a second resolution defining certain parameters for the exchange of DNA information between member states.<sup>41</sup>

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<sup>38</sup> As discussed in the *Interpol Handbook on DNA Data Exchange and Practice*. Available at: <http://www.interpol.int/Public/Forensic/dna/handbook.asp>.

<sup>39</sup> For example: the European DNA Profiling Group (EDNAP) was established in 1988 with the aim of harmonising DNA technology for crime investigation across the European Union. The Standardization of DNA Profiling in the European Union (STADNAP) group exists to promote co-operation across the EU in order to utilise DNA profiling to detect 'mobile serial offenders'; and the European Network of Forensic Science Institutes (ENFSI) has been established with the purpose of sharing knowledge, exchanging experiences and coming to mutual agreements in the field of forensic science.

<sup>40</sup> Council Resolution of 9 June 1997 on the Exchange of DNA Analysis Results. Official Journal C 193, 24/06/1997 p. 0002 – 0003.

<sup>41</sup> Council Resolution of 25 June 2001 on the Exchange of DNA Analysis Results. Official Journal C 187, 03/07/2001 p. 0001 – 0004.

4.46 The Commission acknowledges the advantages of exchanging data for intelligence purposes, particularly within the European Union. The ability to check unsolved cases against the UK database in particular could greatly aid the Gardaí in the investigation of crime. However, the Commission recognises a number of legislative, technological and ethical problems associated with the exchange of data in this way. Currently, DNA database legislation worldwide differs on many points. Some laws allow for testing of suspects and arrestees, whilst others only allow for testing of certain convicts. Each law has different access, use and privacy provisions. In addition, DNA profiling techniques need to be uniform to facilitate exchange and comparison. However, Europe has developed common provisions regulating the protection of personal data transferred within the European Economic Area and to third states. The Irish *Data Protection Acts 1988 and 2003* provide that the transfer of personal data to a country or territory outside the European Economic Area<sup>42</sup> may not take place unless the country or territory ensures an adequate level of protection for the privacy and the fundamental rights and freedoms of data subjects in relation to the processing of personal data having regard to all the circumstances surrounding the transfer.<sup>43</sup> The EU Commission has prepared a list of countries that are deemed to provide an adequate standard of data protection. If the country does not provide an adequate standard of data protection, then the Irish data controller must rely on one of the eight alternative measures, including the consent of the data subjects, and the use of approved contractual provisions.

4.47 The Commission considers that these arrangements provide some welcome protections when transferring data including DNA profiles. Nonetheless, the Commission is conscious that the current state of co-operation between EU member states in respect of DNA profiles is at quite an early stage of development. At some future point it seems likely that a more detailed common framework may be established, as indeed has occurred in relation to extradition arrangements. These arrangements have been largely superseded by the European arrest warrant procedure, implemented in Ireland by the *European Arrest Warrant Act 2003*. The Commission is aware that the European Arrest Warrant Framework incorporates substantive requirements and significant procedural protections to ensure compatibility with human rights obligations. In the absence of a comparable framework in respect of DNA samples and profiles applicable throughout the EU, the Commission has concluded that it should not make any recommendations which would be of general application. Instead, the

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<sup>42</sup> The EEA comprises the 25 EU states and certain other European Free Trade Association states, namely Norway, Iceland and Liechtenstein.

<sup>43</sup> Section 11 of the *Data Protection Act 1988* as amended by section 12 of the *Data Protection (Amendment) Act 2003*.

Commission has concluded that current bilateral arrangements between, for example the FSL and the UK forensic science authorities, should continue to apply on the basis that the arrangements in place are intended primarily to operate at the level of intelligence gathering as opposed to evidential use.

**(3) Report Recommendation**

4.48 *The Commission recommends that existing arrangements for the sharing of DNA samples and profiles, including those on DNA databases, should continue until the establishment of appropriate framework decisions regarding their exchange, whether agreed at EU level or otherwise.*



## CHAPTER 5 DNA EVIDENCE IN COURT

### A Introduction

5.01 In this chapter, the Commission reviews the role and impact of DNA evidence in court. DNA evidence may be used in criminal proceedings by either the prosecution or the defence. The prosecution may seek to introduce DNA evidence of a match between a bodily sample found at a crime scene and a sample taken from the defendant, to suggest the likelihood that the defendant committed the offence or was at least present at the crime scene. The prosecution gives weight to evidence of such a match by offering statistical evidence of the relative probability that the sample found at the crime scene might have come from any person other than the defendant. Alternatively, the defence may seek to rely on DNA evidence to establish that the crime scene sample does not belong to the defendant or to otherwise dispute the prosecution's evidence.<sup>1</sup>

5.02 DNA evidence has been used in a number of cases in the Central and Circuit Criminal Courts in Ireland. The vast bulk of these cases have tended to be dealt with on the basis of a guilty plea entered by the accused or the DNA evidence has been merely a component part of the evidence.<sup>2</sup> The Commission is mindful of the fact that "forensic DNA works best when, as a result of the work done by the police and the scientists, a case does not go to trial at all, because either a suspect pleads guilty or the DNA analysis exonerates someone from involvement in the crime."<sup>3</sup> Nonetheless, when DNA evidence is presented in court, it can have a compelling effect on the outcome of a case. Caution must be exercised to ensure that the evidence is clearly presented and fully comprehended. A concern has been expressed that the statistics used to analyse and present DNA evidence have the potential to overwhelm the minds of the decision makers, so that no

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<sup>1</sup> Australian Law Reform Commission and the National Health & Medical Research Council Report *Essentially Yours; The Protection of Human Genetic Information in Australia* (Report 96, March 2003) at paragraph 44.1.

<sup>2</sup> For example, in an alleged rape where there is no dispute as to intercourse, but there are opposing positions taken in relation to consent, the DNA evidence extracted from semen stains taken from the alleged victim will be readily admitted by the defence.

<sup>3</sup> Judge Arthur Tompkins *Challenges to DNA in the Courtroom* Interpols's 3<sup>rd</sup> International DNA Users' Conference, November 2003.

independent judgment is made as to the strength of the evidence. On the other hand, commentators have noted that the apparent opaqueness of the science, and the statistics used during the presentation of DNA evidence, may allow the defence to generate unanswered questions where there should be none and establish uncertainty by confusion.<sup>4</sup>

5.03 In reviewing the role and impact of DNA evidence in court, the Commission is conscious of the need to maintain, as far as possible, consistency between the treatment of DNA evidence and other evidence, particularly other forensic evidence. Bearing this in mind, the Commission has selected a number of key issues which are particularly relevant to DNA evidence. This chapter is divided into 6 parts; the probative value of a DNA match, presentation of statistical evidence, pre-trial evidential hearings, judicial warnings, corroboration of DNA evidence and illegally and unconstitutionally obtained evidence.

## **B Probative Value of a DNA Match**

5.04 The probative value of a DNA match and the reliability of DNA evidence in court are examined in detail in the Consultation Paper.<sup>5</sup> This section will briefly summarise some of the relevant issues identified by the Commission in the Consultation Paper by way of clarification.

5.05 First, it is important to emphasise that there is widespread acceptance within the scientific community of the reliability of the science of DNA evidence in general. No doubt has been cast on the theoretical underpinnings of DNA profiling or its ability to assist in identifying the source of a DNA sample. Courts worldwide have accepted the accuracy and reliability of DNA technology in general and have admitted it as evidence. In Ireland, the reliability of the DNA profiling technology was accepted in *The People (DPP) v Mark Lawlor*.<sup>6</sup> This was the first case in the Irish courts where DNA evidence was strenuously challenged. The evidence withstood that challenge and was ultimately heard by the jury.<sup>7</sup>

5.06 In the Consultation Paper, the Commission observed that DNA evidence is often perceived by the public as unique and infallible.<sup>8</sup> Unfortunately, this is not the case. The Commission notes the views

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<sup>4</sup> Judge Arthur Tompkins *Challenges to DNA in the Courtroom* Interpol's 3<sup>rd</sup> International DNA Users' Conference, November 2003.

<sup>5</sup> See Consultation Paper at paragraphs 9.03-9.11.

<sup>6</sup> Central Criminal Court 2 December 1995, Court of Criminal Appeal 26 February 2001.

<sup>7</sup> Smyth "DNA in the Dock" [1995] *Lab Link* Volume 2 Issue 6.

<sup>8</sup> See Consultation Paper at paragraph 9.03.

expressed in 2003 by the Court of Criminal Appeal in *The People (DPP) v Allen*.<sup>9</sup>

“Expert evidence comparing DNA profiles is a comparatively recent scientific technique and indeed it would appear that it is still being perfected. As in many scientific advances, the jury have to rely entirely on expert evidence. One of the primary dangers involved in such circumstances is that, the matter being so technical, a jury could jump to the conclusion that the evidence is infallible. That, of course, is not so in the case of DNA evidence, at least in the present state of knowledge.”<sup>10</sup>

The Commission is equally anxious to emphasise that science is no more immutable than human nature. Laboratory performance and sample handling are major factors which influence the accuracy of DNA analysis. Laboratory staff could make errors in conducting DNA analysis, in interpreting or reporting the results of the analysis, or in entering the resulting DNA profile into the DNA database. While quality control and quality assurance procedures can be introduced to minimise the opportunity for error during analysis or interpretation, the potential for human error cannot be fully eliminated.

5.07 Furthermore, even where there is no error in handling or analysing the DNA sample and there is indeed a match, alternative explanations for this match may exist. A match between the crime scene profile and a defendant's profile does not prove that the defendant committed the particular offence. There may be several explanations for a match including the possibility that the sample was planted at the crime scene, or was innocently left at the crime scene before, during or immediately after the offence. There is also the possibility that the sample originated from a close relative of the suspect or from an unrelated person who, by coincidence, has the same DNA profile as the suspect. It is necessary to keep in mind that DNA analysis creates a profile which is based on ten loci only. A DNA profile is not a profile of all 3.3 billion pieces of code found in the DNA. While a profile of all 3.3 billion pieces of code would be unique except in the case of identical twins, a profile based on ten loci cannot be assumed to be unique. Nonetheless, it is evident that the present DNA profiling system is indicative of a probability in the order of less than one in a thousand million or less than one in a billion that a randomly selected, unknown, unrelated person would share this profile with the matching person.

5.08 For these reasons, DNA evidence is fallible. Even at very high levels of probability, errors will arise from time to time. It is therefore very

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<sup>9</sup> [2003] 4 IR 295.

<sup>10</sup> *Ibid* at 299.

important to emphasise at this point that whilst DNA evidence is a very valuable police tool, it is not a substitute for proper police investigation and evidence gathering. As observed by the current Director of the Forensic Science Laboratory, “DNA is indeed a powerful aid but must be used in conjunction with good police intelligence and investigation”.<sup>11</sup>

## **C Presentation of Statistical Evidence**

### **(1) Consultation Paper Recommendation**

5.09 In the Consultation Paper, the Commission recommended that following consultation with an expert group on the statistical presentation of a DNA match, guidance should be provided in the form of rules of court or a code of practice on the presentation of a DNA match statistically. The Commission further recommended that whatever guidelines on the statistical presentation of the significance of a match are decided on, the judge in summing up the evidence should alert the jury to the fact that the estimates are not intended to be precise, that they are the products of mathematical and scientific theory, that they do not purport to define the likelihood of guilt and that the statistical evidence must be considered along with all the evidence in the case.<sup>12</sup>

### **(2) Discussion**

5.10 In the Consultation Paper, the Commission considered the complexities of presenting statistical evidence in court.<sup>13</sup> This is particularly relevant with regard to the presentation of DNA evidence as a statistical presentation of the significance of a match is required. Unlike fingerprint identification, where the expert states that he or she is certain that a particular crime mark was made by the originator of a given exemplar print, a DNA profiling match is presented by means of a numerical statement, typically a ‘match probability’. In other words, a fingerprint expert may give an opinion as to whether or not the defendant left a crime mark; a DNA scientist may not give an opinion as to whether or not the defendant left a crime stain.<sup>14</sup>

5.11 Once a match has been reported between two DNA profiles, that is when the same alleles are found to be present at all ten loci tested, it is necessary to interpret the significance of the match in order to give weight to

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<sup>11</sup> Willis “DNA in the Investigation of Crime” *Communiqué: An Garda Síochána Management Journal* (March 2003) 3 at 9.

<sup>12</sup> See Consultation Paper paragraph 9.44.

<sup>13</sup> See Consultation Paper at paragraphs 9.33-9.43.

<sup>14</sup> Evett, Foreman, Jackson and Lambert “DNA profiling: A discussion of issues relating to the reporting of very small match probabilities” (2000) *Criminal Law Review* 341.

the evidence. To do this one must determine how common or rare a particular profile is in the population or how frequently it is expected to occur. An evaluation of the rarity of a profile is made with the aid of frequency databases. In other words, a sample population database containing the profiles of 300 of the Irish population is used to estimate how often an allele occurs within the population. Each allele may be relatively common. What results in a profile being a rare occurrence is the combination of the ten loci, each with two alleles, each of which may be common but combine into a rare total. Typically, this probability could be in the order of 1 in several billions, which implies that any one profile is likely to be very rare in the general population, if not unique.

5.12 These statistics must be presented in court in a clear and comprehensive fashion. Scientists usually present their statistical calculations in one of two ways. First, they can present it as a ‘match probability’. The match probability is the probability that a randomly selected, unknown, unrelated person would have the same DNA profile as the suspect. The smaller the probability of an adventitious match, the greater the likelihood that the two samples came from the same person. The forensic scientist requires some knowledge of the frequency within which the alleles occur within a population, and so population databases are used for this calculation. The Irish and UK laboratories quote the probabilities in court as being in the order of one in a thousand million or one in a billion. In calculating any match probabilities, the effects of relatedness should be factored in. There is a far greater probability of a chance match occurring in the event of the parties being relatives than if they are strangers. The ‘likelihood ratio’ is an alternative means of evaluating the prospect of a chance match. This involves conducting a measure of the strength of the evidence regarding the hypothesis that the two profiles came from the same source. It is the ratio of the probability of a match if the DNA in the crime scene sample and that from the suspect came from the same person, to the probability of a match if they came from different persons. This approach is used in Ireland in cases where the DNA profile is mixed or the defence specifically requests the use of this method.

5.13 In the Consultation Paper, the Commission examined an error that is commonly made in presenting statistical evidence known as the ‘prosecutor’s fallacy’.<sup>15</sup> This error could be made by the forensic scientist in presenting the evidence or by counsel or the judge in summing up the evidence. Or it could be made by the jury in applying the evidence even though the evidence has in fact been presented and summed up correctly. It is crucial that judges and counsel in cases involving DNA evidence both

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<sup>15</sup> This error was highlighted in the case of *People v Collins* (1968) 68 Cal 2d 319, 66 Cal Rptr 497, 438 P 2d 33. See the Consultation Paper at paragraphs 9.37-9.38.

guard against making the prosecutor's fallacy explicitly and warn jurors against making it privately.<sup>16</sup> The 'prosecutor's fallacy' is that the statistics of the match necessarily translate into the equivalent chance of the accused being guilty. For example, if the frequency of a particular DNA profile is one in a billion and there is a match between the DNA profile of the suspect and the DNA profile of a forensic sample from the crime scene, one way of presenting this would be: "the chance of obtaining this DNA profile if the DNA in the crime sample came from an individual other than the suspect is one in a billion". However, this is sometimes inaccurately presented in terms such as the following: "there is only a one in a billion chance the suspect is innocent". A more subtle, but equally misleading, variation would be: "the chance that the crime sample came from a person other than the suspect is one in a billion".<sup>17</sup> Counsel and judges must be made aware of how to approach the interpretation of statistical evidence so as to avoid this error. The judge should highlight to the jury that the match probability expressed by the forensic scientist is the probability that a randomly selected, unknown, unrelated person would have the same DNA profile as the suspect rather than the probability that the accused did not commit the crime.

5.14 In the Consultation Paper, the Commission noted the solution adopted in the UK concerning the manner in which statistical evidence should be presented.<sup>18</sup> In *R v Doheny and Adams*,<sup>19</sup> the court made specific recommendations as to how such frequencies should be presented in order to avoid confusion and lend appropriate weight to the forensic evidence. These guidelines detail the manner in which the significance of a match should be statistically presented. The complexities of the Bayes Theorem<sup>20</sup> are avoided and the guidelines ensure that the 'prosecutor's fallacy' is consigned to legal history. However, the Consultation Paper highlights some of the problems with these guidelines, including the use of frequency statements and the impact of relatedness.<sup>21</sup> As a result, the Commission does not recommend the adoption of these guidelines.

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<sup>16</sup> Balding and Donnelly "The Prosecutors Fallacy and DNA Evidence" (1994) *Criminal Law Review* 711 at 712.

<sup>17</sup> House of Commons, Science and Technology Committee *Forensic Science on Trial* Seventh Report of Session 2004-05 at 70.

<sup>18</sup> See Consultation Paper at paragraphs 9.40-9.43.

<sup>19</sup> (1997) 1 Cr App R 369.

<sup>20</sup> This is a standard mathematical formula which essentially explains how to assess information such as evidence within the laws of probability.

<sup>21</sup> See Consultation Paper at paragraphs 9.40-9.41.

5.15 Current UK Forensic Science Service policy is to quote a match probability in a statement along the lines of:

“If the DNA in the crime sample had come from some unknown person unrelated to the defendant, the probability of a match would be of the order 1 in X (the relevant figure)”<sup>22</sup>.

However, the concept of a match probability has drawn criticism from some on the grounds that there is still too much potential for misinterpretation by the jury. A working group was set up in the UK to offer advice on a more appropriate way of communicating DNA evidence to the courts. The group has agreed a provisional form of words that scientists should use when addressing DNA evidence:

“The probability that an unknown person, unrelated to the defendant, would have the same profile as the crime sample is 1 in X (the relevant figure)”<sup>23</sup>.

5.16 It is apparent that there is still a great deal of confusion regarding the best approaches for the presentation of statistical evidence to juries. The adversarial nature of the court room, where there may be two groups of experts presenting conflicting evidence, encourages jury confusion and misunderstanding. The Commission agrees with the views expressed by the House of Commons Science and Technology Committee that there is significant room for improvement in the way that statistical evidence, including risks and probabilities, is presented to juries. In order for this to occur, there needs to be a better understanding of the forms of wording and presentation that are easiest to understand, and least misleading, to members of the general public.<sup>24</sup> The Commission does not propose to make any recommendation with regard to the statistics that should be used in presenting a DNA match, but recommends that this decision be informed by research. In this regard, the Commission continues to support the proposal made in the Consultation Paper that an expert group be set up to examine the manner in which the statistics should be presented to the jury. Following this, guidance should be provided in the form of a professional code of practice on the presentation of a DNA match statistically. The Commission considers that it must be made sufficiently clear to a jury that the estimates are not intended to be precise, that they are the products of mathematical and scientific theory, not concrete facts, that they do not purport to define the likelihood of guilt, that they should only be used to form a notion of the rarity of the genetic profile of the accused and most importantly, that the

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<sup>22</sup> House of Commons, Science and Technology Committee *Forensic Science on Trial* Seventh Report of Session 2004-05 at 71.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

DNA evidence must be considered along with all the evidence in the case relating to the issue of identification.

**(3) Report Recommendation**

5.17 *The Commission recommends that following consultation with an expert group on the statistical presentation of a DNA match, guidance should be provided in the form of a professional code of practice on the presentation of a DNA match statistically.*

**D Pre-Trial Evidential Hearings**

**(1) Consultation Paper Recommendation**

5.18 In the Consultation Paper, the Commission recommended that if an issue as to the admissibility of DNA evidence is likely to arise or arises in a case, then consideration should be given to dealing with such an issue at a preliminary hearing or at an early hearing if this is just and convenient in the particular circumstances.<sup>25</sup>

**(2) Discussion**

5.19 The Commission has emphasised that a DNA match, while probative, is not irrefutable. The Irish courts have held DNA evidence in general to be admissible. This was accepted in Ireland in *The People (DPP) v Mark Lawlor*.<sup>26</sup> However, DNA evidence will not be sufficiently reliable to be admitted into court in all cases. The circumstances in which a match will be held inadmissible due to its unreliability have not been spelt out in the Irish courts.

5.20 In the Consultation Paper, the Commission examined the legal situation in various countries, including the United States<sup>27</sup>, the United Kingdom<sup>28</sup> and Australia<sup>29</sup> with regard to the admissibility of DNA evidence in court.<sup>30</sup> It appears that general international practice is to hold a pre-trial hearing to decide on the admissibility of the DNA evidence in question. The Commission considers that holding an evidential hearing to decide whether the DNA match is sufficiently reliable to be admitted would simplify and speed up the trial process. Issues such as laboratory errors and sample

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<sup>25</sup> See Consultation Paper at paragraph 9.17.

<sup>26</sup> Central Criminal Court 2 December 1995. Criminal Court of Appeal 24 February 2001.

<sup>27</sup> See *People v Castro* (1989) 545 NYS 2d 985 (New York Supreme Court).

<sup>28</sup> See *R v Doheny and Adams* (1997) 1 Cr App R 369.

<sup>29</sup> See *R v Tran* (1990) 50 A Crim R 233.

<sup>30</sup> See Consultation Paper at paragraphs 9.13-9.14.

contamination could be dealt with pre-trial which would avoid the problem of leaving conflicting expert testimony about the reliability of specific DNA testing methods as a factual matter for the jury to decide.

5.21 The Commission has noted the general support that exists in Ireland for a pre-trial mechanism to facilitate clarification and resolution of problems which might affect the trial. The Working Group on the Jurisdiction of the Courts has noted the absence of an established tradition in this jurisdiction of pre-trial preparation arrangements.<sup>31</sup> However, the Working Group agreed that

“A pre-trial procedure has the potential to reduce the need for determination in the course of trial, by way of a *voir dire*, of issues of admissibility of certain categories of evidence. Clearly some admissibility issues may arise during, or may appropriately only be resolved at the trial itself. Others such as the determination of the validity of a warrant or other legal instrument, or of evidence within a chain, may be disposable in advance of a trial, and a pre-trial hearing should provide an effective vehicle for this.”<sup>32</sup>

The Working Group recommended that a preliminary hearing should be introduced in all cases on arraignment. Such a hearing would serve as a means of concentrating the efforts of the prosecution and the accused in resolving those issues which it would be proper and feasible to finalise in advance of trial.<sup>33</sup> The Commission supports the opinions expressed by the Working Group and notes their relevance in relation to DNA evidence in court.

5.22 Similarly, a recent report by the Joint Committee on Justice, Equality, Defence and Women’s Rights emphasised the need for a pre-trial procedure in Ireland.<sup>34</sup> The Joint Committee recommended that consideration should be given to the introduction of a Plea and Directions Hearing consistent with the constitutional rights of an accused.<sup>35</sup> A Plea and Directions Hearing is a UK model, the purpose of which is to identify the issues between the parties, establish the pleas of the defendants and assess the likely duration of the trial. It provides a forum for parties to indicate

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<sup>31</sup> Working Group on the Jurisdiction of the Courts *The Criminal Jurisdiction of the Courts* The Courts Service (May 2003) at paragraph 747. Available at [www.courts.ie](http://www.courts.ie).

<sup>32</sup> *Ibid* at paragraph 774.

<sup>33</sup> *Ibid* at paragraphs 775-776.

<sup>34</sup> Joint Committee on Justice, Equality, Defence and Women’s Rights *Report on a Review of the Criminal Justice System* (July 2004) at paragraphs 68-75.

<sup>35</sup> *Ibid* at paragraph 74.

legal issues which may arise at the trial, establish what expert or unusual evidence will be called by either side, make provision for the television/video facilities necessary for the trial and generally aims to have the business of the court as well organised as possible. The House of Commons Science and Technology Committee agreed that

“Pre-trial meetings to identify areas of agreement and disagreement between experts must be held as a matter of routine; it is a false economy not to allow enough time for full discussion at this stage.”<sup>36</sup>

The Committee noted that effective use of pre-trial meetings should reduce the potential for juries to become confused by unnecessary adversarial questioning.<sup>37</sup>

5.23 The Commission continues to support the concept of a pre-trial mechanism, particularly in relation to DNA evidence. Issues such as the risk of laboratory error, the method of DNA analysis used and the basis of subsequent statistical calculation should where possible, be examined before trial to decide if the evidence should be admitted. Such a procedure would avoid the problem of conflicting expert testimony being presented to the jury. Furthermore, the Commission considers that it is also important to ensure that a written record of such an evidential hearing be created and published. Valuable jurisprudence in respect of DNA evidence would be of great assistance to future judges dealing with similar DNA evidence difficulties.

### **(3) Report Recommendation**

5.24 *The Commission recommends that if an issue as to the admissibility of DNA evidence is likely to arise or arises in a case, then consideration should be given to dealing with such an issue at a preliminary hearing or at an early hearing if this is just and convenient in the particular circumstances.*

## **E Judicial Warning**

### **(1) Consultation Paper Recommendation**

5.25 In the Consultation Paper, the Commission recommended that it should be left to the trial judge to decide whether a judicial warning on the DNA evidence is required in any particular case.<sup>38</sup>

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<sup>36</sup> House of Commons Science and Technology Committee *Forensic Science on Trial* Seventh Report of Session 2004-05 at 68.

<sup>37</sup> *Ibid.*

<sup>38</sup> See Consultation Paper at paragraph 9.50.

**(2) Discussion**

5.26 In the Consultation Paper, the Commission examined the question of whether a judicial warning should be given in all cases that involve DNA evidence. It has been suggested that such a warning is necessary due to the complex nature of the presentation of DNA evidence in court. Concerns have been expressed that a jury may fail to understand the evidence presented to them or fail to consider the DNA match in the light of all the other evidence in the case. One method of allaying these concerns would be to require the trial judge to give a direction to the jury, at the end of the trial, on the probative value of DNA evidence.

5.27 In the Consultation Paper, the Commission acknowledged that there are merits in requiring a basic standard direction in all cases in which a DNA match is involved, subject to adjustments to cover the actual facts and issues in the case.<sup>39</sup> Such a warning could assist the jury in weighing the complex evidence presented in court and ensure that false conclusions are not reached. However, the Commission has concluded that a standard warning is unnecessary, that it could unduly fetter the trial judge's discretion and may have the effect of adding further complexity to the case. The Commission acknowledges that while there could be particular circumstances involving DNA evidence which would call for a special warning, this would depend on the facts of the case. The Commission does not seek to impose a general obligation on the trial judge to give such a warning, but would echo the general approach taken by the Court of Criminal Appeal in *The People (DPP) v Allen*<sup>40</sup> in this respect.

**(3) Report Recommendation**

5.28 *The Commission recommends that it should remain for the trial judge to decide whether to advise the jury on the probative value of DNA evidence in any particular case.*

**F Corroboration of DNA Evidence**

**(1) Consultation Paper Recommendation**

5.29 In the Consultation Paper, the Commission did not recommend that there should be a prohibition on convicting on DNA evidence alone. Rather, it recommended that in all cases where it is sought to rely on DNA evidence alone, the jury should be warned of the dangers of convicting on this evidence in the absence of other supporting evidence.<sup>41</sup>

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<sup>39</sup> See Consultation Paper at paragraph 9.46.

<sup>40</sup> [2003] 4 IR 295. See paragraph 5.06 above.

<sup>41</sup> See Consultation Paper at paragraph 9.27.

**(2) Discussion**

5.30 In the Consultation Paper, the Commission considered whether DNA evidence is sufficient on its own to warrant a conviction.<sup>42</sup> The Commission acknowledges that this issue will only arise on rare occasions given that in the great bulk of cases, there will be some other evidence to link the accused to the crime or crime scene. However, such a case arose before the Central Criminal Court, in *The People (DPP) v Howe*,<sup>43</sup> where the entire evidence relied upon by the prosecution was a DNA profile generated from a bloodstain found upon a piece of glass, which a gunman had put his hand through to fire at the deceased. Butler J, in withdrawing a case from the jury, did not invoke any express ruling that DNA evidence should not be used on its own to ground a conviction. These types of cases may become more frequent with the establishment of a DNA database.

5.31 In the Consultation Paper, the Commission observed that certain types of evidence are seen as particularly weak or suspect and so additional supportive or corroborative evidence is required.<sup>44</sup> In these situations, two solutions have been adopted. The first is the requirement of corroborative evidence. This corroborative evidence would be required by law, in other words, the corroborative evidence must actually be present in order for the jury to convict. The second solution is a corroboration warning. In such cases, the jury is advised not to convict in the absence of corroboration but if they are satisfied of the accused's guilt beyond reasonable doubt, they can convict even in the absence of corroborative evidence. These warnings can be mandatory or discretionary.

5.32 The Commission has emphasised that a DNA match does not always conclusively establish the guilt of the accused.<sup>45</sup> In the Consultation Paper, the Commission noted that while supporting evidence of a DNA match has been perceived as desirable in the UK, no court in that jurisdiction has actually held that there should be a mandatory requirement of corroboration in all cases where DNA evidence is sought to be relied on without any independent material evidence. Each case is considered on an individual basis in order to decide if corroboration is necessary in the particular case.<sup>46</sup> In addition, the Commission observed that there is no

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<sup>42</sup> See Consultation Paper at paragraphs 9.18-9.26.

<sup>43</sup> *Irish Times* 15 October 2003, Central Criminal Court (Butler J).

<sup>44</sup> See Consultation Paper at paragraph 9.18.

<sup>45</sup> See paragraphs 5.06-5.08 above.

<sup>46</sup> See Consultation Paper at paragraph 9.21.

requirement for additional evidence in the cases of other less reliable forms of evidence including identification evidence and accomplice evidence.<sup>47</sup>

5.33 The Commission has acknowledged that while it is accepted that in a large volume of cases, DNA evidence alone will not be enough to ground a conviction, it is evident that a DNA match could, in certain instances, prove the guilt of the defendant beyond reasonable doubt.<sup>48</sup> An example is given in the Consultation Paper of such an instance where a rape victim is found dead covered with the blood of the accused and with traces of his semen in her vagina.<sup>49</sup> A DNA evidential hearing could provide an adequate means of ensuring that the evidence is sufficiently reliable before being introduced. Whether corroboration is necessary should be left to the judge to decide on the basis of the facts in each individual case. Consequently, the Commission does not recommend that there should be a prohibition on convicting on DNA evidence alone.

5.34 However, the Commission considers that due to the factors that can impact on the probative value of a DNA match and the perceived infallibility of DNA evidence, it may be appropriate that a warning should be given of the dangers of convicting on DNA evidence alone. However, the Commission considers that any warning should be left as a matter for the general discretion of the trial judge as already suggested.<sup>50</sup>

**(3) Report Recommendation**

*5.35 The Commission does not recommend that there should be a prohibition on convicting on DNA evidence alone. The Commission recommends that in all cases where it is sought to rely on DNA evidence alone, it should remain a matter of discretion for the trial judge whether the jury should be warned of the dangers of convicting on this evidence in the absence of other supporting evidence.*

**G Illegally and Unconstitutionally Obtained Evidence**

**(1) Consultation Paper Recommendation**

5.36 In the Consultation Paper, the Commission recommended that, as at present, where DNA evidence is obtained illegally, but not in breach of a person's constitutional rights, the trial judge should be empowered to determine, as a matter of discretion, whether to admit it in evidence.<sup>51</sup>

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<sup>47</sup> See Consultation Paper at paragraph 9.22.

<sup>48</sup> See Consultation Paper at paragraphs 9.23-9.24.

<sup>49</sup> See Consultation Paper at paragraph 9.24.

<sup>50</sup> See paragraph 5.28 above.

<sup>51</sup> See Consultation Paper at paragraph 9.31.

**(2) Discussion**

5.37 In the Consultation Paper, the Commission considered whether a match obtained through a DNA profile which is acquired and retained in breach of the rules which govern how it is to be obtained and retained on the national database, should be admissible in court.<sup>52</sup> The Commission confirmed that the situation would in essence depend on whether the breach of the rules is unconstitutional or illegal. The current legal situation in Ireland is that if evidence is obtained as a result of a deliberate and conscious violation of a suspect's privacy or bodily integrity rights, any evidence obtained from the breach would automatically be excluded, in the absence of extraordinary excusing circumstances.<sup>53</sup> However, if the evidence is illegally as opposed to unconstitutionally obtained, the evidence would not be automatically inadmissible. In such instances, the judge has discretion in deciding whether to admit the evidence to the court.<sup>54</sup> Therefore, if DNA evidence has been obtained in breach of an individual's constitutional rights, this evidence will be inadmissible except in extraordinary excusing circumstances. However, if the DNA evidence has been obtained illegally, but not in breach of an individual's constitutional rights, then the trial judge will have discretion whether to admit the evidence in court.

5.38 This issue of the admissibility of illegally or unconstitutionally obtained evidence is particularly significant when one considers the Commissions recommendations regarding the removal of suspect's profiles from the database and the destruction of samples. The Commission has recommended the removal of suspect's profiles from the database and the destruction of samples on similar lines to those set out in section 4 of the *Criminal Justice (Forensic Evidence) Act 1990*.<sup>55</sup> In brief, the profile must be removed from the database and both the profile and sample destroyed where proceedings for an offence are not instituted against the person from whom the sample was taken within 12 months of the taking of the sample. In addition, the DNA profile must be removed from the database and the sample destroyed where proceedings have been so instituted and the person is acquitted or discharged or the proceedings have been discontinued. Difficulties may arise if these profiles are not removed from the database on time and a cold hit results. This problem arose in the UK, when a match was made between an improperly retained profile and a crime scene profile on the DNA database. This issue was considered by the House of Lords in

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<sup>52</sup> See Consultation Paper at paragraphs 9.28-9.30.

<sup>53</sup> This follows from the principle set down in *The People (DPP) v Kenny* [1990] IR 110 and *The People (Attorney General) v O'Brien* [1965] IR 142.

<sup>54</sup> See Supreme Court decisions *The People (Attorney General) v O'Brien* [1965] IR 142, *The People (DPP) v Mahon* [1986] IR 393.

<sup>55</sup> See paragraphs 2.67-2.69 above.

*Attorney General's Reference No. 3 of 1999*.<sup>56</sup> The House of Lords overturned the Court of Appeal decision and ruled that it should be left to the discretion of the trial judge as to whether to admit the evidence in these circumstances.<sup>57</sup> It is unclear whether the Irish courts would reach the same conclusion if a similar situation were to arise here. Much would depend on whether the DNA profiles and samples are considered to have been retained illegally or in breach of an individual's constitutional rights. In any event, the Commission considers that DNA evidence should receive the same treatment as other forms of evidence. As a result, where DNA evidence is obtained illegally, but not in breach of an individual's constitutional rights, the trial judge would be empowered to determine, as a matter of discretion, whether to admit the evidence.

**(3) Report Recommendation**

5.39 *The Commission recommends that, as at present, where DNA evidence is obtained illegally, but not in breach of a person's constitutional rights, the trial judge should be empowered to determine, as a matter of discretion, whether to admit it in evidence.*

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<sup>56</sup> [2001] 1 All ER 577.

<sup>57</sup> Section 82 of the *Criminal Justice and Police Act 2001* was introduced shortly after this decision. This section amended the section 64 of the *Police and Criminal Evidence Act 1984* and allowed for the indefinite retention of samples and profiles from individuals who had not been prosecuted, or who had been acquitted.



## CHAPTER 6 SUMMARY OF RECOMMENDATIONS

### **A Chapter 1: Establishing a DNA Database**

6.01 The Commission recommends the establishment of a limited, rather than comprehensive, DNA database. [Paragraph 1.20]

### **B Chapter 2: Purpose and Scope of the DNA Database**

6.02 The Commission recommends that the purposes of the database should be stated in precise terms in primary legislation and that any change to its purpose or scope would also be prescribed by further primary legislation. [Paragraph 2.04]

6.03 The Commission recommends that the database should be used for the purposes of criminal investigations or proceedings. The specific purposes for which the database may be used should be detailed in legislation. [Paragraph 2.09]

6.04 The Commission recommends that the profiles of deceased persons may be matched against the suspects, convicted persons and volunteers indexes of the database for the purposes of identifying these persons and not for any other purpose such as paternity determination. The Commission recommends that the profile of a deceased person may be matched against the crime scene index where a court authorises this on the basis that there are reasonable grounds for suspicion that the deceased was responsible for a crime and it is an appropriate order to make having regard to all the circumstances of the case. [Paragraph 2.14]

6.05 The Commission recommends that in the event of a person being so severely injured as to be unable to indicate his or her identity, a person with a proper interest in the matter should be entitled to make a High Court application seeking the identification of the person from the suspects, convicted persons and volunteers indexes of the DNA database. [Paragraph 2.17]

6.06 The Commission recommends that the taking of DNA samples should only occur under a clear legislative framework. [Paragraph 2.21]

6.07 The Commission recommends that legislation should provide for the power to obtain an additional sample in the event of the first sample

being insufficient or unsatisfactory, or where the first sample is contaminated, destroyed or lost. [Paragraph 2.26]

6.08 The Commission recommends that the explanation for taking samples should be given in a readily understandable manner, using ordinary language. [Paragraph 2.29]

6.09 The Commission recommends that safeguards similar to those recommended by the Human Rights Commission, in respect of the taking of bodily samples, should be provided for in a code of practice. [Paragraph 2.32]

6.10 The Commission recommends that an individual should be subject to a standard sampling procedure such as mouth swabbing. If possible, an alternative option should be made available to the individual where there is real and genuine opposition to the procedure in question. [Paragraph 2.34]

6.11 The Commission recommends the implementation of safeguards to ensure that the power to use reasonable force is not arbitrarily exercised. [Paragraph 2.37]

6.12 The Commission recommends that a member of the Garda Síochána authorising the taking of a DNA sample for the purposes of generating a DNA profile to be placed on the DNA database need not have reasonable grounds for believing that the sample will tend to confirm or disprove the involvement of the person from whom the sample is taken in the said offence. [Paragraph 2.41]

6.13 The Commission does not recommend any amendment to the present position by which DNA sampling is limited to offences for which an individual may be detained under section 30 of the *Offences Against the State Act 1939*, section 4 of the *Criminal Justice Act 1984* or section 2 of the *Criminal Justice (Drug Trafficking) Act 1996*. [Paragraph 2.47]

6.14 The Commission recommends that there should be a review of the statutory procedures for sampling with a view to consolidation. [Paragraph 2.49]

6.15 The Commission recommends that the DNA profiles of suspects may be temporarily retained on the DNA database. A suspect's profile must be removed from the database and both it and the DNA sample destroyed as soon as practicable after:

- 12 months have elapsed since the sample was taken and proceedings for any offence in respect of which a person could be detained under section 30 of the *Offences Against the State Act 1939*, section 4 of the *Criminal Justice Act 1984* or section 2 of the *Criminal Justice (Drug Trafficking) Act 1996* have not been instituted against the suspect or

- Proceedings have been instituted and the person is acquitted or discharged or the proceedings are discontinued. [Paragraph 2.67]

6.16 In addition, the Commission recommends that if a court is satisfied, on an application being made to it on behalf of either the Director of Public Prosecutions or the person from whom the sample was taken, that there is good reason why the relevant sample or profile should not be destroyed, the court may by order authorise the retention of the sample or profile for such purpose or period as it directs. [Paragraph 2.68]

6.17 If a suspect is convicted of an offence in respect of which a person could be detained under the 1939, 1984 or 1996 Act, the DNA profile may be retained indefinitely on the DNA database. [Paragraph 2.69]

6.18 The Commission recommends that a person convicted of an offence for which the detention provisions of the Offences Against the State Act 1939, the Criminal Justice Act 1984 or the Criminal Justice (Drug Trafficking) Act 1996 apply, may be subject to DNA sampling without his or her consent. There should be no need to show that the taking of a sample was required to prove or disprove involvement in an offence or to prove that it is suspected that the convicted person committed an offence in addition to the offence which caused the incarceration. The corresponding profile may be indefinitely retained on the convicted persons index of the database. The Commission also recommends that, in the event of a DNA sample being obtained after the person is convicted, both the sample and the DNA profile should be destroyed if the conviction is subsequently quashed. [Paragraph 2.76]

6.19 The Commission recommends that all those convicted of an offence for which the detention provisions of the *Offences Against the State Act 1939*, the *Criminal Justice Act 1984* or the *Criminal Justice (Drug Trafficking) Act 1996* apply, and who are serving a prison sentence at the date of the introduction of the DNA database may be sampled. [Paragraph 2.77]

6.20 The Commission recommends that the taking of samples from volunteers, that is, persons who are not suspects or convicted persons, should only occur under legislative cover and only if the appropriate consent is given in writing. The Commission recommends that an individual should only be requested to provide a bodily sample if the sample is likely to further the investigation of a specific offence. [Paragraph 2.81]

6.21 The Commission recommends that failure to consent should be precluded from constituting a reasonable ground for suspecting a person's involvement in an offence so as to justify the compulsory taking of a sample under section 2 of the *Criminal Justice (Forensic Evidence) Act 1990*. [Paragraph 2.83]

6.22 The Commission recommends that samples from persons other than suspects or convicted persons may not be taken without the consent of the person. [Paragraph 2.85]

6.23 The Commission recommends that a volunteer's profile may only be retained on the database where an informed consent has been given for this. At least two types of consent must be legislated for; the first is a limited form of consent that would confine the use of the sample to a particular investigation. The second form of consent would allow the sample to be used to assist a particular investigation and for the profile to be placed on the DNA database. A volunteer should be advised on all the implications of each form of consent. [Paragraph 2.88]

6.24 The Commission recommends that any individual, even a person unconnected with a particular investigation, should be permitted to have his or her profile retained on the DNA database. [Paragraph 2.90]

6.25 The Commission recommends that volunteers be permitted to withdraw consent to the retention of profiles on the database. [Paragraph 2.92]

6.26 The Commission recommends that a Chief Superintendent be required to approve in writing a mass screening before it may be conducted. In particular, permission should only be given by the Chief Superintendent after having regard to factors such as whether it is necessary for the proper investigation of an offence and whether the same objectives could be achieved by less intrusive or costly means. The Commission also recommends that evidence of a person's failure to consent to testing during a mass screening should not be admissible in court. [Paragraph 2.98]

6.27 The Commission recommends the inclusion of a missing persons index and an unidentified persons index in the DNA database. The missing persons index would contain the DNA profiles of missing persons or the relatives of missing persons, and the unidentified persons index would contain the DNA profiles of unidentified human remains and the DNA profiles of severely injured persons who are unable to indicate their identity. The Commission recommends that the missing persons index may be matched against the convicted persons, suspects, volunteers and unidentified persons indexes of the database for identification purposes only. [Paragraph 2.102]

### **C Chapter 3: Retention, Destruction and Analysis of Samples**

6.28 The Commission recommends that where biological samples are found at the scene of a crime they should be retained indefinitely. [Paragraph 3.06]

6.29 The Commission recommends the retention of comparator samples under strict security measures set out in legislation. If, for whatever reason, a DNA profile is removed from the database and destroyed, the corresponding DNA sample must also be destroyed. The Commission recommends that this situation be reassessed in five years' time in order to determine whether the retention of samples, in addition to profiles, is still necessary. [Paragraph 3.14]

6.30 The Commission recommends that the analysis of biological samples taken from the scene of a crime, beyond the generation of a profile, should be limited to exceptional cases and where it is believed that the scene of the crime stain comes from the perpetrator of the offence. Such analysis of samples taken from the scene of crime should always be limited to purposes that further the criminal investigation and the results of any analysis should be kept under the most careful custody. Analysis of coding regions should be allowed to determine non-sensitive phenotype information. [Paragraph 3.21]

6.31 The Commission recommends that any analysis of comparator samples beyond the generation of a profile should be forbidden. [Paragraph 3.26]

#### **D Chapter 4: Custodian of the Database and Information Sharing**

6.32 The Commission recommends the enactment of legislation to establish an independent statutory body, called the Forensic Science Agency, which would incorporate the Forensic Science Laboratory and be the custodian of the DNA database. This body should be governed by a Board comprising a number of individuals with relevant and varied expertise but who are independent of the Government. This body would be responsible for both the profiling and storage of the crime scene and comparator samples. Its functions in this regard would be subject to review by the Irish National Accreditation Board. A department of the Forensic Science Agency would be in charge of the custody of the DNA database. This body's function of managing the database would be subject to external oversight by an oversight commissioner. [Paragraph 4.13]

6.33 The Commission recommends that strong security measures be implemented to ensure that the information on the database is used only for the permitted purposes set out in the legislation. The Commission recommends that in setting up the database, provision should be made for adequate resources to carry out an expert study to determine the precise form that these measures should take. This would include an examination of the transfer of DNA samples to the proposed Forensic Science Agency and the transfer of match information back to the Garda Síochána. [Paragraph 4.19]

6.34 The Commission recommends that stringent and effective safeguards be put in place to ensure that all biological samples are stored under appropriately secure conditions. An expert study should be carried out to determine the precise form that these measures should take. [Paragraph 4.22]

6.35 The Commission recommends the enactment of an offence of intentionally or recklessly causing the disclosure of the information derived from the samples or the information contained on the DNA database for purposes other than those provided for by the legislation establishing the DNA database. [Paragraph 4.24]

6.36 The Commission recommends that an efficient system be designed to ensure that both the DNA profiles and samples are destroyed as provided for by legislation. [Paragraph 4.29]

6.37 The Commission recommends that the proposed Forensic Science Agency be required to follow oversight procedures similar to those followed by the current FSL, in particular those provided by the Irish National Accreditation Board. The Commission recommends that the quality control and quality assurance procedures be kept under review to ensure that the appropriate high standards are maintained. [Paragraph 4.32]

6.38 The Commission recommends that adequate, competency-based training in the identification, preservation and collection of DNA evidence be provided for all members of the Garda Síochána who arrive at the scene of the crime and that higher level training should be provided for specialist crime scene examiners. [Paragraph 4.36]

6.39 The Commission recommends the establishment of elimination databases, similar to the Police Elimination Database in the UK. All members of the Garda Síochána and the proposed Forensic Science Agency should be required to contribute their DNA profile to these databases. Additionally, the Commission recommends that persons who work at the scenes of crime and relevant manufacturing staff should be encouraged to volunteer their DNA profiles to an elimination database. [Paragraph 4.41]

6.40 The Commission recommends that existing arrangements for the sharing of DNA samples and profiles, including those on DNA databases, should continue until the establishment of appropriate framework decisions regarding their exchange, whether agreed at EU level or otherwise. [Paragraph 4.48]

## **E Chapter 5: DNA Evidence in Court**

6.41 The Commission recommends that following consultation with an expert group on the statistical presentation of a DNA match, guidance should

be provided in the form of a professional code of practice on the presentation of a DNA match statistically. [Paragraph 5.17]

6.42 The Commission recommends that if an issue as to the admissibility of DNA evidence is likely to arise or arises in a case, then consideration should be given to dealing with such an issue at a preliminary hearing or at an early hearing if this is just and convenient in the particular circumstances. [Paragraph 5.24]

6.43 The Commission recommends that it should remain for the trial judge to decide whether to advise the jury on the probative value of DNA evidence in any particular case. [Paragraph 5.28]

6.44 The Commission does not recommend that there should be a prohibition on convicting on DNA evidence alone. The Commission recommends that in all cases where it is sought to rely on DNA evidence alone, it should remain a matter of discretion for the trial judge whether the jury should be warned of the dangers of convicting on this evidence in the absence of other supporting evidence. [Paragraph 5.35]

6.45 The Commission recommends that, as at present, where DNA evidence is obtained illegally, but not in breach of a person's constitutional rights, the trial judge should be empowered to determine, as a matter of discretion, whether to admit it in evidence. [Paragraph 5.39]



**APPENDIX            DRAFT CRIMINAL JUSTICE (DNA  
DATABASE) BILL**

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**CRIMINAL JUSTICE (DNA DATABASE) BILL 2005**

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ARRANGEMENT OF SECTIONS

PART 1

PRELIMINARY AND GENERAL

Section

1. Short title, commencement, collective citation and construction.
2. Interpretation.
3. Expenses.

PART 2

TAKING OF SAMPLES

4. Authorisation to take sample in connection with database.
5. Provisions regarding volunteers.
6. Mass screening.
7. Use of ordinary language.
8. Additional sample.
9. Samples to be taken under Act of 1990.
10. Code of practice.

PART 3

DNA DATABASE

11. Establishment day.

12. Establishment of DNA database.
13. Purposes of DNA database.
14. Composition of DNA database.
15. Permissible matching of DNA profiles.
16. Convicted persons index.
17. Suspects index.
18. Volunteers index.
19. Unidentified persons index.
20. Retention of crime scene samples.
21. Retention of comparator samples.
22. Destruction of samples.
23. Analysis of samples.
24. Regulations.
25. Disclosure of information.

#### PART 4

#### FORENSIC SCIENCE AGENCY

26. Establishment of Agency.
27. Functions of Agency.
28. Board of Agency.
29. Chief Executive of Agency.
30. Staff of Agency.
31. External review.

#### ACTS REFERRED TO

Offences Against the State Act 1939	1939, No. 13
Criminal Justice Act 1984	1984, No. 22
Criminal Justice (Drug Trafficking) Act 1996	1996, No. 29
Criminal Justice (Forensic Evidence) Act 1990	1990, No. 34
Criminal Procedure Act 1993	1993, No. 6

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**DRAFT CRIMINAL JUSTICE (DNA DATABASE) BILL 2005**

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**BILL**

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*entitled*

AN ACT TO ESTABLISH A DNA DATABASE, TO AMEND THE LAW RELATING TO FORENSIC EVIDENCE, TO ESTABLISH A BODY TO BE KNOWN AS THE FORENSIC SCIENCE AGENCY, TO PROVIDE FOR THE POWERS AND STAFF OF THE FORENSIC SCIENCE AGENCY, TO AMEND THE CRIMINAL JUSTICE (FORENSIC EVIDENCE) ACT 1990 AND TO MAKE PROVISION FOR OTHER RELATED MATTERS

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

PART 1

PRELIMINARY AND GENERAL

**Short title, commencement, collective citation and construction**

1.—(1) This Act may be cited as the Criminal Justice (DNA Database) Act 2005.

(2) This Act shall come into operation on such day or days as the Minister may fix by order or orders either generally or with reference to any particular purpose or provision, and different days may be fixed for different purposes and different provisions.

(3) The Act of 1990 and this Act shall be construed together as one Act and may be cited as the Criminal Law (Forensic Evidence) Acts 1990 and 2005.

**Interpretation**

2.—In this Act, unless the context otherwise requires—

“Act of 1990” means the Criminal Justice (Forensic Evidence) Act 1990;

“Agency” means the Forensic Science Agency established under *Part 4*;

“comparator sample” means a sample taken from a suspect, convicted person or a volunteer;

“crime scene” means any place within the meaning of section 4 of the Criminal Justice Bill 2004;<sup>1</sup>

“DNA” means deoxyribonucleic acid, and terms that include “DNA” shall be read accordingly;

“DNA database” means the database established pursuant to *section 12*;

“DNA profile” in relation to any person means information derived from an analysis of a sample of genetic material that is clearly identifiable as relating to that person and is capable of comparison with information obtained from an analysis of another sample of genetic material for the purpose of determining whether or not the sample is from that person;

“establishment day” means the day appointed under *section 11*;

“Minister” means the Minister for Justice, Equality and Law Reform;

“prescribed” means prescribed in Regulations made by the Minister for Justice, Equality and Law Reform;

“sample” means a sample within the meaning of section 2 of the Act of 1990 which is capable of generating a DNA profile;

“specified offence” means an offence to which the detention provisions of section 30 of the Offences Against the State Act 1939, section 4 of the Criminal Justice Act 1984 or section 2 of the Criminal Justice (Drug Trafficking) Act 1996 apply;

“staff of the Agency” does not include the Chief Executive of the Agency;

“volunteer” means a person who voluntarily consents to the taking from him or her of a sample under *section 5*.

## **Expenses**

3.—The expenses incurred in the administration of this Act shall, to such extent as may be sanctioned by the Minister for Finance, be paid out of moneys provided by the Oireachtas.

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<sup>1</sup> This refers to the definition in section 4 of the *Criminal Justice Bill* as initiated.

PART 2  
TAKING OF SAMPLES

**Authorisation to take sample in connection with database**

4.—Notwithstanding section 2(5)(b) of the Act of 1990, a member of the Garda Síochána who authorises the taking of a sample for the purposes of generating a DNA profile to be placed on the database need not have reasonable grounds for believing that the sample will tend to confirm or disprove the involvement of the person from whom the sample is to be taken in the said offence.

*Explanatory Note*

*[This section implements the recommendation in paragraph 2.41.]*

**Provisions regarding volunteers**

5.—The following provisions apply in relation to a volunteer, without prejudice to section 2(11) of the Act of 1990:

(a) the taking of a sample from a volunteer may only be carried out in accordance with the provisions of this Act;

(b) the volunteer shall give an appropriate consent in writing to the taking of a sample;

(c) the sample is likely to further the investigation of a specific offence;

(d) failure by a volunteer to consent to the taking of a sample shall not constitute a reasonable ground for suspecting the involvement of the volunteer in an offence so as to justify the compulsory taking of a sample under section 2 of the Act of 1990.<sup>2</sup>

*Explanatory Note*

*[This section provides for the taking of DNA samples from volunteers. See paragraphs 2.78-2.85.]*

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<sup>2</sup> The Commission notes that section 13 of the *Criminal Justice Bill 2004* as initiated, proposes to amend section 2 of the *Criminal Justice (Forensic Evidence) Act 1990*.

### **Mass screening**

6.—(1) In this section ‘mass screening’ means the taking of samples from a defined group of persons, who for the purposes of this Act shall be deemed to be volunteers in the course of a criminal investigation into a specific offence.

(2) A mass screening shall not be conducted without the approval in writing to such a screening of an officer of the Garda Síochána not below the rank of Chief Superintendent.

(3) Before deciding to conduct a mass screening, an officer of the Garda Síochána referred to in *subsection (2)* shall take into account the following factors:

(a) whether or not a mass screening would be unduly intrusive or unnecessarily costly, having regard to the likely result of the screening;

(b) whether or not a mass screening would be unduly invasive of bodily integrity and personal privacy;

(c) whether or not the criminal investigation concerned could be furthered by means other than a mass screening.

(4) The failure or refusal of any person to participate in a mass screening shall not be admissible as evidence in any court.

#### *Explanatory Note*

*[This section provides for the implementation of the recommendation made with regard to mass screening in paragraph 2.98.]*

### **Use of ordinary language**

7.—The information required by section 2(6) of the Act of 1990 to be given by a member of the Garda Síochána shall be given in a readily understandable manner and by using ordinary language.

#### *Explanatory Note*

*[This section implements the recommendation in paragraph 2.29.]*

### **Additional sample**

8.—Where a sample which has been obtained under section 2 of the Act of 1990 as amended by this Act is, in the opinion of the member of the Garda Síochána concerned, contaminated or is insufficient or unsatisfactory for the purposes of that section, an additional sample may be taken.

#### *Explanatory Note*

*[This section implements the recommendation in paragraph 2.26.]*

### **Samples to be taken under Act of 1990**

9.—For the avoidance of doubt, it is declared that a sample may be taken only in accordance with the Act of 1990, as amended by this Act.<sup>3</sup>

#### *Explanatory Note*

*[This section implements the recommendation in paragraph 2.21.]*

### **Code of practice**

10.—The Minister may publish a code of practice providing practical guidance in respect of the taking of samples.

#### *Explanatory Note*

*[This section provides for the publication of a code of practice in respect of the taking of DNA samples. See paragraphs 2.27-2.37.]*

## PART 3

### DNA DATABASE

### **Establishment day**

11.—The Minister shall, by order, appoint a day to be the establishment day for the purposes of this Act.

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<sup>3</sup> The *Criminal Justice Bill 2004* as initiated proposes to amend the 1990 Act. See also paragraph 2.49.

## **Establishment of DNA database**

12.—On the establishment day, a DNA database stands established.

### *Explanatory Note*

*[This section provides for the establishment of a DNA database. See paragraph 1.20.]*

## **Purposes of DNA database**

13.—(1) The DNA database may be used only:

- (a) for the purpose of criminal investigations or proceedings or both; and
- (b) for the purpose of the identification of missing persons, or the remains of unidentified persons or of severely injured persons who are unable to indicate their identity.

(2) Without prejudice to *subsection (1)* the DNA database may be used for the following purposes:

- (a) to conduct forensic matching permitted under *section 15*;
- (b) to make the information available to the person to whom the information relates;
- (c) to administer the DNA database system;
- (d) to facilitate a review of an alleged miscarriage of justice under section 2 of the *Criminal Procedure Act 1993*;
- (e) to investigate a complaint by the oversight commissioner of the database;
- (f) to compile statistics for the oversight commissioner on the operation of the database;
- (g) to enable the exchange of DNA profiles between jurisdictions in accordance with relevant international obligations;
- (h) any other related purpose.

*Explanatory Note*

*[This section sets out the permitted purposes of the DNA database. See paragraphs 2.02-2.17.]*

**Composition of DNA database**

14.—The DNA database is to consist of the following:

- (a) a crime scene index containing DNA profiles obtained from crime scenes, including from the bodies of victims of crime;
- (b) a convicted persons index containing the DNA profiles of persons convicted of a specified offence;
- (c) a suspects index containing the DNA profiles of individuals who are suspected of having committed a specified offence;
- (d) a volunteers index containing the DNA profiles of volunteers;
- (e) a missing persons index containing the DNA profiles of missing persons or their relatives;
- (f) an unidentified persons index containing the DNA profiles of unidentified human remains and the DNA profiles of severely injured persons who are unable to indicate their identity.

*Explanatory Note*

*[This section provides for the composition of the DNA database. See paragraphs 2.50-2.102.]*

**Permissible matching of DNA profiles**

15.—(1) The crime scene index may be matched against the convicted persons index, suspects index and volunteers index of the database only.

(2) The missing persons index may be matched against the convicted persons index, suspects index, volunteers index and unidentified persons index of the database only.

(3) Subject to *section 19*, the unidentified persons index may be matched against the convicted persons index, suspects index, volunteers index and missing persons index of the database only.

*Explanatory Note*

*[This section sets out the permissible matching of the DNA profiles retained on the various indexes of the database. See paragraphs 2.50-2.102.]*

**Convicted persons index**

16.—(1) The DNA profile of a person convicted of a specified offence may be retained on the convicted persons index of the database.

(2) This DNA profile shall be removed from the database and destroyed if the conviction is subsequently quashed.

(3) Where on the establishment day a person stands convicted of a specified offence and is serving a sentence of imprisonment, a sample may be obtained for the purposes of developing a DNA profile which may be retained on the convicted persons index.

*Explanatory Note*

*[This section gives details of the convicted persons index of the database. See paragraphs 2.70-2.76.]*

**Suspects index**

17.—(1) The DNA profile of a suspect of a specified offence may be temporarily retained on the suspects index of the database.

(2) The DNA profile of a suspect shall be removed from the database and destroyed where proceedings for a specified offence are not instituted against the person within 12 months from the taking of the sample, and where the failure to institute the proceedings within that period is not because he or she has absconded or cannot be found.

(3) The destruction of the DNA profile shall be carried out on the expiration of that period unless an order has been made under *subsection (5)*.

(4) Where proceedings have been so instituted and the person is acquitted or discharged or the proceedings are discontinued, the DNA profile shall be removed from the database and destroyed as soon as reasonably practicable unless an order has been made under *subsection (5)*.

(5) If a court is satisfied, on an application being made to it on behalf of either the Director of Public Prosecutions or the person from whom the

sample was taken, that there is good reason why the relevant sample or profile should not be destroyed, the court may by order authorise the retention of the sample or profile for such purpose or period as it directs.

(6) Where a person from whom a sample has been taken under section 2 of the Act of 1990 is convicted of a specified offence, the DNA profile of that person shall be placed on and retained on the convicted persons index of the database.

*Explanatory Note*

*[This section gives details of the suspects index of the database, in particular the removal of suspect's profiles from the database. See paragraphs 2.51-2.69.]*

**Volunteers index**

18.—(1) The DNA profile of a volunteer may be retained on the volunteers index of the database where the appropriate consent is obtained.

(2) The consent of a volunteer may consist of either:

(a) a consent that would confine the use of the sample to a particular criminal investigation or

(b) a consent that would permit the DNA profile to be retained on the volunteers index of the database.

(3) Notwithstanding any other provision of this Act, any person other than a person from whom a sample may be taken in accordance with the Act of 1990, as amended by this Act, may consent in writing to the retention of his or her DNA profile on the volunteers index of the database.

*Explanatory Note*

*[This section gives details of the volunteers index of the database, in particular the necessity of consent. It also provides that any person may consent to the retention of his or her DNA profile on the database. See paragraphs 2.85-2.91.]*

**Unidentified persons index**

19.—(1) The DNA profile of an unidentified deceased person may be retained on the unidentified persons index of the database.

(2) The DNA profile of a deceased person may be matched against the crime scene index of the database where the High Court authorises such a matching where it is satisfied that there are reasonable grounds for suspicion that the deceased was responsible for a crime and it is an appropriate order to make having regard to all the circumstances of the case.

(3) Where a person is so seriously injured that it is impossible to identify him or her, a person with an interest in the matter may apply to the High Court for authorisation to obtain a sample from that person for the purposes of providing a DNA profile to be retained on the unidentified persons index of the database.

*Explanatory Note*

*[This section gives details of the unidentified persons index of database including unidentified deceased or severely injured persons. See paragraphs 2.10-2.17.]*

**Retention of crime scene samples**

20.—A sample found at a crime scene shall be retained indefinitely by the Agency.

*Explanatory Note*

*[This section implements the recommendation made in paragraph 3.06.]*

**Retention of comparator samples**

21.—Comparator samples may be retained by the Agency under prescribed security measures.

*Explanatory Note*

*[This section implements the recommendation made in paragraph 3.14.]*

**Destruction of samples**

22.—Where for any reason a DNA profile is removed from the DNA database and destroyed, the corresponding sample shall be destroyed.

*Explanatory Note*

*[This section provides for the destruction of DNA samples in addition to the destruction of the corresponding DNA profiles. See paragraph 3.14.]*

### **Analysis of samples**

23.—(1) Analysis of a sample taken from a crime scene, beyond the generation of a DNA profile, shall be limited to exceptional cases and only if it is believed by the member of the Garda Síochána in charge of the criminal investigation concerned that the sample comes from the perpetrator of the offence giving rise to the sample.

(2) An analysis of a sample taken from a crime scene, beyond the generation of a DNA profile, shall be limited to purposes that further the relevant investigation and the results of such an analysis shall be kept in the custody of either the Garda Síochána or the Agency as may be prescribed.

(3) An analysis of a sample taken from a suspect, convicted person or volunteer may not extend beyond the generation of a DNA profile.

#### *Explanatory Note*

*[This section implements the recommendations in paragraph 3.21 and 3.26.]*

### **Regulations**

24.—(1) The Minister may make regulations for the purposes of giving full effect to this Act.

(2) Without prejudice to *subsection (1)* regulations may provide for the following:

(a) strict and effective arrangements to ensure that all samples are stored under appropriately secured conditions;

(b) the destruction of samples and DNA profiles in accordance with the provisions of this Act;

(c) the establishment and maintenance of elimination databases containing the DNA profiles of members of the Garda Síochána and members of staff of the Agency.

#### *Explanatory Note*

*[This section provides for the security of the retained DNA samples, the destruction of forensic material and the establishment of elimination databases to be set out in Regulations. See paragraphs 4.22, 4.29 and 4.41.]*

## **Disclosure of information**

25.—(1) A person who intentionally or recklessly discloses or causes the disclosure, other than for a purpose provided for by or under this Act, of information derived from a sample taken under section 2 of the Act of 1990, as amended by this Act, or of information contained on the DNA database, is guilty of an offence.

(2) A person convicted of an offence under this section is liable:

(a) on summary conviction to a fine not exceeding €3,000 or to a term of imprisonment not exceeding 6 months, or both;

(b) on conviction on indictment to a fine not exceeding €10,000 or to a term of imprisonment not exceeding 5 years, or both.

### *Explanatory Note*

*[This section implements the recommendation in paragraph 4.24.]*

## PART 4

### FORENSIC SCIENCE AGENCY<sup>4</sup>

#### **Establishment of Agency**

26.—(1) On the establishment day, a body corporate to be known as the Forensic Science Agency stands established to perform the functions assigned to it by this Act.

(2) On the establishment day, the Forensic Science Laboratory of the Department of Justice, Equality and Law Reform<sup>5</sup> stands dissolved.

(3) The Agency has, under its corporate name, perpetual succession and may sue and be sued in its corporate name.

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<sup>4</sup> Part 4 of this Bill sets out in general terms the provisions concerning the establishment, functions and staff of the proposed Forensic Science Agency. The Commission is aware that further provisions setting out the details of the relevant arrangements, including staffing, will be required. The Commission has suggested in this Report at paragraph 4.09 that the *Courts Service Act 1998* might serve as a model for this purpose.

<sup>5</sup> See section 33 of the *Criminal Justice Bill 2004* as initiated.

(4) The Agency is, subject to this Act, independent in the performance of its functions.

*Explanatory Note*

*[This section establishes the Forensic Science Agency. See paragraph 4.13.]*

**Functions of Agency**

27.—(1) The functions of the Agency shall be—

(a) to perform the functions formerly exercised by the Forensic Science Laboratory of the Department of Justice, Equality and Law Reform;

(b) to manage and oversee the DNA database;

(c) to exercise the functions conferred on it by or under this Act.

*Explanatory Note*

*[This section sets out the functions of the Agency, in particular, the custodianship of the DNA database. See paragraph 4.13.]*

**Board of Agency**

28.—(1) There shall be a board of the Agency.

(2) The members of the Board shall be appointed by the Minister and shall have requisite knowledge and experience of forensics, data protection, crime investigation and human rights.

*Explanatory Note*

*[This section establishes the Board and its membership. See paragraph 4.13.]*

**Chief Executive of Agency**

29.—There shall be a Chief Executive Officer of the Agency.

*Explanatory Note*

*[This section establishes the post of Chief Executive. See paragraph 4.09.]*

**Staff of Agency**

30.—There shall be appointed to the Agency such number of staff as shall enable it to carry out its functions, and the staff of the Agency shall be civil servants of the State.

*Explanatory Note*

*[This section provides that the staff of the Agency will be civil servants in the Civil Service of the State. See paragraph 4.09.]*

**External review**

31.—The management of the DNA database shall be subject to the external review of an oversight commissioner.

*Explanatory Note*

*[This section provides for the external oversight of the database. See paragraphs 4.10-4.11.]*

