Observations on the Criminal Justice (Forensic Evidence and DNA Database System) Bill 2013

March 2014

IHRC

AN COIMISIÚN UM CHEARTA DUINE
IRISH HUMAN RIGHTS COMMISSION

I. INTRODUCTION

1. The Irish Human Rights Commission (IHRC) is Ireland's National Human Rights Institution, set up by the Irish Government under the Human Rights Commission Acts 2000 and 2001.[1] The IHRC has a statutory remit to endeavour to ensure that the human rights of all persons in the State are fully realised and protected in the law and practice of the State and is further mandated to make recommendations to the Government as it deems appropriate in relation to the measures which the IHRC considers should be taken to strengthen, protect and promote human rights in the State.[2]

2. The main purposes of the Criminal Justice (Forensic Evidence and DNA Database System) Bill 2013 are to replace the existing statutory and common law arrangements governing the taking of samples from suspects for forensic testing and use as evidence in criminal investigations and to provide for the establishment of a DNA Database System for use by An Garda Síochána as an intelligence source for criminal investigations.[3] More specifically, Parts 2 to 7 provide for the taking of samples from various categories of persons, including persons in Garda custody, offenders, previous offenders, child offenders, and missing or unknown persons, among others. Parts 8 and 9 set out how the DNA Database System will be structured, operated, and managed. Part 10 explains the rules governing the destruction of samples and removal of DNA profiles from the DNA Database System. Part 11 implements the DNA-related elements of relevant European Union (EU) law while also providing further guidance on the question of international cooperation and policing more generally.[4]

3. Legislative reform providing for the taking of bodily samples and the creation of DNA profiles for the purpose of investigating criminal offences (among other purposes) engage important questions of human rights, particularly in relation to the right to bodily integrity and the right to privacy, the right to respect for private life and the right to a fair trial.[5] The Irish Constitution guarantees the unenumerated right to respect for private life as one of the fundamental personal rights of the citizen[6] and also ensures that the individual enjoys his or her right to bodily integrity.[7] These rights are further recognised in international law, under provisions such as Article 17 of the International Covenant on Civil and Political Rights (ICCPR) and best practice international standards found in documents such as the Council of Europe Committee of Ministers Recommendation No.

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[1] For detailed information on the work of the IHRC, *see* <www.ihrc.ie>.

[2] Section 8(d) of the Human Rights Commission Act 2000. The Commission's functions further include keeping under review the adequacy and effectiveness of law and practice with regard to constitutional and international human rights standards deriving from the Irish Constitution and the international treaties to which Ireland is a party, *per* section 8(a).

[3] Explanatory Memorandum to 2013 Bill, at p.1.

[4] Explanatory Memorandum to 2013 Bill, at p.1. Specifically the 2013 Bill implements EU Council Decision 2008/615/JHA of 23 June 2008.

[5] *See* IHRC Observations on the General Scheme of the Criminal Justice (Forensic Sampling and Evidence) Bill 2007 [hereinafter IHRC Observations on the 2007 Scheme], at pp.14-29, for a comprehensive overview of the jurisprudence and relevant human rights standards under the Irish Constitution and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[6] Article 40.3.1 of the Irish Constitution. *See McGee v AG* [1974] IR 284; *Norris v AG* [1984] IR 36.

[7] *Ryan v Attorney General* [1965] IR 294.

R(92)1 and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.[8] The European Court of Human Rights (ECtHR) has emphasised the importance of having clear detailed rules that govern the scope and application of measures allowing for the taking of bodily samples and the creation of DNA profiles, as well as robust safeguards concerning, *inter alia*, duration, storage, usage, access to third parties, procedures for preserving the integrity and confidentiality of data and procedures for its destruction.[9] While appreciating the important contribution forensic sampling and the availability of a DNA Database can make to crime investigation, the IHRC considers that legislation in this area must find a proportionate balance between the rights of the person who is the source of a DNA profile and the wider societal interest of the prevention of disorder and crime and the investigation of offences.[10]

4. The IHRC previously published *Observations on the Criminal Justice (Forensic Evidence and DNA Database System) Bill 2010* in March 2010, in which it made a number of recommendations relating to the 2010 version of the Bill. The IHRC is pleased to note that many of the proposals contained in the 2013 Bill are in line with the recommendations made by the IHRC in its 2010 Observations. The IHRC particularly acknowledges the significance of those amendments made in relation to the destruction of samples and removal of profiles.[11] Furthermore, while the broad scheme of the legislation remains similar to that under the 2010 Bill, the 2013 Bill goes much further in giving effect to the State's international human rights obligations. Notwithstanding this, the IHRC wishes to highlight a number of outstanding issues in the 2013 Bill where it considers the Bill should be amended to strengthen the protection of human rights and to ensure that Ireland is in line with the highest international human rights standards.

[8] *See* Council of Europe, Committee of Ministers Recommendation No. R(92) 1, *On the Use of Analysis of DNA within the Framework of the Criminal Justice System* and UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted on 7 September 1990 by the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders. *See also*: Council of Europe Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) Standards, CPT/Inf/E(2002)1 – Rev. 2009; UN General Assembly Resolution 34/169, "Code of Conduct for Law Enforcement Officials", December 1979.

[9] *S and Marper v. United Kingdom*, Judgment of 4 December 2008, Application nos. 30562/04 and 30566/04 at para.99. In addition, specific articles engaged under the ECHR include Article 3 (prohibition against torture, inhuman and degrading treatment) and Article 8 (right to private life).

[10] *See further* IHRC Observations on the 2007 Scheme, at pp.3-5.

[11] These provisions relating to the destruction of samples and removal of profiles are found under Part 10 of the 2013 Bill.

SUMMARY OF RECOMMENDATIONS

Part 2: Taking of Samples from Persons in Custody of An Garda Síochána

- Section 11 should be deleted from the 2013 Bill, thus allowing bodily samples to be taken only for the purposes of investigating a specific criminal offence (per sections 12 and 13).

- Section 19 concerning negative inferences should be removed from the 2013 Bill. If this approach is not taken, the negative inference provisions should make provision for a person to be given guaranteed access to legal advice whenever they are requested to consent to the provision of an intimate bodily sample. In addition, a specific warning should be devised that members of An Garda Síochána must provide to persons whenever they request an intimate sample.

- Sections 21 and 22 should be further amended so as to provide that where a parent/guardian cannot be present for the taking of a sample, the nominated adult who is present should be a social worker or other qualified professional who is not a member of the Garda and who has specific experience working with protected persons or children.

- An electronic recording should be made whenever a bodily sample is taken, whether reasonable force is used or not. This is unless, of course, the person from whom the sample is being taken objects.

- The 2013 Bill should require that certain principles be considered whenever the use of reasonable force is contemplated. These principles include:

    - the seriousness of the relevant offence;
    - the degree of the individual's alleged participation in the offence;
    - the age, physical and mental health, cultural background, and religious beliefs of the person (to the extent that they are known);
    - whether there is a less intrusive but reasonably practical way of obtaining evidence tending to confirm or disprove that the person committed the relevant offence; and
    - if the person refuses to give consent, their reasons for doing so.

- Whenever reasonable force is used, certain reporting requirements should be implemented, similar to those reporting requirements found under the Mental Health Commission's *Rules Governing the Use of Seclusion and Mechanical Means of Bodily Restraint*.

Part 3: Taking of Samples from Volunteers to Generate DNA Profiles

- Section 27 of the 2013 Bill should be amended to provide that a volunteer should only be requested to provide a bodily sample where a member of an Garda

Síochána, not below the rank of Superintendent, is satisfied that the sample is likely to further the investigation of a specific criminal offence.

- Section 28 should be removed from the 2013 Bill to ensure that people who are designated volunteers are not requested to consent to the retention of their DNA profile in the DNA Database System where this is not necessary for the investigation of a specific offence for which their bodily sample was requested.

- Sections 27 and 29 of the 2013 Bill should be amended so as to stipulate that "volunteers" and persons involved in a mass screening have the opportunity to communicate with a legal practitioner before providing such a sample. If the person is unable to consult with a lawyer, he or she must be provided with written information explaining the procedures involved in taking a bodily sample.

Part 4: Taking of Samples from Other Persons or Bodies for Reference Index of DNA Database System

- Sections 33 and 34 should be amended to provide that a sample can only be taken from a former offender where an application has been made to a judge of the District Court. In the absence of such reforms, sections 33 and 34 should at least provide that where an application is made to a judge of the District Court for an order requiring a person to have a sample taken, the judge must be satisfied that the bodily sample and DNA profile of the particular person are required for the investigation of a specific offence.

- The IHRC repeats its recommendations regarding the use of reasonable force in taking a sample from the relevant person.

Part 5: Taking of Samples for Elimination Purposes

- There are no recommendations for amendments in respect of Part 5.

- The only concerns arising in relation to those samples taken for elimination purposes concern the retention periods of such sample and related DNA profiles. These concerns are dealt with under Part 10.

Part 6: Taking of Samples from Persons or Bodies for Purposes of Identification Division of DNA Database System

- There are no recommendations for amendments in respect of Part 6.

Part 7: Taking of Certain Samples under Parts 3 and 6 from Protected Persons or Children

- Part 7 should be amended so as to allow for the nomination of a qualified professional to be present during the taking of samples from protected persons and children under Parts 3 and 6.

Part 8: DNA Database System

- There are concerns regarding sections 67(3) and (4) which allow for the transmitting of bodily samples to another laboratory for the purposes of generating DNA profiles from that sample. These provisions should law down specific safeguards in relation to the contracting out of these FSI functions.
- Section 68(1) should be clarified insofar as it allows the comparison of DNA profiles within the DNA Database System "for the purpose of the administration of that System."

- Section 68(9) should provide more information as regards the number of staff expected to be authorised to search the DNA Database, as well as any codes of conduct governing that staff.

- Section 69 should provide additional details on the manner in which FSI staff may use information from the DNA Database System for statistical and analytical purposes.

Part 9: DNA Database System Oversight Committee

- Schedule 1 of the 2013 Bill should be amended to provide that the Minister is required to appoint at least one member with human rights expertise to the Oversight Committee.

Part 10: Destruction of Samples and Destruction, or Removal from DNA Database System, of DNA Profiles

- There are no recommendations to make in respect of those provisions relating to the destruction/removal of samples/profiles taken from detained persons, offenders, and former offenders.

- The 2013 Bill should provide for a regular review of the necessity of the retention of "volunteer" samples/profiles in situations where an investigation has been open for a prolonged period of time or where proceedings in respect of an offence have lasted a long time.

- Sections 87(4) and 87(10) should be removed from the 2013 Bill, so that "volunteers" cannot be requested to consent to the entry of their DNA profile on the general DNA Database System at all. In the alternative, section 28(2) should

be amended so as to require a member of An Garda Síochána to specifically direct the volunteer's attention to the fact that a positive request will be required on their part in order for their profile to be removed from the DNA Database.

- Sections 88, 89, and 90 should be amended so as to provide a shorter retention period in the case of DNA profiles taken from Gardaí and FSI employees appointed after the commencement of this Bill, as well as from certain prescribed persons.

- There are no recommendations to make in respect of section 92, relating to the destruction/removal of samples and profiles taken under Part 6 of the 2013 Bill.

- There are no recommendations to make in respect of sections 93 to 99, concerning miscellaneous matters relating to Part 10 of the 2013 Bill.

Part 11: International Cooperation

- Chapter 4 should further clarify the basis for placing notes in the DNA Database System in respect of a specific DNA profile under sections 106(3) and 107(4), where that DNA profile was supplied to the national contact point of a designated state and matches a DNA profile found in the DNA analysis files of the designated state concerned.

- Chapter 7 should be amended so as to provide concrete safeguards for the transmission of DNA profiles between different law enforcement agencies, in relation to the use and destruction of such profiles, which would match those safeguards otherwise applying under the 2013 Bill.

Part 12: Miscellaneous

- The 2013 Bill should specify that any code of practice drafted under section 143 have due regard to international best practice and international human rights standards.

- The 2013 Bill should also provide for consultations to be held between the Garda Commissioner, the IHRC, the Data Protection Commissioner, and other relevant bodies as regards the drafted codes of practice.

- Section 143 should also be amended so as to create a role for the DNA Database Oversight Committee in drafting these codes of practice.

- The 2013 Bill should provide for training to be given to all members of An Garda Síochána, thus ensuring that relevant members have an in depth understanding of the 2013 Bill's requirements and operation. Such a measure could be included

under section 142 (regulations regarding the taking of samples) or section 143 (codes of practice).

II. TAKING OF SAMPLES FROM PERSONS IN CUSTODY OF AN GARDA SÍOCHÁNA

a. Relevant Provisions of the 2013 Bill

5. Part 2 of the Bill makes provision for the taking of samples from persons in the custody of An Garda Síochána i.e. persons who are suspected of being involved in the commission of criminal offences but have not been charged.[12] Section 9 provides that a sample may be taken from a person who is detained under any of the existing Garda detention powers. Essentially this means that samples may generally only be taken from persons detained in respect of offences carrying a 5 year sentence of imprisonment or more.[13]

6. Section 11 provides that a member of the Garda, not below the rank of sergeant, may take a sample from a detained person for the purpose of generating a DNA profile for entry in the DNA Database System.[14] Such a sample is not taken for evidential purposes or necessarily for investigation purposes.[15] References in section 11 to a sample mean a sample of hair (other than pubic hair) or a swab from the mouth of the person.[16] While the person's consent is not required in order to take such a sample, he or she must still be given certain information before the sample is taken, including that reasonable force may be used in the event that he or she refuses to allow the sample to be taken.[17] Protected persons and children under 14 years of age are excluded from the application of this section.[18]

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[12] Explanatory Memorandum to 2013 Bill, at p.4.

[13] Section 9. Exceptions to this offence threshold include certain offences under the Offences Against the State Act 1939 and the Criminal Justice (Drug Trafficking) Act 1996 which do not meet the 5-year threshold.

[14] A "sample" may be described as either an "intimate sample" or a "non-intimate sample". An "intimate sample" means a sample of blood, pubic hair, or urine, a swab from a genital region or body orifice other than the mouth, or a dental impression. A "non-intimate sample" means a sample of saliva, hair other than pubic hair, a nail, or any material found under a nail, a swab from any part of the body including the mouth but not from any other body orifice or a genital region, or a skin impression, *see* section 2(1). A "DNA profile" essentially provides a link identifying the person and information about that person from the sample he or she gave, *see* section 2(1).

[15] Sections 11(1) and (2). Essentially, a sample can be taken from a detained person solely for the purpose of generating a DNA profile that can then be entered into the reference index of the DNA Database System; thus, the sample is not being taken for the purposes of investigating a specific offence to which the detained person is related or indeed for the ongoing investigation of other offences.

[16] Section 2(3)(a).

[17] Section 11(3).

[18] The member in charge of the Garda station is responsible for deciding whether a person detained under section 9(1) is a "protected person", *see* section 10(1). A "protected person" is defined as "a person (including a child) who, by reason of a mental or physical disability (a) lacks the capacity to understand the general nature and effect of the taking of a sample from him or her, or (b) lacks the capacity to indicate (by speech, sign language or any other means of communication) whether or not he or she consents to a sample being taken from him or her, *see* section 2(1).

7. Section 12 concerns the taking of an intimate sample from a detained person for the purposes of the investigation of the offence in respect of which that person is detained and for evidential purposes in any proceedings.[19] Such a sample may also, if appropriate, be used to generate a DNA profile for entry in the DNA Database System.[20] Reasonable force may not be used in order to obtain such a sample. In order to take such a sample, a member of the Garda not below the rank of inspector must authorise it, and the detainee's consent must be obtained in writing.[21] Before the detained person's consent is requested, he or she must be informed of certain matters including the negative inference provisions under section 19.[22] These provisions state that a refusal to consent may give rise to an adverse inference being drawn in subsequent criminal proceedings. While such an adverse inference may be treated as corroborating any evidence to which it is relevant, it may not be the sole or main basis of a conviction.[23] This adverse inference may only be drawn if certain steps are followed, including: the person was told in ordinary language that a failure to consent or a withdrawal of consent could give rise to such an inference being drawn; the person was given an opportunity to consult a solicitor before refusing consent; and the request for consent was recorded by electronic means or the person consented in writing to it not being so recorded.[24]

8. Section 13 provides for the taking of a non-intimate sample from a detained person for the purposes of the investigation of the offence in respect of which the person is detained and for evidential purposes in any proceedings.[25] If appropriate, the sample may also be used to generate a DNA profile for entry in the DNA Database System.[26] A sample under this provision may only be taken where a member of the Garda not below the rank of inspector has authorised it.[27] Unlike in the case of intimate samples, the consent of the detained person is not required under section 13. The person must still be informed of various matters, however, before the sample is taken, including that reasonable force may be used if he or she refuses to allow the sample to be taken.[28]

9. Before an intimate sample is taken from a protected person or child, "appropriate consent" must be obtained. In the case of a protected person or a child under the age of

[19] Explanatory Memorandum to 2013 Bill, at p.5.
[20] Section 12(1).
[21] Section 12(2). Before authorising the taking of an intimate sample, the member must be satisfied that there are reasonable grounds for suspecting the involvement of the person in the relevant offence and for believing that the sample will confirm or disprove this involvement, *see* section 12(3).
[22] Section 12(5).
[23] Section 19(1).
[24] Sections 19(2) and (3). It should be noted that these negative inference provisions will not apply to: a protected person; a child who is under 14 years; a child who is 14 years or older who gave the necessary consent but whose parent or guardian refused consent, unless a judge of the District Court makes an order under section 17(6) and the child refuses to comply with the order, *see* section 19(5).
[25] Explanatory Memorandum to 2013 Bill, at p.5.
[26] Section 13(1).
[27] Section 13(2). Such authorisation must be granted on the basis that there are reasonable grounds to suspect the involvement of the person in the offence for which he or she is detained and there are grounds to believe that the sample will confirm or disprove the involvement of that person in the offence, *see* section 13(3).
[28] Section 13(5).

14, the consent of a parent/guardian or an order from a District Court judge is required.[29] In the case of a child aged 14 years or older, the consent of the child as well as the consent of the child's parent/guardian or an order from a District Court judge is required.[30] In certain circumstances a member of the Garda not below the rank of inspector may apply to a District Court judge for an order to take an intimate sample from a protected person or child.[31] In considering such an application, the judge should have regard to certain matters including: the nature of the offence; the best interests of the protected person or child concerned; the interests of the victim of the offence; and the protection of society.[32]

10. Section 19 sets out the negative inferences to be drawn from a refusal to consent to the taking of an intimate sample. These provisions are discussed in more detail above, at paragraph 7.

11. Sections 21 and 22 of the 2013 Bill set out special provisions for the taking of samples from protected persons and children. These provisions state first that in taking an intimate sample from a protected person or child, a person other than a member of An Garda Síochána must be present, unless the protected person or child indicates that he or she does not wish to have such a person present.[33] This person may be the parent/guardian of the person or, if appropriate, an adult relative or other adult reasonably named by the person.[34] In the absence or exclusion of a parent/guardian or other adult, another adult may be nominated by the member in charge of the Garda station.[35]

12. Section 24 of the 2013 Bill sets out the circumstances in which a sample may be taken with the use of reasonable force. As noted, force cannot be used for any samples taken under section 12 i.e. intimate samples.[36] Reasonable force must be authorised by a member of the Garda not below the rank of superintendent and the detained person must be informed in advance of the intention to use reasonable force.[37] The use of reasonable force must be observed by a member of the Garda, not below the rank of Inspector, who

[29] Sections 15(1)(b) and 15(1)(c)(ii).
[30] Section 15(1)(c)(i).
[31] Sections 16 and 17. The circumstances in which such an application can be made include, for example, where a parent/guardian cannot be contacted despite reasonable efforts or where the parent/guardian refuses to give consent in the case of a protected person or in the case of a child (where the child's consent is not required).
[32] Sections 16(4) and 17(4).
[33] Sections 21(1) and 22(1).
[34] Sections 21(4) and 22(4). A parent/guardian or other adult may be excluded in certain circumstances e.g. where he or she is the victim of the offence in question or where he or she has also been arrested in respect of that offence.
[35] Sections 21(1)(b) and 22(1)(b). Insofar as practicable, the person nominated will be of the same sex as the person from whom the sample is to be taken. In addition, the nominated adult must, insofar as practicable, in the case of protected persons be suitable by reason of his or her training or experience with persons who have physical or mental disabilities. In the case of children, the nominated adult must, insofar as practicable, be suitable by reason of his or her training or experience with children, *see* Sections 21(2) and 22(2).
[36] Explanatory Memorandum to 2013 Bill, at p.8.
[37] Sections 24(3) and (4).

is to determine the number of members reasonably needed to take the sample.[38] The taking of a sample with the use of reasonable force must be recorded by electronic or similar means.[39]

13. Section 24 makes special provision for the use of reasonable force in taking a non-intimate sample from a protected person or child. It states that a parent/guardian or other appropriate adult must be present while the sample is being taken, unless the protected person or child indicates that he or she does not wish to have the person present. In the absence or exclusion of a parent/guardian or other appropriate adult, the member in charge of the Garda station may nominate an adult.[40] In all cases in which a sample is forcibly taken from a protected person or child, the taking of the sample shall be recorded by electronic or similar means.[41]

b. IHRC Analysis

14. Article 8 of the European Convention on Human Rights (ECHR) provides that an interference with the right to respect for private life of a person can only be justified where that interference is (1) done in accordance with the law, (2) pursues a legitimate aim, and (3) is "necessary in a democratic society".[42] The ECtHR has recognised this last factor, "necessary in a democratic society", as involving a proportionality test in which the Court asks whether the interference is proportionate to the legitimate aim being pursued.[43] Using this proportionality analysis, the IHRC considers the power under section 11 to take bodily samples solely for the purpose of entering a DNA profile on the DNA Database System and not for the purpose of investigating an offence for which a suspect is detained as being overly broad and believes it risks being applied in a disproportionate and arbitrary manner.[44]

15. Having considered the right to a fair trial under Article 38.1 of the Irish Constitution as well as Article 6 ECHR, and bearing in mind the privilege against self-

[38] Section 24(5).
[39] Section 24(10).
[40] Sections 24(6) and 24(8). The criteria for nominating an adult are similar to those listed under sections 21(2) and 22(2), i.e. the member in charge will, insofar as practicable, in the case of protected persons nominate a person who, by reason of his or her training or experience with persons who have physical or mental disabilities, is suitable for that purpose. In the case of children, the member in charge will, insofar as practicable, nominate a person who, by reason of his or her experience with children, is suitable for that purpose, *see* sections 24(7) and 24(9).
[41] Section 24(10).
[42] *See* Article 8 of ECHR and *Maslov v Austria*, Judgment of 28 June 2008, Application No. 1638/03, at para.45. *See also* Harris, O'Boyle & Warbrick, *Law of the European Convention on Human Rights* (2nd ed., Oxford University Press, 2009), Chapter 9.
[43] *See*: *The Sunday Times v United Kingdom*, Judgment of 26 April 1979, Application No. 6538/74; *Handyside v United Kingdom*, Judgment of 7 December 1976, Application No. 5493/72.
[44] IHRC 2010 Observations, at para.56. It may be noted that the case of *Marper v United Kingdom* discussed the concerns arising in the context of police use of suspects' fingerprints, DNA profiles and cellular samples. The case specifically concerned, however, the retention of such materials. The Court's ruling in this case is therefore better discussed in Section 10 of these Observations dealing with the 2013 Bill's provisions for destruction/removal of DNA samples/profiles.

incrimination that is inherent in this right,[45] the IHRC recommends that the negative inference provisions under section 19 be removed from the 2013 Bill. While the IHRC acknowledges that adverse inferences have in the past been accepted as permissible despite this privilege against self-incrimination,[46] it is arguable that the statutory regimes at issue in previous Irish cases were not strictly comparable with the current regime envisaged in the 2013 Bill. As regards the 2013 Bill, a person in deciding whether to consent or refuse to the taking of a sample has to consider not only the impact of this procedure on their right to bodily integrity and privilege against self-incrimination, but also the privacy concerns relating to the indefinite retention of their DNA sample on a database Valid reasons may exist behind a reluctance to provide DNA samples that do not arise in relation to other forms of potentially incriminating evidence. A person's capacity to provide real consent should not therefore be influenced by the possibility that negative consequences will flow from his or her refusal to give consent. For this reason, evidence in court against the accused should not include inferences drawn from his or her refusal to provide a sample.[47] The IHRC is also particularly concerned at the application

[45] In respect of the Irish Constitution, *see Heaney v. Ireland [*1996] 1 IR 580. In respect of the ECHR, *see*: *John Murray v United Kingdom*, Judgment of 8 February 1996, Application No. 18731/91, at para.45; *Saunders v United Kingdom*, Judgment of 17 December 1996, Application No. 19187/91, at para.68; *Jalloh v Germany*, Judgment of 11 July 2006, Application No. 54810/00, at para.97; *Gäfgen v. Germany*, Judgment of 1 June 2010, Application No. 22978/05, at para.168; *Van Der Heijden v The Netherlands*, Judgment of 3 April 2012, Application No. 42857/05, at para.64; and *Case of Navone & ors v Monaco*, Judgment of 24 October 2013, Application No. 62880/11, 62892/11, 62899/11, at para.71.

[46] *See Rock v Ireland* [1997] 3 IR 484 and *John Murray v United Kingdom*, Judgment of 8 February 1996, Application No. 18731/91. It is also noted that the ECtHR has stated that the right against self-incrimination is primarily concerned with respecting the will of an accused person to stay silent. As commonly understood in the legal systems of the Contracting Parties to the Convention, the right does not extend to the use of material which "may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing."[46] Thus, it seems the privilege against self-incrimination will not apply to situations where a bodily sample has been taken from a suspect against his wishes and is used in subsequent criminal proceedings against him or her. This may imply that allowing adverse inferences to be drawn from a suspect's refusal to supply a bodily sample will also not infringe the right against self-incrimination under the ECHR. *See*: *Saunders v United Kingdom*, Judgment of 17 December 1996, Application No. 19187/91, at para.69; *JB v Switzerland*, Judgment of 3 May 2001, Application No. 31827/96, at para.68; *PG & JH v United Kingdom*, Judgment of 25 September 2001, Application No. 44787/98, at paras.54, 80. It may also be noted that similar statements have been made regarding the objective nature of a forensic sample by the Irish Supreme Court, in the recent case of *DPP v Gormley & White* [2014] IESC 17. In discussing the applicant's claim as regards the taking of a sample from him before his lawyer arrived at the police station, Clarke J stated: "it must be acknowledged that the results of forensic testing are objective. Such results do not depend on the will of a suspect or comments made by a suspect in circumstances where the right to self-incrimination could have been invoked or where it is possible that the circumstances in which the interrogation took place led to the suspect, in the absence of advice, being unfairly prejudiced by the way in which the relevant questioning was conducted or responded to." Clarke J went on to conclude: "I am not satisfied that the mere fact that otherwise lawful forensic sampling is properly taken prior to the attendance of a legal adviser renders any subsequent trial, at which reliance is placed on the results of tests arising out of that forensic material, unfair." *See* paras.10.1, 10.3.

[47] *See* IHRC Observations on the 2007 Scheme, at pp.48, 49.

of negative inference provisions to children aged 14 and older, noting that the complexity of such provisions may create particular difficulties for children.[48]

16. In the event that the negative inference provisions under section 19 are to be retained in the 2013 Bill, the IHRC calls for certain safeguards to be implemented. In *Salduz v Turkey*[49], the ECtHR found that in order for the right to a fair trial to remain sufficiently "practical and effective", access to a lawyer must be provided from the first interrogation of a suspect by the police, unless there are compelling reasons to restrict this right in the particular circumstances of the case.[50] In addition the Council of Europe's Committee for the Prevention of Torture's (CPT) has emphasised the importance of the right to access to a lawyer for any person in custody. This right is a fundamental safeguard against ill treatment and, in order be to be effective, access to legal assistance should be guaranteed from the very outset of a person's deprivation of liberty.[51] The right of access to a lawyer in police custody is also the subject of legislative developments at an EU level.[52] Suspects are often most vulnerable to inappropriate pressure in the very early stages of criminal proceedings, immediately after their arrest, and therefore will require legal assistance at this point.[53] Access to legal advice at this point will therefore enable a suspect to receive clear information regarding the consequences of either giving an intimate sample or refusing to give such a sample. Indeed, such information could also be provided to suspects by the Gardaí, in the form of a standardised mandatory warning[54] which advises the person of the consequences of either consenting or refusing to give an intimate sample and also advising the person of their right of access to a lawyer.[55]

[48] *See* IHRC 2010 Observations, at para.80. Indeed, children may not have the level of maturity and understanding required to fully understand the implications of their refusal to consent to the taking of an intimate bodily sample. This may be the case even if basic language is used to describe the consequences of such refusal.

[49] Judgment of 27 November 2008, Application No. 36391/02.

[50] *Salduz*, at para.55. It may be noted that the applicant in *Salduz* was a minor.

[51] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, "CPT Standards", CPT/Inf/E (2002) 1 - Rev. 2013, December 2013, at paras.18, 19. Available at <http://www.cpt.coe.int/en/documents/eng-standards.pdf> .

[52] The right of access to a lawyer is dealt with under the Stockholm Programme (European Council work programme (Justice and Home Affairs) 2010-2014). On 27 November 2013 the European Commission announced a number of forthcoming measures in this regard including a Directive to ensure that suspects have access to legal aid at the early stages of criminal proceedings, including for people subject to a European Arrest Warrant.

[53] *See* Dovydas Vitkauskas & Grigoriy Dikov, "Protecting the right to a fair trial under the European Convention on Human Rights", Council of Europe Human Rights Handbooks, February 2012, at p.90. Available at <http://www.coe.int/t/dghl/cooperation/capacitybuilding/Source/documentation/hb12_fairtrial_en.pdf>.

[54] Such a standard mandatory warning could be formulated in line with ongoing efforts to reform the 'caution' and create special warnings for suspects in situations where 'inferences' may be drawn from their silence. The Advisory Committee on the Interviewing of Persons in Garda Custody is due to report shortly and will specifically look at different inference provisions in various pieces of legislation, recommending special warnings for each such inference provision.

17. The IHRC welcomes those amendments made in sections 21 and 22 relating to the training and experience of nominated adults who are to be present during the taking of a sample from a protected person or child. The IHRC notes, however, that this training and experience is not an absolute requirement. Furthermore, the 2013 Bill does not specifically require a nominated adult to be a "social worker" or "qualified professional", as recommended by the IHRC in its 2010 Observations.[56]

18. While the IHRC welcomes those provisions requiring electronic recording to be done whenever a sample is being taken using reasonable force, it recommends that such a recording be made in all situations in which a bodily sample is taken (unless the person objects).[57] Such a recording is beneficial to both the person from whom the sample is taken and the individual Gardaí/authorised person taking the sample, acting as both a safeguard against ill-treatment and as a record demonstrating the integrity of the process.[58]

19. The IHRC also emphasises that force should only be used by members of An Garda Síochána where it is strictly necessary and only to the extent required for the performance of their duties.[59] The UN Code of Conduct for Law Enforcement Officials, the UN Basic Principles on the Use of Force and Firearms, and the CPT Standards all highlight the principle that force should only be used in exceptional circumstances against detained persons suspected of having committed an offence.[60] The IHRC also believes that certain principles in relation to the use of reasonable force could be expressly provided for in the 2013 Bill, as well as in any codes of practice or accompanying Ministerial regulations created pursuant to sections 142 and 143. Such regulations may be updated from time to time to take account of the experience of invoking the legislation and evolving human rights standards.[61]

c. Recommendations

20. The IHRC recommends that section 11 be removed from the 2013 Bill, thus allowing bodily samples to be taken only for the purposes of investigating a specific criminal offence (per sections 12 and 13).

21. While the IHRC welcomes the amendments that have been made in respect of the negative inference provisions of the 2013 Bill, it recommends that those provisions allowing a negative inference to be drawn from an accused person's failure to consent to

[56] IHRC 2010 Observations, at para.81.
[57] *See generally* IHRC 2010 Observations, at para.54.
[58] Ibid.
[59] Ibid, at para.55.
[60] *See* (fn) 8.
[61] IHRC 2010 Observations, at para.60. Such principles to be considered when authorising the use of force included: the seriousness of the relevant offence; the degree of the individual's alleged participation in the offence; the age, physical and mental health, cultural background, and religious beliefs of the person (to the extent that they are known); whether there is a less intrusive but reasonably practical way of obtaining evidence tending to confirm or disprove that the person committed the relevant offence; and if the person refuses to give consent, their reasons for doing so, *see* para.55.

the taking of an intimate bodily sample be removed from the 2013 Bill. Furthermore, those negative inference provisions contained in section 19 should be amended to remove its application to children aged 14 and over. If this approach is not taken, the IHRC proposes that the 2013 Bill make provision for a person to be given guaranteed access to legal advice when they have been requested to consent to the provision of an intimate bodily sample.[62] In addition, the IHRC recommends a specific warning be devised that Gardaí must provide to persons whenever they request an intimate sample.[63] This warning should advise persons that they have the right to access to a lawyer and also inform them of the consequences of providing an intimate sample versus the consequences of refusing to provide such a sample. This warning should also be adapted to suit the needs of minors.

22. While the IHRC welcomes the changes made to sections 21 and 22, as regards the appropriate experience and training of nominated adults, it recommends that these provisions be further amended to provide that where a parent/guardian cannot be present for the taking of a sample, the nominated adult who is present should be a social worker or other qualified professional who is not a member of the Garda and who has specific experience working with protected persons or children.

23. The IHRC recommends that in all situations where a bodily sample is being taken an electronic video recording is made, unless the person from whom the sample is being taken objects to such a recording. The IHRC further proposes that certain principles be expressly provided for in the 2013 Bill, thus providing a more robust safeguard against potential abuses of the reasonable force provisions.[64] Finally the IHRC recommends that reporting requirements be implemented in relation to the use of reasonable force, similar to those reporting requirements found under the Mental Health Commission's *Rules Governing the Use of Seclusion and Mechanical Means of Bodily Restraint*.[65] Such a requirement would involve the Gardaí reporting every incident in which reasonable force was used in order to take a sample under the 2013 Bill. These reports would then be placed on a register and provided on a mandatory basis to An Garda Síochána Ombudsman Commission (GSOC) and other oversight mechanisms,[66] thereby allowing for the independent monitoring of the use of reasonable force under the Bill in all the Garda stations throughout the country.[67]

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[62] Ibid, at para.69. The legal advisor can then fully explain to the person the implications of a refusal to consent and the negative inferences that may flow from that refusal.

[63] *See* (fn) 54.

[64] Such principles can be found at (fn) 59.

[65] Mental Health Commission, "Rules Governing the Use of Seclusion and Mechanical Means of Bodily Restraint – Version 2", October 2009, available at <http://www.mhcirl.ie/File/Revised_Rules_SecMR.pdf> . The rules have been written pursuant to section 69(2) of the Mental Health Act 2001.

[66] Future possible oversight mechanisms may include, for example, those mechanisms established by the Optional Protocol to the UN Convention Against Torture (OPCAT). Upon ratification, OPCAT requires the relevant state to set up a National Preventive Mechanism (NPM) to undertake regular visits to places of detention. Ireland is currently a signatory to OPCAT but has not yet ratified it.

[67] *See* Appendixes 3 and 4 of the Mental Health Commission "Rules" for an example of how such an incident may be recorded.

III. TAKING OF SAMPLES FROM VOLUNTEERS TO GENERATE DNA PROFILES

a. Relevant Provisions of the 2013 Bill

24. Part 3 of the Bill governs the taking of a sample from a volunteer for the purposes of generating a DNA profile in respect of that person and also sets out the circumstances in which a mass screening may be conducted. The samples to be taken under Part 3 are limited to mouth swabs or head hair.[68]

25. Section 27 of the 2013 Bill provides for the taking of a sample from what it terms "volunteers".[69] In the case of such "volunteers", a member of the Garda or an authorised person may request a person to have a sample taken for the purpose of generating a DNA profile. Such requests can be made in relation to the investigation of a particular offence or the investigation of an incident that may have involved the commission of an offence.[70] The volunteer must be informed of certain matters before their consent is sought and their consent must be in writing.[71] A refusal of a person to give consent for the taking of a sample shall not of itself constitute reasonable cause to suspect the person of having committed the offence concerned for the purpose of arresting and detaining him or her.[72]

26. DNA profiles will not be entered in the DNA Database System routinely.[73] Rather a volunteer must give written consent before his or her DNA profile may be entered into the reference index of the System.[74] The volunteer must be provided with certain information before giving his or her consent. Such information includes: that he or she is not obliged to give consent to the entry of the DNA profile; the effect of such entry; and the rules governing the destruction of the sample and the removal of the profile from the System.[75]

27. The 2013 Bill also sets out the circumstances in which a mass screening of a class of persons defined by certain characteristics may be conducted. Such a mass screening must be authorised by a member of the Garda not below the rank of chief superintendent where he or she has reasonable grounds for believing that the mass screening of the target class is likely to further the investigation of the offence and it is a reasonable and proportionate measure to be taken in the investigation of that offence.[76] The target class

[68] Explanatory Memorandum to 2013 Bill, at p.9.
[69] A "volunteer" is a person other than an offender or person in custody. It may include a victim or a person reasonably considered to be a victim, *see* sections 27(1) and (2).
[70] Section 27(1).
[71] Sections 27(3) and 27(4). Most importantly, the "volunteer" must be told that they are not obliged to have the sample taken, *per* section 27(3)(a).
[72] Section 27(9).
[73] Explanatory Memorandum to 2013 Bill, at p.10.
[74] Section 28(3). This provision excludes protected persons, children, victims or a person reasonably considered to be a victim from its scope i.e. such persons cannot be asked to consent to their DNA profile being entered into the DNA Database, *see* section 28(1).
[75] Section 28(2).
[76] Section 29(2).

may be determined by sex, age, kinship, geographic area, time, or any other matter which the authorising member considers appropriate.[77]

b. IHRC Analysis

28. While the IHRC recognises and welcomes that certain provisions found in Part 3 have implemented key recommendations of the 2010 Observations, it still has some concerns arising from this Part of the 2013 Bill.[78] For example, in light of the significant intrusion on a person's privacy and bodily integrity that is entailed in taking a sample, the IHRC considers the wording used in respect of "volunteers" to be overly broad. Such wording could allow the taking of samples from a "volunteer" where there is no causal connection between the giving of a sample and a specific ongoing investigation.[79] This would go against both the Law Reform Commission (LRC) previous recommendations and the IHRC's 2010 recommendations, which argued that a volunteer should only be requested to provide a sample where the sample is likely to further the investigation of a specific criminal offence.[80]

29. The IHRC also believes that the DNA profile of a volunteer should only be retained for the purposes of the investigation of a specific offence for which the sample is provided. As such, volunteers should not be asked to consent to their DNA profile being entered into the general DNA Database System.[81] This is necessary in order to ensure proportionality in the scope of the DNA Database and to minimise the interference with the right to privacy. The IHRC questions what legitimate aim is being pursued by allowing the Garda to request a volunteer to consent to the entry of their profile to the general DNA Database System, where that volunteer is not suspected of having committed a relevant offence and is not subject to a police investigation.[82] Allowing such an option may considerably broaden the scope of persons who will have their DNA profile entered in the DNA Database System in an unnecessary and disproportionate manner that is not in keeping with the primary purposes of the DNA Database.[83]

30. The IHRC would further like to highlight the importance of allowing, in situations where consent is being sought from a volunteer or person involved in a mass screening, the opportunity for that volunteer/person to communicate with a legal practitioner.[84]

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[77] Section 29(3). A refusal of a volunteer to consent to the taking of a sample shall not of itself constitute reasonable cause for a member to suspect the person of having committed the offence concerned for the purpose of arresting and detaining him or her, *see* section 29(10).

[78] An example of such a welcome amendment include sections 27(9) and 27(10), which provide that a person's refusal to give consent "shall not of itself constitute reasonable cause for a member of An Garda Síochána to suspect the person of having committed the offence concerned for the purpose of arresting and detaining him or her". *See generally* IHRC 2010 Observations, at para.15.

[79] IHRC 2010 Observations, at para.13.

[80] Ibid. *See also* Report of the Law Reform Commission, *The Establishment of a DNA Database*, LRC 78-2005, at para.2.81.

[81] IHRC 2010 Observations, at para.14.

[82] Ibid.

[83] Ibid.

[84] Ibid, at para.15. This recommendation was also made previously in IHRC Observations on the 2007 Scheme, at p.46.

Where the person does not wish to communicate with a legal practitioner or is not in a position to do so, he or she must instead be given full information regarding the taking of a sample, as well as its use, retention and removal, in the form of a leaflet. In this way, full and informed consent can be ensured.[85]

c. Recommendations

31. The IHRC recommends that section 27 of the 2013 Bill be amended to provide that a volunteer should only be requested to provide a bodily sample where a member of An Garda Síochána, not below the rank of Superintendent, is satisfied that the sample is likely to further the investigation of a specific criminal offence. It further recommends that section 28 be removed from the 2013 Bill to ensure that people who are designated volunteers are not requested to consent to the retention of their DNA profile in the DNA Database System where this is not necessary for the investigation of a specific offence for which their bodily sample was requested.[86]

32. The IHRC recommends that sections 27 and 29 of the 2013 Bill be amended so as to stipulate that "volunteers" and persons involved in a mass screening should have the opportunity to properly consider their consent to the provision of a sample and to decide whether they would like to communicate with a legal practitioner before providing such a sample. If a person does not want to consult with a lawyer, or is not in a position to do so, he or she must instead be provided with written information explaining the procedures involved in taking a bodily sample.

33. The IHRC further wishes to raise the possibility that the identification of a class of persons could potentially be directed, either explicitly or possibly inadvertently, at a racial or ethnic minority in the State. This would be wholly unacceptable and should accordingly be explicitly proscribed.

IV. TAKING OF SAMPLES FROM OTHER PERSONS OR BODIES FOR REFERENCE INDEX OF DNA DATABASE SYSTEM

a. Relevant Provisions of the 2013 Bill

34. Part 4 of the Bill provides for the taking of samples for the purposes of the DNA Database System from offenders (adult and children), former offenders, and the bodies of deceased persons who are suspected of having committed an offence. Samples to be taken under this Part are limited to mouth swabs or head hair.

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[85] Ibid, at paras.15, 21. Note that there is no express provision in the 2013 Bill for an opportunity to consider consent, to communicate with a legal practitioner, or to provide full information in writing. Furthermore, there is no express provision requiring these matters to be addressed in a code of practice drafted under section 143 of the 2013 Bill. This lack of express provision, however, would of course not exclude such issues from being addressed.

[86] In addition, see Section 10 of these Observations for comments on the retention of volunteer samples/DNA profiles where samples were taken for a specific investigation and that investigation has since closed.

35. Section 31 provides that a sample may be taken from an "offender" for the purpose of generating a DNA profile to be entered in the reference index of the DNA Database System.[87] Section 32 sets out those procedures to be followed in taking a sample from a child offender.[88] Where an offender is in prison or a detention school/centre, as the case may be, the sample will be taken by a prisoner officer/authorised staff member following authorisation by the prison governor/director of the children detention school.[89] Where the adult or child offender is not in prison, the sample can be taken by a member of the Garda, following an authorisation by another member not below the rank of Sergeant and pursuant to a "notice to attend".[90] Non-compliance with a notice to attend, without reasonable cause, may result in the adult or child offender being prosecuted summarily.[91]

36. Samples may also be taken from persons (including a child) who are "former offenders".[92] Section 34 lays down the procedures to be followed in taking a sample from former offenders. It states that a member of An Garda Síochána not below the rank of superintendent can authorise the taking of a sample if he is satisfied that a person is a former offender and that it is in the interests of the protection of society and desirable for the purpose of assisting in the investigation of offences to have a sample taken from the person.[93] If the person concerned does not comply with the Garda request, an application can be made to a judge of the District Court for an order requiring him or her to have a sample taken.[94]

37. Section 36 provides for reasonable force to be used in taking samples from adult and child offenders, where the person concerned is in prison, a children detention school

[87] Section 31(2). An "offender" includes a person who: on commencement of this section is still subject to sentence in connection with a relevant offence; is sentenced after commencement of this section, whether convicted before or after its commencement; was convicted of an offence outside the State but is serving a sentence of imprisonment in the State following transfer, whether before or after the commencement of this section; and persons who are subject to the registration requirements of Part 2 of the Sex Offenders Act 2001, *see* section 31(1).

[88] Note that the categories of child offender from which a sample can be taken are similar to those adult offenders listed, *see* section 32(1).

[89] Sections 31(4), (5) and sections 32(4), (5). Sections 31(8) and 32(8) further specify the information that is to be given to the adult or child offender by the prison officer, authorised staff member of the children detention school, or Garda, as the case may be, before the sample is taken

[90] Sections 31(6), (7), (9), and sections 32(6), (7), (9). In the case of a child offender, a notice to attend will also be sent to the parent/guardian of the child offender concerned, *see* section 32(10).

[91] Sections 31(12) and 32(12). The penalties upon a summary conviction include, for adults, a class A fine or imprisonment for a term not exceeding 12 months or both, and for children, a class C fine or detention for a period not exceeding 6 months or both.

[92] Section 33 describes a "former offender" as a person who is no longer subject to a sentence for a relevant offence or, in the case of a sex offender, is no longer subject to notification requirements under the Sex Offenders Act 2001. It also applies to a person who is no longer subject to a sentence for a corresponding offence in the case of convictions in other jurisdictions or is no longer subject to corresponding requirements in the case of convictions for sexual offences in other jurisdictions.

[93] Section 34(2).

[94] Sections 34(5) and (6). In making such an order, the judge must be satisfied that the person is a former offender and it is in the interests of justice in all the circumstances of the case to make the order, *see* section 34(6).

or other place of detention.[95] Such force must be authorised by the governor of the prison/place of detention or the director of the children detention school.[96] The person must be informed in advance of the intention to use reasonable force and that this reasonable force has been authorised.[97] The taking of a sample with the use of reasonable force must be recorded by electronic means.[98]

b. IHRC Analysis

38. The IHRC is concerned by the possible indefinite retention of DNA profiles generated from the samples of adult offenders in the DNA Database System. It acknowledges that section 80 of the 2013 Bill provides certain exceptions to this retention and also welcomes the exceptions in place under section 84 for DNA profiles generated from the samples of child offenders.[99] These concerns, regarding the extensive retention of the DNA profiles of adult offenders, are dealt with under Section 10 of these Observations, which discuss the relevant provisions of Part 10 of the 2013 Bill (concerning the destruction/removal of samples and DNA profiles from the DNA Database System).

39. The IHRC believes that sections 33 and 34 allowing a sample to be taken from a former offender represent a serious interference with Article 8 of the ECHR (right to private life) and the IHRC questions whether this interference can be justified as "necessary in a democratic society". While sections 33 and 34 do not give police a blanket permission to take samples from all former offenders,[100] the safeguards protecting the private life and bodily integrity of former offenders are weak under the 2013 Bill. While the IHRC appreciates that sometimes it is necessary in investigating ongoing offences to collect the DNA profiles of former offenders, it is of the opinion that any such collection should only be on foot of the person being treated as a suspect and that it should also involve judicial oversight. Such oversight may ensure that the taking of samples in these circumstances complies with the constitution and best practice in international human rights law as well as providing a more proportionate way of achieving the legitimate aims of these provisions.[101] Thus, the IHRC is of the view that where An Garda Síochána consider it necessary to take a sample from a person who has previously been convicted of a relevant offence and has served his or her sentence, in light of the circumstances outlined in section 33(2), the Garda should be required to apply

[95] Sections 36(1) and (2).
[96] Section 36(3).
[97] Section 36(4).
[98] Section 36(7).
[99] These exceptions for child offenders provide that a child offender's DNA profile will be kept for a maximum of 4 years (in the case of non-custodial sentences) and 6 years (in the case of custodial sentences). This exception will not apply where the child offender was convicted of an offence that is triable by the Central Criminal Court or an offence that is excluded by the Minister due to its nature and seriousness, *see* section 84(2).
[100] For example, sections 33 and 34 limit their application to former offenders convicted of a "relevant" offence and/or those former offenders whom the Garda specifically believe it is desirable to receive a sample from.
[101] IHRC 2010 Observations, at para.11.

to a judge of the District Court in order to take such a sample.[102] In considering any such application for permission to take a sample from a former offender, the judge must be satisfied on the basis of evidence presented by An Garda Síochána that the bodily sample and DNA profile of the particular person are required for the investigation of a specific offence.[103] The judge should also be satisfied that it is necessary and proportionate to take such a sample.[104]

40. The IHRC welcomes the requirement that any taking of a sample with the use of reasonable force from an adult or child offender should be electronically video recorded. The IHRC further reiterates its earlier discussion on the benefits of adopting certain principles in relation to the use of reasonable force, as well as emphasising the principle that force should only ever be used by the Garda where it is strictly necessary.[105]

c. Recommendations

41. The IHRC has no recommendations to make as regards the taking of samples from adult and child offenders.[106]

42. The IHRC recommends that sections 33 and 34 be amended to provide that a sample can only be taken from a former offender where the person is a suspect in the case and an application has been made to a judge of the District Court by An Garda Síochána and the judge is satisfied that it is necessary and proportionate to take such a sample.[107] If such judicial oversight is not adopted, the IHRC recommends that sections 33 and 34 should at least provide that where an application is made to a judge of the District Court for an order requiring a person to have a sample taken, the judge should be satisfied on the basis of the evidence presented by the Garda that the bodily sample and DNA profile of the particular person are required for the investigation of a specific offence.[108]

43. As regards the use of reasonable force, the IHRC repeats its recommendations made earlier in these Observations (at paragraph 22).

V. TAKING OF SAMPLES FOR ELIMINATION PURPOSES

a. Relevant Provisions of the 2013 Bill, IHRC Analysis, and Recommendations

44. Part 5 of the Bill deals with the taking of samples from persons who, in the performance of their duties, are considered to be at risk of inadvertently contaminating crime scene samples with their own DNA. It provides for the entry of the relevant DNA profiles into the three elimination indexes of the DNA Database System. The bodies

[102] Ibid, at para.16.
[103] Ibid, at para.17.
[104] Ibid, at para.16.
[105] *See* Paragraph 19 of these Observations.
[106] *See* Section 10 of these Observations for recommendations regarding the retention of the DNA profiles of adult and child offenders.
[107] IHRC 2010 Observations, at para.16.
[108] Ibid, at para.17.

covered include An Garda Síochána, FSI, the State Pathologist's Office, and the Garda Síochána Ombudsman Commission.[109]

45. The IHRC does not have any issues as regards this Part of the 2013 Bill, except for some potential concerns regarding the retention of relevant samples and/or DNA profiles taken pursuant to Part 5.[110] These concerns, along with others, are more fully dealt with in Section 10 of these Observations.

VI. TAKING OF SAMPLES FROM PERSONS OR BODIES FOR PURPOSES OF INDENTIFICATION DIVISION OF DNA DATABASE SYSTEM

a. Relevant Provisions of the 2013 Bill, IHRC Analysis, and Recommendations

46. Part 6 of the Bill deals with the taking of samples in relation to: missing persons; seriously ill or severely injured persons who are unable by reason of their illness or injury to identify themselves; and unknown deceased persons. These samples may be used to generate DNA profiles that can then be entered in the missing and unknown persons index of the DNA Database System.

47. The IHRC welcomes these provisions and is satisfied that sufficient safeguards are provided in Part 6 for the taking of samples from items belonging to a missing person or from blood relatives of the missing persons, as well as for the taking of samples from unknown persons who are seriously ill or injured and cannot identify themselves.[111] The IHRC therefore has no recommendations to make on Part 6 of the 2013 Bill.

VII. TAKING OF CERTAIN SAMPLES UNDER PARTS 3 AND 6 FROM PROTECTED PERSONS OR CHILDREN

a. Relevant Provisions of the 2013 Bill

48. Part 7 of the Bill makes special provision for the taking of samples from protected persons or children under Part 3 (volunteers) and Part 6 (missing and unknown persons).

49. Before taking a sample under Parts 3 and 6, the protected person or child must be given any necessary information in a manner and in language appropriate to the level of understanding of the person and/or in an age appropriate manner.[112] As regards consent,

[109] Explanatory Memorandum to 2013 Bill, at p.14.
[110] Sections 88(2) and 89(2). Such concerns relate to the retention of DNA profiles in the elimination index of the DNA Database System for up to 10 years after the person from whom it was taken has left An Garda Síochána or FSI.
[111] Such safeguards can be found under section 48 (regarding samples taken from items belonging to a missing person and blood relatives of the missing person) and section 49 (regarding samples taken from seriously ill or injured unknown persons) of the 2013 Bill. An example of such safeguards under section 49 include: the provision for consultation with the person concerned insofar as possible; the limitation of any samples taken to those of a non-intimate nature; and the requirement that authorisation from the High Court is obtained before any such sample is taken
[112] Section 53.

the requirements are as follows: for children aged 16 years or older, only the child's consent is required; for a child aged between 14 and 16 years, the child's consent and the consent of a parent/guardian are required; for a child aged under 14 years, the parent/guardian's consent is required; and for a protected person, the parent/guardian's consent is required.[113] If a parent/guardian's consent cannot be obtained, the consent of a grandparent, adult sibling or adult child (in the case of a protected person) is sufficient.[114] If the consent of none of these specified people can be obtained, an application may be made to the District Court for an order authorising the taking of the sample.[115] Section 57 provides that the adult who gave consent to the taking of a sample from the protected person or child under Parts 3 and 6 is also permitted to be present when the sample is being taken. Part 7 also clarifies that even if consent is given or a court order is made, the sample will not be taken if the protected person or child objects to or resists the taking of the sample.[116]

b. IHRC Analysis

50. The IHRC welcomes the safeguards provided by the 2013 Bill for those situations in which a sample is taken from a protected person or child under Parts 3 and 6. In particular, the IHRC welcomes section 57 which allows the adult who consented on behalf of the protected person/child to be present during the taking of the sample. The IHRC notes, however, that in the absence of a consenting adult being present, it would be beneficial for an alternate, nominated, person to be present during the taking of the sample. . While samples taken under this Part will be restricted to those of a non-intimate nature, the IHRC considers it advisable that a nominated adult be present during the taken of a sample, similar to those found in sections 21 and 22 of the 2013 Bill.[117] Such an approach would provide an additional safeguard for protected persons and children in taking samples from them under Parts 3 and 6.

c. Recommendations

51. The IHRC recommends that Part 7 be amended so that, in situations where a consenting adult is not present, a qualified professional can be nominated to be present during the taking of samples from protected persons and children under Parts 3 and 6.

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[113] Section 54(2).
[114] Section 54(3).
[115] Section 54(4). Section 56 describes in further detail the factors to be considered by a judge before authorising such an order. These factors may include: where the sample is required for the purposes of the investigation of a particular offence, the nature and seriousness of that offence; the best interests of the protected person or child concerned; the wishes of the protected person or child, insofar as they can be ascertained; and whether the taking of a sample is justified in all the circumstances of the case, *see* section 56(2).
[116] Section 57(2).
[117] *See* Paragraphs 17, 22 of these Observations. Such an amendment would then allow for the Garda to nominate an adult who, by reason of their qualifications, has the necessary skills to work with protected persons/children.

VIII. DNA DATABASE SYSTEM

i. Relevant Provisions of the 2013 Bill

52. Part 8 of the Bill establishes the DNA Database System. It is divided into 4 chapters dealing with, respectively: the structure and purposes of the System; the investigation division of the System; the identification division; and the functions of Forensic Science Ireland (FSI) in relation to the System.[118]

53. The DNA Database System shall be comprised of 2 divisions: the investigation division and the identification division. The investigation division will contain the following indexes of DNA profiles: the crime scene index; the reference index; and the elimination indexes (split into the elimination indexes of the Garda, crime scene investigators and prescribed persons).[119] The identification division will contain only one index of DNA profiles: the missing and unknown persons index.[120] Each index will also contain information that may be used to identify the sample from which each profile was generated.[121] The DNA Database System will only be used for: the investigation and prosecution of criminal offences; the finding or identification of missing persons; the identification of seriously ill or severely injured persons who cannot indicate their identity; and the identification of the bodies of unknown deceased persons.[122]

54. Sections 61 to 65 deal with the investigation division of the DNA Database System. These sections explain that the crime scene index will contain DNA profiles of persons generated from samples of biological material found at, or recovered from, crime scenes.[123] Section 62 provides that the reference index of the System will contain DNA profiles generated from samples taken from: persons in Garda custody; volunteers who consent to the entry of the DNA profiles in the System; offenders and former offenders; deceased suspects; and those profiles received under Part 11 regarding international cooperation. Sections 63 to 65 describe the DNA profiles that will be contained within the elimination indexes.[124] Section 66 describes the identification division of the System.[125]

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[118] Explanatory Memorandum to 2013 Bill, at p.18.

[119] Sections 59(2) and (3). It should be noted that section 59(1) provides that FSI will establish the DNA Database System as soon as may be after the commencement of this section.

[120] Section 59(4).

[121] Sections 59(3) and (4).

[122] Section 60(1). Specific examples of how the System might be used include: conducting searches of the System as permitted by section 68; conducting automated searching for, or automated comparison of, certain DNA profiles in the System with other DNA profiles; and facilitating a review of an alleged miscarriage of justice under the Criminal Procedure Act 1993, *see* section 60(2). Further examples of how the System may be used are provided under this section – it is, however, a non-exhaustive list and section 60(2) in no way prejudices the generality of section 60(1).

[123] Section 61(1). A "crime scene" is defined under section 61(2) and includes *inter alia* the place where the offence is reasonably suspected of having been committed and the body of the victim of the offence, whether living or deceased. It should further be noted that crime scene samples predating the commencement of this Bill will be included.

[124] The Garda Síochána elimination index will contain DNA profiles of certain Garda personnel, *per* section 63. The crime scene investigators index will contain DNA profiles of certain Garda personnel, FSI staff

55. Part 8 further describes the functions of FSI in relation to the DNA Database System.[126] Among these functions, it provides that the Director of FSI may make arrangements with other laboratories for the generation of DNA profiles from samples.[127] Section 68 specifies the rules for how a DNA profile entered in an index may be compared with another profile in that same index or with a DNA profile in another index.[128] The System may only be searched by a member of the staff of FSI and a DNA profile in the System cannot be compared with a DNA profile that is not entered in the System, except in accordance with Part 11 of the 2013 Bill.[129] It should be noted that any person who recklessly or intentionally discloses information relating to either a sample or information in the DNA Database System shall be guilty of an offence.[130] Section 69 allows FSI to process information in the System for statistical and analytical purposes, once the data does not contain any identifying information. Finally, the Director of FSI is required to submit an annual report to the Minister regarding the performance of its functions.[131]

b. IHRC Analysis

56. The IHRC welcomes the clarity of Part 8 in its description of how the DNA Database System will be structured and operated, and particularly welcomes the requirement that the Director of FSI submit an annual report to the Minister regarding the performance of its functions. The IHRC questions, however, whether there are adequate safeguards in place as regards the power of the Director of FSI to contract out to other laboratories (whether within or outside the State) the duty of generating DNA profiles from samples. While section 67(4) subjects any such contractual arrangements to the requirements contained in the overall 2013 Bill, there might still arise some concerns about transmitting sensitive information in the form of bodily samples to another

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members, and certain prescribed persons, *per* section 64. The prescribed persons index will contain DNA profiles of certain prescribed persons, *per* section 65.

[125] This provision sets out that the missing and unknown persons index of this division will contain DNA profiles generated from samples taken from, or in relation to, persons or the bodies of deceased persons who are missing, seriously ill or severely injured, or unknown deceased persons. It will also contain profiles received and entered into the missing and unknown persons index under Part 11 (regarding international cooperation).

[126] These functions may include: the generation of DNA profiles from samples taken under the Bill; the searching of the System to see whether there is a match between two DNA profiles; and the reporting of any results of the searches of the System to an Garda Síochána, the Ombudsman Commission or a coroner, as appropriate, *per* section 67(2). *See* section 67(2) for a longer list of the potential functions of FSI.

[127] Sections 67(3) and (4). Such arrangements will be subject to compliance with the requirements of the 2013 Bill.

[128] Section 68(1). No DNA profile in the DNA Database System may be compared with another profile in the System unless it is in accordance with section 68 or where it is done solely for the purpose of administration of the System. In all cases, a profile entered in an index may be compared with other profiles in the same index. Sections 68(2) to 68(8) go on, however, to specify the permissible comparisons between profiles entered in different indexes.

[129] Section 68(9).

[130] Section 145(2). Such a person shall be liable, on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months or both, or, on conviction on indictment, to a fine not exceeding €50,000 or imprisonment for a term not exceeding 5 years or both.

[131] Section 70. Copies of this report must be laid before the Houses of the Oireachtas.

laboratory not directly controlled by the 2013 Bill or, indeed, by the State at all. Under the State's duty to "secure" rights and to exercise due diligence, functions delegated or subcontracted to private bodies require utmost state control under human rights standards. The Human Rights Committee has commented on this positive obligation in the context of rights protected under the ICCPR, such as the right to privacy as follows:

> *"...the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities".*[132]

57. Furthermore, in laying out the permissible comparisons between DNA profiles within the DNA Database System, section 68(1) states that such comparisons are subject to this provision "unless it is done solely for the purpose of the administration of the System." The IHRC would welcome further clarification as to what precisely the "administration of the System" means and why it might be necessary to compare profiles for such administration.

58. The IHRC notes that the DNA Database System may only be searched by a member of staff of FSI (with the exception under Part 11 regarding international cooperation). Further information regarding the number of staff expected to have access to the Database would be welcome, as well as any information regarding the code of conduct governing this staff. Finally, the IHRC would welcome additional details on the manner in which the statistical and analytical information referred to in section 69 may be used.

c. Recommendations

59. The IHRC recommends that sections 67(3) and (4) be expanded and that specific safeguards be laid down in relation to the contracting out of FSI functions to other laboratories, including specific reference to "control" requirements. In addition, the IHRC recommends that queries relating to the meaning of the "administration of the system" and the codes of conduct governing FSI staff, as mentioned above, are addressed by way of further explanation in the 2013 Bill.

[132] Human Rights Committee, General Comment No. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 29 March 2004, CCPR/C/21/ Rev.1/ Add.13

IX. DNA DATABASE SYSTEM OVERSIGHT COMMITTEE

a. Relevant Provisions of the 2013 Bill

60. Part 9 of the Bill provides for the establishment of an independent committee to oversee the management and operation of the DNA Database System for the purposes of maintaining the System's integrity and security.[133] This Committee shall make recommendations to the Minister and Director of FSI as it considers appropriate and may also review any specific matter relating to the management and operation of the System. Any report written pursuant to such a review shall be submitted to the Minister.[134] The Director of FSI, FSI staff, An Garda Síochána, and Ombudsman Commission must all cooperate with the Oversight Committee and furnish information to the Committee if so requested.[135] Finally, the Committee shall submit an annual report to the Minister regarding the performance by the Committee of its functions under the Bill.[136]

61. Schedule 1 of the 2013 Bill deals with the question of membership of the Oversight Committee and sets out specific persons to be included on that Committee, such as a judge or former judge and a member of staff of the Data Protection Commissioner (DPC).[137] Schedule 1 further states that when appointing persons to be ordinary members of the Committee, the Minister shall have regard to the desirability of their having obtained qualifications, experience or expertise in science, human rights or any other field which the Ministers thinks appropriate having regard to the functions of the Committee.[138]

b. IHRC Analysis

62. The IHRC welcomes the provisions of the 2013 Bill allowing the DNA Database System Oversight Committee to undertake a review of the operation of the System, on its own initiative as well as at the bequest of the Minister.[139] The IHRC further welcomes requirement in Schedule 1 that a person from the DPC sit on the Oversight Committee. The presence of such a person will ensure that the Database System is transparent, with the DPC representative able to continuously monitor and assess the running of the Database once it is operative.

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[133] Sections 71 and 72.
[134] Sections 72(3) and (4). It should be noted that the Committee shall perform such a review if requested by the Minister. Furthermore, any report received by the Minister following such a review must also be laid before the Houses of the Oireachtas.
[135] Section 73.
[136] Section 74.
[137] Section 71(3) specifically states that Schedule 1 shall have effect in relation to the Oversight Committee.
[138] Schedule 1, section 1(7).
[139] The IHRC also welcomes the requirement that the Minister for Justice place a copy of the report written pursuant to the review before the Houses of the Oireachtas. These provisions are in line with the recommendations made by the IHRC in respect of the 2007 Scheme of the Bill, *see* IHRC Observations on the 2007 Scheme, at p.39. *See also* IHRC 2010 Observations, at para.43.

63. The IHRC recommends, however, that Schedule 1 of the 2013 Bill be amended to provide that the Minister is required, when appointing persons to be members of the Committee, to appoint at least one person with human rights expertise. This would go further than section 1(7) of the current Schedule 1, which merely requires the Minister to have regard to the desirability of appointing Committee members with qualifications, experience or expertise in human rights.[140] Given the serious human rights implications which may arise in relation to the retention of a person's DNA profile or bodily sample, the IHRC considers it imperative that the Oversight Committee includes a person with human rights expertise.[141]

c. Recommendations

64. The IHRC recommends that Schedule 1 of the 2013 Bill be amended to provide that the Minister is required to appoint at least one member with human rights expertise to the Oversight Committee.

X. DESTRUCTION OF SAMPLES AND DESTRUCTION, OR REMOVAL FROM DNA DATABASE SYSTEM, OF DNA PROFILES

a. Relevant Provisions of the 2013 Bill

65. Part 10 of the Bill sets out the circumstances in which samples taken under the 2013 Bill may be destroyed and DNA profiles removed from the DNA Database System. This Part is comprised of 5 Chapters, each having regard to the different circumstances in which samples may be taken under the Bill. Chapter 1 deals with those samples taken under Parts 2 and 4 (persons in Garda custody and offenders), Chapter 2 applies to samples taken under Part 3 of the Bill (volunteers), Chapter 3 concerns those samples taken under Part 5 (elimination purposes), Chapter 4 applies to Part 6 samples (samples taken for identification purposes) and Chapter 5 deals with miscellaneous matters.

66. Section 76 sets out the circumstances in which an intimate or non-intimate sample taken from a person is to be destroyed. Where the section applies, the sample concerned is to be destroyed before the expiry of a period of 3 months from the date on which the applicable circumstance first applied. The circumstances are that: it has been decided not to institute proceedings against the person within 12 months of taking the sample; the proceedings were instituted and the person was acquitted of the offence charged or the charge against the person was dismissed for insufficient evidence or the proceedings were discontinued; the person is subject to an order under section 1(2) of the Probation of Offenders Act 1907 and has not been convicted of a relevant offence during a period of 3 years from the making of the order; or the person's conviction was quashed or declared to

[140] IHRC 2010 Observations, at para.45.

[141] Such an amendment would also be in line with earlier recommendations made by the LRC and recommendations made in the IHRC Observations on the 2007 Scheme, *see* IHRC 2010 Observations, at para.44.

be a miscarriage of justice.[142] The "retention" period of 3 months may be extended to 12 months in certain circumstances.[143] The Commissioner of An Garda Síochána must notify the person in writing when he decides to retain a sample.[144] Other than section 76, where the Commissioner believes exceptional circumstances apply, he or she can allow for an intimate or non-intimate sample to be destroyed.[145]

67. Section 80 sets out the circumstances in which a DNA profile from a detained person or adult/child offender is to be removed from the reference index of the DNA Database System.[146] Such a profile must be removed within 3 months of the applicable circumstances first occurring.[147] This provision is subject to section 81, which allows the Garda Commissioner to extend the retention period for certain DNA profiles in the reference index of the DNA Database System in particular circumstances.[148] The length of the permitted extension period varies depending on the ground on which the extension is authorised, but in all cases it is subject to a maximum of 6 years in the case of an adult or 3 years in the case of a child or protected person.[149] Section 84 of the 2013 Bill contains a special provision for child offenders as regards the indefinite retention arrangements applicable to the DNA profiles of convicted persons entered in the DNA Database System. The Bill sets down a retention period of 4 years for child offenders given a non-custodial sentence and 6 years for child offenders given a custodial sentence.[150] Finally, section 85 provides that where certain circumstances arise during the

[142] Section 76(1). It should also be noted that section 76(2) provides that subsection 76(1)(c), regarding a person subject to an order under the Probation of Offenders Act 1907, will not apply where the order granted has been discharged on the appeal of a person against conviction for the relevant offence concerned, if on appeal his or her conviction is affirmed.

[143] The specified circumstances are that: the investigation concerned has not been concluded; a decision on whether to institute proceedings against the person has not been taken; the sample and any results of the forensic tests conducted on it are likely to be required for the prosecution of an offence; all the circumstances of the case and the reasons that no proceedings have been instituted or, if instituted, that they did not result in a conviction make it necessary to retain the sample, *see* sections 77(1) to 77(3).

[144] Section 77(5).

[145] Section 78(1). Such exceptional circumstances include: it is established that the relevant offence was not committed; it is established that the detention of the person concerned during which the sample was taken was done on the basis of mistaken identity; or it is determined that the detention of the person during which the relevant sample was taken was unlawful, *see* section 78(2).

[146] Specifically, section 80 concerns those DNA profiles generated from samples taken from persons under sections 11, 12, 13, 31, or 32.

[147] Those circumstances include: where the person was not proceeded against within 12 months for a relevant offence; if proceeded against, the person was acquitted or the proceedings were dismissed or discontinued; the person is subject to an order under section 1 of the Probation of Offenders Act 1907 and has not been convicted of a relevant offence within a period of 3 years from the making of the order; or the person's conviction was quashed or declared to be a miscarriage of justice, *see* section 80(1).

[148] Section 81. Those situations in which such an extension may be made are set out in sections 81(2) and (3) and involve the Commissioner taking account of all the circumstances of the case, including the reasons why proceedings were not instituted against the person as well as factors such as the nature and seriousness of the offence, the age of the person concerned when the sample was taken, whether the person has any previous convictions for a similar offence, etc.

[149] Sections 81(7), (9).

[150] Section 84(1). This provision does not apply, however, where the child offender was convicted of an offence that is triable by the Central Criminal Court or an offence that is excluded by the Minister due to its nature and seriousness, *see* section 84(2).

retention period or authorised extended retention period, the obligation to remove a DNA profile under section 80 or 84 will not apply.[151]

68. Section 83 concerns former offenders and provides that a person from whom a sample was taken under section 34 may apply to the Commissioner to have the profile generated from that sample removed from the DNA Database System.[152] A former offender can make such an application in situations where his or her conviction for the relevant offence was quashed or declared a miscarriage of justice.[153]

69. Section 87 provides that a volunteer may request the destruction of his or her sample and any profile generated by way of a notice in writing to the Commissioner.[154] Following such a request, the sample/profile is to be destroyed within 3 months.[155] If a sample/profile taken under section 27 or 29 has not been destroyed previously, it is to be destroyed within 3 months of the completion of the investigation or any related proceedings. The member of the Garda in charge of the investigation of the offence shall determine when the investigation is concluded.[156] In circumstances where a volunteer has consented, under section 28, to the entering of their DNA profile in the reference index of the DNA Database System, that DNA profile shall not be removed unless the person makes a request to that effect.[157]

70. Samples taken from Gardaí for elimination purposes are to be destroyed as soon as the DNA profile has been generated from the sample, or within 6 months of the sample being taken, whichever occurs later.[158] As regards the removal of a related DNA profile, for persons whose consent was not required in order to take a sample the profile will be removed when 10 years has elapsed since the person ceased being a member of An Garda Síochána.[159] In the case of a person whose consent was required before taking the sample, he or she may, at any time and without giving a reason, request the destruction/removal of his or her sample/DNA profile.[160] Sections 89 and 90 deal with the destruction/removal of samples/DNA profiles taken from staff members of FSI and

[151] Section 85(1). Such circumstances include where the person is proceeded against for another relevant offence or is convicted of another relevant offence during the retention period. Where these circumstances arise, the removal of the DNA profile will be governed with reference to the further offence, *see* section 85(2).
[152] Section 83(1).
[153] Section 83(2). If the Commissioner refuses the application or does not determine it within the time limit, the person concerned can appeal to the District Court, *see* section 83(9).
[154] Section 87(1). In the case of a protected person or child, the person who gave consent on their behalf may request the destruction of the sample/profile.
[155] Section 87(3). This requirement is subject to section 93.
[156] Sections 87(8) and (9).
[157] Section 87(10). Upon such a request being made, his or her DNA profile shall be removed as soon as practicable thereafter from that System.
[158] Section 88(1).
[159] Section 88(2).
[160] Section 88(3). Such a request must be made in writing to the Commissioner and must be dealt with by the Commissioner within 3 months of its receipt, *per* sections 88(3), (4). It may also be noted that these provisions are subject to the right of the Director of FSI to direct, with good reason and following consultations with the Commissioner, that the particular profile not be removed from the relevant elimination index, *see* section 88(5).

certain prescribed persons. These provisions largely follow the procedures laid down in section 88 as applied to members of the Garda.

71. A blood relative of a missing person may request the destruction of his or her sample and the removal of the corresponding profile by giving notice in writing to the Commissioner.[161] If a missing person is found or identified, the sample/profile taken from a blood relative or any sample/profile relating to the missing person must be destroyed within 3 months.[162] Similar arrangements apply in the case of samples taken from unknown persons (living or deceased).[163]

72. Finally, section 95 provides that the Minister will conduct a review of the operation of this Part of the 2013 Bill within 6 years of commencement,[164] while section 98 sets out how a person is to be notified of the destruction of a sample or the removal of a profile from the System.

b. IHRC Analysis

73. The IHRC recognises and welcomes the substantial amendments made by the 2013 Bill to Part 10 dealing with the destruction/removal of samples and DNA profiles. In particular, the IHRC welcomes those provisions allowing for an intimate or non-intimate sample to be destroyed or a DNA profile to be removed from the DNA Database within 3 months of particular circumstances arising (e.g. acquittal, dismissal, or discontinuance).[165]

74. Extension of the retention periods for samples and profiles is further subjected to certain judicial safeguards and is ultimately limited at a maximum of 6 years for adults and 3 years for children.[166] In a similar vein, in "exceptional circumstances" where a sample has been taken or a profile made when no offence has in fact been committed, or in the case of mistaken identity or unlawful detention, the 2013 Bill shifts the onus from

[161] Section 92(1). In the case of a protected person or child, the person who gave consent on their behalf may make such a request. Furthermore, upon such a request being made, the relevant sample/profile must be destroyed within 3 months, *see* section 92(2).
[162] Section 92(3).
[163] It should be noted that the Bill lays down certain qualifications in respect of these arrangements discussed above. For example, a sample/profile cannot be destroyed or removed where it is required for the purposes of: investigating the disappearance of a missing person; investigating how the unknown living person became ill or was injured; investigating how the unknown deceased person died; or an inquest. Upon completion of the relevant investigation or inquest, however, the sample/DNA profile will be destroyed or removed within 3 months, *see* sections 92(8), 92(10). The member of the Garda in charge of the investigation shall determine when the investigation of the relevant offence is completed, *see* section 92(9). Also note that upon completion of an inquest, the sample/profile will only be destroyed/removed where the coroner conducting the inquest does not dictate otherwise, *per* section 92(10).
[164] Section 95 also provides for further reviews to be conducted thereafter, as considered appropriate by the Minister.
[165] Sections 76(1) and 80(1). Indeed, these amendments have created what the Minister has described as a "presumption" in favour of removal and destruction in such cases, *see* Minister for Justice & Equality Alan Shatter, *Minister Shatter publishes legislation to establish long-awaited DNA database*, 11 September 2013, available at <http://www.justice.ie/en/JELR/Pages/PR13000335>.
[166] Sections 77 and 81.

the person in question, who had to apply for destruction or removal under the 2010 Bill, to the Commissioner, who is now placed under a duty to destroy any relevant samples or remove any relevant profiles.[167]

75. These amendments to the 2013 Bill bring the proposed legislation in line with the European approach as discussed in *Marper v UK*[168] and as laid down in the Council of Europe Committee of Ministers Recommendation 92(1)[169]. It also follows the general theme of certain recommendations made by the Law Reform Commission as well as the Data Protection Commissioner.[170]

76. The IHRC recommends that the 2013 Bill provide for a regular review of the necessity of the retention of samples and profiles from "volunteers" in situations where an investigation has been open for a prolonged period of time or where proceedings in relation to an offence stretch over a long period of time.[171] While "volunteer" samples shall be destroyed within 3 months of an investigation being concluded,[172] the power to determine when an investigation is concluded remains vested in the member of the Garda in charge of the investigation.[173] The possibility thus remains of open-ended investigations which are not brought to conclusion in a timely manner. In addition, although volunteers can apply to have their profile removed from the DNA Database, the IHRC is concerned that where a "volunteer" is not vigilant in this regard, his or her bodily sample and/or profile could be retained for a prolonged period.[174] Specifically, as regards situations in which a volunteer consents to his or her DNA profile being retained in the DNA Database System, the IHRC is concerned by the lack of a default removal provision. The IHRC believes that the obligation rests with the State authorities, rather than volunteers, to ensure that the DNA profiles of people who are not suspected of a criminal offence are not stored for a prolonged period of time where this is not necessary for the investigation of a crime and that there should be a presumption that this occurs.[175]

77. As stated above, the IHRC has some concerns regarding the length of the retention period for samples/profiles taken from An Garda Síochána personnel, FSI staff, and other prescribed persons. The standard retention period of 10 years after a person has left their respective organisation (for those persons appointed after the commencement of this Bill) seems extremely long, and in the absence of a clear justification the IHRC

[167] Sections 79 and 82.
[168] Judgement of 4 December 2008, Application nos. 30562/04 and 30566/04, at para.107. Hereinafter *Marper*.
[169] Council of Europe, Committee of Ministers Recommendation No. R(92) 1, *On the Use of Analysis of DNA within the Framework of the Criminal Justice System*, at para.8.
[170] *See* IHRC 2010 Observations, at para.34.
[171] Ibid, at para.39.
[172] Section 87(8). Samples will also be destroyed within 3 months of any proceedings in respect of that offence being determined.
[173] Section 87(9).
[174] IHRC 2010 Observations, at para.36.
[175] Ibid, at para.37.

questions whether such a retention period, with no apparent scope for review or early removal, is proportionate and not excessive.[176]

78. The IHRC welcomes those provisions providing for the destruction and removal of samples and DNA profiles where taken for identification purposes as striking a fair balance between the competing goals of investigating and identifying missing/unknown persons while still respecting the rights of blood relatives to control the retention of their samples/profiles, as well as the rights of missing/unknown persons themselves, from whom samples may be taken.

79. The IHRC welcomes the requirement that the Minister review Part 10 of the 2013 Bill within 6 years of commencement. This is an important safeguard which provides an opportunity for a proper assessment of these provisions and subsequent amendments if necessary.

c. Recommendations

80. The IHRC does not have any recommendations to make in respect of those provisions relating to the destruction/removal of samples/profiles taken from detained persons, offenders, and former offenders.

81. The IHRC recommends that provision be made for a regular review of the necessity of the retention of "volunteer" samples/profiles in situations where an investigation has been open for a prolonged period of time or where proceedings in respect of an offence have lasted a long time and that a presumption in favour of automatic destruction operate after a defined period of time. The IHRC further recommends that "volunteers" should not be requested to consent to the entry of their DNA profile on the general DNA Database System at all. In line with this recommendation, sections 87(4) and 87(10) should be removed from the 2013 Bill. In the alternative, the IHRC would recommend that when giving information to a volunteer about the effect of their profile entering the DNA Database (as provided for by section 28(2)), the relevant member of An Garda Síochána should specifically direct the volunteer's attention to the fact that a positive request is required on their part in order for their profile to be removed under Part 10.

82. The IHRC recommends that sections 88 and 89 be amended so as to provide a shorter retention period in the case of DNA profiles taken from Gardaí and FSI employees appointed after the commencement of this Bill. In addition, section 90 should be similarly amended so as to provide for shorter retention periods in the case of certain prescribed persons.

[176] Indeed, using the language of Article 8, it could be argued that such a lengthy retention period is a disproportionate method of trying to achieve an otherwise legitimate goal (that being the efficient investigation of crime).

83. The IHRC does not have any recommendations to make in respect of section 92, relating to the destruction/removal of samples and profiles taken under Part 6 of the 2013 Bill.

84. The IHRC does not have any recommendations to make in respect of sections 93 to 99, concerning miscellaneous matters relating to Part 10 of the 2013 Bill.

XI. INTERNATIONAL COOPERATION

a. Relevant Provisions of the 2013 Bill

85. Part 11 of the Bill deals with the State's EU and international commitments, implementing aspects of various agreements such as the Prüm Council Decision[177] and the Agreement between Iceland and Norway and the EU. Part 11 further makes amendments to the Criminal Justice (Mutual Assistance Act) 2008, the Criminal Justice (Forensic Evidence) Act 1990, and the International Criminal Court Act 2006. It also regulates police cooperation with Interpol and other police forces in relation to such matters as searching the DNA Database System to assist with the investigation of criminal offences and the finding of missing or unknown persons in other states.

86. Chapters 2 and 3 concern automated searching of DNA data and dactyloscopic data. They constitute a relatively straightforward implementation of Articles 2, 4, 6, 8 and 9 of the Prüm Decision. Under Chapter 2, the Director of FSI is appointed the national contact point in the State in relation to DNA data.[178] As the national contact point, the Director of FSI will allow the national contact point of other designated states to access certain content in the State's DNA Database System for the purpose of investigating criminal offences in that designated state.[179] The reverse will also be possible i.e. an authorised officer for DNA data in Ireland may supply a DNA profile in the reference index or crime scene index to the national contact point of a foreign designated state for the purpose of conducting a search of the DNA profiles contained in that state.[180] Chapter 3 appoints the Head of the Technical Bureau of An Garda Síochána as the national contact point in the State in respect of dactyloscopic data, responsible for performing all the functions of the national contact point as set out in the relevant EU or international instruments.[181] Sections 110 and 111 lay down similar provisions to 104 and 105, except as applying to dactyloscopic data rather than DNA data.[182]

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[177] Council Decision 2008/615/JHA. Hereinafter "Prüm Decision".

[178] Section 103. In this role, the Director of FSI is instructed to perform the functions of the national contact point as set out in EU or international instruments.

[179] Section 104. The other national contact point will be allowed to compare, through automated searching, a DNA profile in an individual case with the reference index and crime scene index of the System, *per* section 105.

[180] Section 106. Section 107 allows an authorised officer for DNA data to go further than sharing the DNA from an individual profile held on the crime scene index and instead supply some or all of the content of the crime scene index to a national contact point of a foreign designated state, for the purpose of conducting a comparison with the foreign state's DNA profiles.

[181] Section 108.

[182] Dactyloscopic data refers to fingerprint images, images of fingerprint latents, palm prints, palm print latents and templates of such images that are stored and dealt with in an automated database, *see* Summary

87. Chapter 4 gives effect to the data protection provisions of the Prüm Decision, which are contained in Chapter 6 of the Decision. Chapter 6 states that each Member State must guarantee a level of protection of personal data in its national law that is at least equal to that of certain Council of Europe recommendations and conventions.[183] Chapter 4 of Part 11 of the 2013 Bill then provides that the Data Protection Act 1988 (as amended) applies to the processing of personal data under Part 11 of the 2013 Bill, as well as Part 5 of the Criminal Justice (Mutual Assistance) Act 2008.[184] As the 1988 Act is the means by which Ireland gives effect to the Council of Europe Data Protection Convention and relevant EU directives, this extends the protections under those instruments, as given effect to in Irish law, to the processing of data under the Prüm Decision.[185] Finally, Chapter 4 designates the Data Protection Commissioner as the competent authority in Ireland for the purposes of the Prüm Decision.[186]

88. Chapter 5 of Part 11 amends the Criminal Justice (Mutual Assistance) Act 2008, essentially giving effect to Article 7 of the Prüm Decision.[187] In making these amendments, Chapter 5 also clarifies the action to be taken by the Minister on foot of a request for identification evidence for use outside the State.[188] Chapter 6 amends the International Criminal Court Act 2006, setting out the appropriate procedures to be followed in the case of a request for assistance in obtaining identification evidence from

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of Prüm Decision, available at <http://europa.eu/legislation_summaries/justice_freedom_security/police_customs_cooperation/jl0005_en.htm#KeyTerm>

[183] Article 25(1), Chapter 6, of the Prüm Decision, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008D0615:EN:NOT> [visited 28 January 2014]. Those Council of Europe conventions and recommendations referred to are as follows: the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981; its Additional Protocol of 8 November 200; Recommendation No R (87) 15 of 17 September 1987 of the Committee of Ministers of the Council of Europe to the Member States regulating the use of personal data in the police sector. Chapter 6 further makes provision for the purpose of data processing in this context, data protection and data security, and data subjects' right to information and damages, *see generally* Articles 26 to 32 of the Prüm Decision.

[184] Specifically the Data Protection Act 1988 applies to Chapters 2 and 3 of Part 11 of the 2013 Bill, as well as Chapter 3 of Part 5 of the Criminal Justice (Mutual Assistance) Act 2008.

[185] The 2013 Bill also restricts the availability of the exception in section 8(b) of the 1988 Act where processing of personal data is "required for the purpose of preventing, detecting or investigating offences", *see* section 116.

[186] Section 117.

[187] Specifically, section 121 of the 2013 Bill amends section 78 of the Act of 2008 to specify the requirements for a request for identification evidence for use outside the State. This amended provision specifically requires a statement of the purpose for which the evidence is sought, confirmation that the evidence will only be used for that purpose and an investigation warrant or appropriate statement from a competent authority in the requesting Member State, *see* section 121(b).

[188] In particular, provision is made for the following matters: that the purpose for which the evidence is sought is one in respect of which the evidence could be obtained in the State; that the evidence will be returned to the Minister if requested; that the samples/profiles in question shall be destroyed as soon as practicable after their return/transmission as appropriate or appropriate assurances in relation to destruction are obtained (which mirror those applying domestically under the 2013 Bill); judicial safeguards in the case of extension of the period for retention of the evidence; the obtaining of consent in cases where identification evidence is taken from children or protected persons. Sections 123 and 124 of the 2013 Bill should be also noted, as they insert the new sections 79A and 79B into the 2008 Act, regarding the procedures to be followed where a request is made pursuant to Article 7 of the Prüm Decision.

the International Criminal Court. These amendments bring the procedure into line with that applicable under the Criminal Justice (Mutual Assistance) Act 2008. Chapter 7 deals with police cooperation among law enforcement agencies outside the State (including Interpol), specifically in relation to the transmission and receipt of DNA profiles from missing or unknown persons as well as crime scene evidence.

b. IHRC Analysis

89. The IHRC welcomes Part 11's significantly expanded provisions on international cooperation and particularly welcomes the more comprehensive implementation of the Prüm Decision. In addition, the IHRC notes the improvements made in Chapter 4 regarding data protection, which essentially give effect to the data protection provisions of the Prüm Decision. The net effect of Chapter 4 is that the normal national rules (which, as stated above, are in turn based on the relevant Council of Europe and EU rules in the field) apply in the case of transmission of DNA and dactyloscopic data under the Prüm Decision. This represents an important safeguard. Thus, it should be noted that although the 2013 Bill does not give effect to Council Framework Decision 2008/977/JHA[189], as recommended by the IHRC in 2010, Part 11 does now give effect to the data protection provisions of the Prüm Decision, which were left entirely unimplemented in the 2010 Bill.

90. The IHRC further welcomes Chapters 5 and 6 as generally consistent with the overall scheme for the taking of identification evidence under the 2013 Bill. As regards Chapter 7, concerning police cooperation, the IHRC notes that while sections 130, 131 and 132(1)(b) are limited in their terms to missing and unknown persons, sections 132 and 133 go further than this and extend police cooperation to the investigation of criminal offences more generally. While some general provision is made for the imposition of safeguards in respect of these provisions, the conditions applicable to searches under these provisions are not subject to the same detailed safeguards – in relation to the use and destruction of profiles – that apply otherwise under the 2013 Bill. The IHRC emphasises that in the case of non-designated States, it is especially important to ensure an adequate level of human rights protection and data protection. Thus, while these provisions under Chapter 7 are limited in their scope and largely facilitative in nature, they give rise to some concern as to their consistency with the general scheme under the 2013 Bill as well as with the human rights and data protection safeguards underpinning the general scheme.

c. Recommendations

91. The IHRC recommends that Chapter 4 further clarify what the basis is for placing notes in the DNA Database System in respect of a specific DNA profile under sections 106(3) and 107(4), where that DNA profile was supplied to the national contact point of a designated state and matches a DNA profile found in the DNA analysis files of the designated state concerned.

[189] This Decision deals with the protection of personal data processed in the framework of police and judicial cooperation in criminal matters.

92. As regards Chapter 7, the IHRC further recommends that more concrete safeguards are put in place for the transmission of DNA profiles, in relation to the use and destruction of such profiles, which would match those safeguards otherwise applying under the 2013 Bill. This is important under the State's obligations to "secure" human rights and exercise due diligence in its
exchange functions with other jurisdictions.

XII. MISCELLANEOUS

a. Relevant Provisions of the 2013 Bill

93. Part 12 of the Bill provides additional information clarifying certain sections of the 2013 Bill. Section 135 makes clear that a sample may be taken under the 2013 Bill even if a sample has previously been taken under the Criminal Justice (Forensic Evidence) Act 1990 or otherwise prior to the commencement of this Bill. Furthermore, a sample may be taken a second time even if a previous sample was taken under this Bill. Sections 136 to 140 allow certain delegations of functions laid down in the Bill. For example, the Garda Commissioner may delegate any of his functions under the Bill to members of An Garda Síochána and the Director of FSI may delegate his functions to a staff member of FSI.[190]

94. Section 141 provides additional guidelines to be followed when taking samples under the 2013 Bill. These guidelines state that a sample must be taken in circumstances affording reasonable privacy to the person and shall not be taken from a person in the presence or view of another person whose presence is not necessary, required, or permitted.[191] This provision further states that nothing in the 2013 Bill authorises "the taking of a sample or such identification evidence from a person in a cruel, inhuman or degrading manner."[192] Section 142 states that the Minister shall make regulations relating to the taking of samples under this Act.[193] The regulations may prescribe: the manner in which samples may be taken under this Act; the persons who may be present when

[190] Sections 138 and 140. In addition, a member not below the rank of a superintendent may appoint in writing a person, other than a member of An Garda Síochána, to be an "authorised person" for the purposes of taking samples under Part 3 (volunteers), Part 6 (missing and unidentified persons), and sections 41 and 42 of Part 5 (elimination index), *see* section 136. The Director of a children detention school may also appoint in writing a member of staff of the school as an "authorised member of the staff" for the purposes of Part 4 (pertaining to the taking of samples from child offenders), *per* section 137.

[191] Section 141(1).

[192] Section 141(2). The guidelines specifically address the taking of a sample from a person who is in custody and state that no such sample should be taken while simultaneously questioning the person, *see* section 141(3).

[193] Section 142(1). While these regulations may be wide-ranging and broad in nature, section 142(2) prescribes certain arrangements to be made regarding the timing of the taking of such samples from child offenders. Such arrangements may consider, for example, the desirability of taking a sample while child offenders are detained in a children detention school or place of detention and the need for child offenders to be of an age at which they can understand the nature and effect of the taking of such samples.

samples are being taken; and the location and physical conditions in which samples may be stored.[194]

95. Section 143 provides for various parties to draft codes of practice, following consultation with the Director of FSI, to submit to the Minister for the purposes of giving practical guidance as to the procedures to be followed when their respective personnel are taking samples. These various parties from whom draft codes of practice are required include: the Garda Commissioner; the Ombudsman Commission; the Director of the Irish Prison Service; the National Director of the Irish Youth Justice Service; and the Director of FSI itself.[195] Finally, sections 145 to 157 deal with various issues such as: disclosures of sensitive information by persons with access to the DNA Database System; non-compliance with provisions of the Bill by a member of An Garda Síochána; the effect of the 2013 Bill on other statutes requiring a person to give bodily samples; and the amendment of certain provisions of the Criminal Justice Act 1984 so as to align them with the 2013 Bill.

b. IHRC Analysis

96. The IHRC welcomes sections 141 and 142 which provide an additional safeguard against abuse when taking samples from persons under the 2013 Bill. The IHRC also welcomes the requirement under section 143 that codes of practice be developed by various parties to govern the taking of samples. The IHRC believes, however, that such codes of practice should be drafted with due regard to international best practice and international human rights standards. In addition, consultations regarding the codes of practice should take place between the Garda Commissioner, the IHRC, the Data Protection Commissioner, and other relevant bodies.[196] It is further noted that there is no role provided for the Oversight Committee (established under Part 9 of the 2013 Bill) in respect of the codes of practice to be drafted under section 143. This is despite the possibility of overlap between the Oversight Committee's functions under section 72 and those matters likely to be covered by any codes of practice. The IHRC recommends that the codes of practice or regulations made by the Minister incorporate certain principles in relation to the use of reasonable force.[197] Currently, the 2013 Bill does not make express provision for these principles to be addressed in regulations or a code of practice (although this would not of course exclude such issues from being addressed).

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[194] Section 142(3). The regulations may also set out the manner in which certain information may be recorded (e.g. a consent given by a person or an authorisation granted by a member of the Garda etc).

[195] Sections 143(1) to 143(5). There is also provision under Part 12 for the Director of FSI, the Garda Commissioner, and the Ombudsman Commission to make arrangements by written protocols concerning: the transmission of samples to FSI; the reporting by FSI of results of searches; and the operation of Part 10 (destruction/removal of samples/DNA profiles), *see* section 144(1). The Director of FSI, the Director of the Irish Prison Service, and the National Director of the Irish Youth Justice Service also shall make arrangements by written protocol regarding the transmission of samples to FSI, *see* section 144(2).

[196] IHRC 2010 Observations, at paras.53, 58.

[197] *See* Paragraphs 19, 23 of these Observations for a discussion of those principles that should be considered in relation to the use of reasonable force.

97. Finally, the IHRC believes that the commencement of the 2013 Bill should be accompanied by comprehensive training for all relevant members of An Garda Síochána.[198] This training should encompass basic training for all members who arrive first at a crime scene and should include continuing professional development training courses in order to maintain a high level of awareness of the appropriate operation of these legislative powers.

c. Recommendations

98. The IHRC recommends that the 2013 Bill specifies that any code of practice be drafted with due regard to international best practice and international human rights standards. Furthermore, consultations should be held between the Garda Commissioner, the IHRC, the Data Protection Commissioner, and other relevant bodies as regards the codes of practice. Section 143 should also create a role for the DNA Database Oversight Committee in drafting these codes of practice.

99. The IHRC recommends that training be provided for members of An Garda Síochána so as to ensure relevant members have an in depth understanding of the 2013 Bill's requirements and operation. This measure could be appropriately included in regulations made under section 142 or for the code of practice prepared under section 143.

[198] IHRC 2010 Observations, at para.62.