

CRIMINAL JUSTICE (FORENSIC EVIDENCE AND DNA DATABASE SYSTEM) ACT, 2014

AN OVERVIEW FROM A CRIMINAL PRACTITIONER'S PERSPECTIVE

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The following is a paper prepared in connection with an address to the 15th Annual Conference of the Director of Public Prosecutions. Any opinions expressed therein are those of the author as are the inevitable errors.

INTRODUCTION

1.1. The Criminal Justice (Forensic Evidence and DNA Database System) Act, 2014 was enacted on the 22nd June 2014. The Act has not yet been commenced save for Sections 147 and 148 which provides for the recognition of the reliability of DNA profiles and fingerprint evidence from “accredited” forensic service providers within the State or another member State¹. It is hoped that the Act may be commenced by year end but substantial preparatory work, particularly in relation to Garda information systems, would appear to be necessary to ensure the necessary flow of information is available to properly operate the database in accordance with the statutory scheme.

1.2. The Act is a lengthy piece of legislation stretching to 172 detailed sections and extending to 231 pages to include Schedules. The main purposes of the Act are to:-

- Replace the existing statutory *and common law* arrangements governing the taking of samples for forensic testing for use as evidence in criminal investigations and proceedings (including the repeal of the Criminal Justice (Forensic Evidence) Act, 1990).
- Provide for the establishment of a DNA database for use by the Garda Síochána as an intelligence source for criminal investigations (and also to find missing persons and identify unknown persons).
- Provide for the taking of samples for the purposes of the DNA Database System
- Provide for the establishment, management and oversight of the System
- Regulate the taking of samples from volunteers in connection with the investigation of offences

¹ S.I. 317/2014

- Implement the Prum Council Decision² providing for the exchange of DNA and fingerprint evidence as part of increased cross-border cooperation among member States
- Amend the existing provisions for the retention and destruction of fingerprints held by An Garda Síochána

1.3.The Act therefore deals, inter alia, with a number of separate but related developments; a new regime for obtaining and retaining forensic samples for evidential purposes and, parallel to that, a regime for the taking of samples for the purposes of the DNA Database System. The two regimes are designed to operate separately and with limited possibilities of overlap.

1.4.A thorough review of the Act is beyond the scope of this paper. Previous addresses to this Conference have considered the desirability of a DNA Database System, the operation of a DNA Database and the International and European context in which that debate has taken place.³This paper will endeavour to provide an overview of the scheme of the Act, and to highlight potential issues which may be of interest, particularly to practitioners of criminal law. Definitions and procedures are necessarily synopsised. I do not propose to deal in any depth with the arguments concerning the desirability of a DNA database or the privacy aspects which arise. However, some consideration of these issues is necessary to contextualise a reading of the Act. In addition a review of the existing schemes for the taking and retention of forensic samples and fingerprints is necessary to consider the effect of the changes wrought by the Act.

FORENSIC SAMPLES AND FINGERPINTS - THE CURRENT REGIME

2.1. The Criminal Justice (Forensic Evidence) Act, 1990 provides the statutory basis for taking forensic samples from suspects. The powers provided are exercisable in respect of a person who has been detained under one of the statutory detention regimes⁴i.e. where a person has been arrested and detained in respect of offences which carry a maximum period of imprisonment of at least five years. The main provisions relating to the taking of samples are as follows:-

- The taking of a forensic sample must be authorised by a Superintendent who holds the necessary belief; i.e. that there are reasonable grounds for suspecting the person's involvement in the offence, and that the sample will tend to confirm or disprove his involvement.
- The detained person should be informed of the existence of an authorisation and that the results of testing may be given in evidence.

² Council Decision 2008/615/JHA and Implementing Council Decision 2008/616/JHA

³ Paper by Dr. Maureen Smyth, 19th October 2013 - International and European Aspects of DNA database

⁴ S. 4 of the Criminal Justice Act, 1984, S.2 of the Criminal Justice (Drug Trafficking) Act, 1996, S. 30 of the Offences Against the State Act, 1939, S. 50 of the Criminal Justice Act, 2007.

- Separate procedures apply in respect of “intimate” and “non-intimate” samples, although that phraseology is not used
- An intimate sample can only be taken with the written consent of the detained person
- Failing the required consent to an intimate sample, inferences, adverse to the detained person, may be drawn by a judge or jury at a subsequent trial from his failure to consent to the taking of the sample. The detained person must have been informed of the consequences of a failure to consent.
- Non-intimate samples do not require the consent of the detained. They may be “taken or caused to be taken” where the authorisation is given.

2.2 The retention and destruction regime (Section 4) provides as follows:-

- Every “*record identifying a person*” from whom a sample has been taken under the Act and every sample identified by that record shall be destroyed in the following circumstances:-
 - Where proceedings are not instituted within 12 months
 - Where proceedings are commenced but result in acquittal, dismissal or discontinuance, at the expiration of 21 days after the acquittal etc.
 - Where a person is dealt with under Section 1(1) or 1(2) of the Probation of Offenders Act, 1907, on expiration of 3 years from the making of the order
 - Where a person does not come within one of the above categories, i.e. where charged and convicted and the Probation Act is not applied, no obligation to destroy arises.
 - Note that the obligation is to destroy the “record identifying a person” and the underlying sample. There appears to be no obligation to destroy a DNA profile extracted from a sample as long as the person can’t be identified
- Section 4(5) provided that the Director of Public Prosecutions could apply to a court to extend the periods of retention on proof of good reasons why the records should not be destroyed. The section facilitated the retention of samples and records in complex ongoing cases where a person was not charged within the 12 month period, or where proceedings were terminated prematurely, e.g. where charges were struck out in the District Court for delay in serving a Book of Evidence.

2.3. Each of the statutory detention regimes permits the taking of fingerprints from a detained person either as a matter of course or on the authority of a superior officer. The provisions of Section 6A of the Criminal Justice Act, 1984 (as inserted by S48(b) the Criminal Justice Act, 2007) expressly provide for the use of reasonable force where a person refuses to permit their fingerprints to be taken. The procedure must be authorised by a Superintendent, attended by an inspector and video-recorded. Section 6A is equally applicable to all the other detention regimes.

2.4. The destruction of fingerprint records is governed by Section 8 of the Criminal Justice Act, 1984 (as substituted by the Criminal Justice Act, 2007). The procedure is not one of automatic destruction but provides that a person may request the Commissioner of the Garda Síochána to destroy their fingerprint records where:-

- They have not been charged within 12 months of the taking of the records
- Or where they have been charged but acquitted or proceedings were dismissed or discontinued
- Where the Commissioner declines to destroy the records, an application may be made to the District Court by the person concerned. The Commissioner is not obliged to apply any particular test to his decision but the Court may have regard to the result of analysis (if any) of the records, any previous convictions of the person and whether “it would be unjust” not to allow the appeal
- The procedure is not applicable to fingerprints taken prior to the commencement of the Section which was inserted by S.49 of the Criminal Justice Act, 2007, in which case the pre-existing regime with tighter time limits will apply.
- Section 8 is applicable to all detention regimes save where fingerprints have been taken from a detained person under the Offences Against the State Act, 1939 or the Criminal Law Act 1976 where no destruction obligation arose regardless of outcome

2.5. Parallel to the statutory procedures set out above, a practice existed where, in place of operating the statutory regimes, Gardaí would ask a detained person to consent to a voluntary sample or fingerprint being taken. In fact, Gardaí were instructed to seek the consent of detained persons prior to invoking the statutory procedures. Where the samples or fingerprints were obtained on foot of an informed consent, knowing that they could be used in evidence, the evidence was routinely admitted at trial. The effect of this practice, which may have been administratively convenient for the Garda Síochána, was to exclude the operation of the controls on the retention and destruction of forensic samples and fingerprints. There were therefore no express legal limits on the ability of the Gardaí to retain those samples and fingerprints, effectively bypassing a system enacted by the Oireachtas which included protections for the privacy interests of detained persons.

2.6. In *DPP v Boyce*⁵ the Supreme Court addressed that very issue and narrowly held that the enactment of the statutory scheme did not exclude the existing common law entitlement to seek a voluntary sample from a detained person once the consent was fully informed. The approach adopted by the Court was essentially one of statutory interpretation although the absence of retention and destruction powers appear to have informed a strong dissent from Fennelly J.

⁵ [2008] IESC 62

2.7. The brief review above reveals a number of difficulties with the internal logic of the scheme and led to recurring difficulties for practitioners in trials. A short list of the issues include:-

- The absence of express provisions governing the procedure for taking non-intimate forensic samples in the absence of consent, similar to the provisions of Section 6A of the Criminal Justice Act, 1984, notwithstanding the apparent power to “take or cause to be taken” samples without consent.
- The overlap between the statutory regime and the “voluntary” procedure led to frequent issues as to how a consent to a voluntary sample was procured, whether it was a truly informed consent, whether Gardaí had misrepresented the extent of their statutory powers for the purpose of procuring the consent. Notwithstanding the decision of the Supreme Court in *DPP v Boyce*, the failure of An Garda Síochána to operate the statutory scheme frequently coloured the judicial approach to those issues.
- The continued survival of the “voluntary sample” procedure appeared to be inconsistent with developing European Court of Human Rights jurisprudence in the area of privacy rights and personal information. That jurisprudence also raised issues as to the sustainability of a system which placed the onus on a person to request the destruction of their fingerprints.

THE ADVANTAGES/DISADVANTAGES OF A DNA DATABASE SYSTEM

3.1. The debate about the desirability and extent of a DNA database sought to balance the clear utility of a database in the investigation of crime against the consequent interference with the privacy rights of citizens. The usefulness of a DNA database as an investigative tool is widely acknowledged. The UK National DNA Database Report for 2011-2012 reported that the match rate on loading a crime scene sample onto the database was 61%. The figures do not indicate that 61% of crimes are solved by the Database as there may be a number of reasons for the match e.g. crime scene to crime scene matches indicating that an unknown individual was involved in committing more than one offence. An analysis of prosecutions carried arising from public disorder incidents in August 2011 when there were incidents of rioting in London showed that of 1320 forensic examinations, 479 were matched with existing subject profiles on the database.

3.2. On the other hand, privacy concerns had two main strands. The first was the concern that a DNA profile might reveal information about a person beyond the identity of the person. A biological sample e.g. a blood sample, contains a person’s complete DNA profile. The genetic information contained might reveal their susceptibility to physical disease or mental ill-health. The prevailing medical view appears to be that the DNA profile extracted from the sample for the purpose of retention on a database contains a miniscule amount of non-coding DNA, which reveals no more than the gender and identity of the person. A residual concern as to the amount of information which now, or in the future, may be contained in a DNA

profile has clearly informed the approach of the European Court of Human Rights. The second concern was that the mere retention of a DNA profile coupled with an ability to process it amounted to the retention of personal data and thus an unwarranted interference with a person's privacy rights. Whatever debates may exist about the precise amount of personal information that is contained in a DNA profile, the debate reflects a genuine unease among citizens about the nature and amount of their personal information that the State should hold. The recent controversy about the obligation of citizens to forward PPSN numbers to Irish Water reflects that underlying concern.

3.3. A template for resolution emerged in the case of *S and Marper v United Kingdom*.⁶ The first Applicant was a young man from whom a forensic sample and fingerprints had been taken, at age 11, in connection with a suspected attempted robbery. He was subsequently acquitted. The second Applicant, Marper, was suspected of involvement in an incident of domestic violence and his fingerprints and DNA were taken. The case did not proceed after the complaint was withdrawn. Both men applied to have their material destroyed under the governing legislation, Section 64 of the Police and Criminal Evidence Act, 1984. The European Court of Human Rights held that:-

- The taking and retention of cellular material, DNA profiles and fingerprints amounted to an interference with the private and family rights of the Applicants. The gravamen of the interference was clearly greatest in the case of cellular material (i.e. a bodily sample) given the amount of information potentially contained therein and least in the case of fingerprints, given their sole utility was to identify a person.
- The taking, use and retention of the material had to be “in accordance with law” i.e. both having a legal basis, and a basis which was sufficiently clear and accessible to allow a citizen know where he stood vis-vis the State.
- The scheme had to be in pursuit of a legitimate aim. The Court accepted that the detection of serious crime was such an aim.
- The scheme had to be necessary in a democratic society. The scheme had to be proportionate not just in relation to the overall aim but in respect of the positions of the Applicants.
- The Court held the blanket nature of the legislative scheme amounted to an unwarranted interference with the Applicant's privacy rights under Article 8. There were no restrictions on taking or retaining material arising from the nature and gravity of the offences, the age of the person, the outcome of the proceedings and only a limited ability to apply to the authorities to destroy material.

3.4. A further driver for the enactment of this Act was the Prum Council Decision⁷. That Decision and the implementing Directive obliged the State to create databases or “files” of

⁶ [2008] ECHR 1581

⁷ Cf footnote 2 above

both DNA profiles and dactyloscopic records (i.e. fingerprints) and to share the data by providing access to the databases by other States.

3.5. The Marper case therefore provided a template for future appropriate legislation, acknowledging the “margin of appreciation” which States have, but highlighting areas which should be scrutinised to determine whether measures were proportionate, e.g. nature and gravity of the offence involved, age of the suspect, outcome of the investigation during which the samples were taken, and the nature and adequacy of a destruction regime. It is in that context that the current Act was introduced to the Dáil in September 2013. While it may never be possible to obtain agreement as to whether the balance between competing interests has been perfectly determined in this instance, the Act can certainly be regarded as a considered response to the decision in *Marper* and a vast improvement on the previous Bill introduced in 2010 which fell with the dissolution of the last Dáil.

THE OPERATION OF THE DNA DATABASE

4.1. The management and operation of the DNA Database is entrusted to Forensic Science Ireland (formerly the Forensic Science Laboratory of the Department of Justice) and the provisions governing the operation of the system are set out in Chapter 8 of the Act.

4.2. The database will be divided into an Investigation Division (to investigate suspected crimes) and an Identification Division (to identify “unknown” and “missing” person). This paper will not address the functions and purpose of the Identification Division although that aspect is an important aspect of the Database System. The Investigation Division will be divided into a Reference Index, Crime Scene Index and Elimination Indexes. The Reference Index will contain the DNA profiles of persons from whom “database samples” are taken under the Act together with samples previously taken under the Forensic Evidence Act 1990 and not previously destroyed. The Crime Scene Index will contain samples taken from “Crime Scenes”, which concept is extensively defined in the Act. The Elimination Indexes contain samples from Gardaí, scenes of crime examiners and “prescribed persons” i.e. staff of Forensic Science Ireland.

4.3. Section 60 provides that the database system may only be used for the investigation and prosecution of criminal offences (leaving aside the finding of missing persons or the identification or unknown persons). That provision is intended to address any concern that the Database might be accessed by third parties or be made the subject of discovery orders in non-criminal matters.

4.4. Section 68 prescribes the permitted searches which may be carried out. Again the provision makes clear that no searches may be carried out save in accordance with that section. This amounts to a “double lock” mechanism which in conjunction with Section 60 restricts the uses to which the database can be put. Further, Section 68 (9) provides that a DNA profile on the Database may not be compared with any profile which is not on the

system save in the cases of International Cooperation. Section 68 permits the following searches:-

- A Crime Scene profile may be compared:-
 - With other Crime Scene profiles (which might link the crime scene to a previous crime scene)
 - with the Reference Index (which might identify a potential suspect)
 - with the Elimination indexes (to exclude the possibility of contamination)
- A Reference Index profile may be compared with:-
 - Other profiles in the Reference Index (to see if the person has previously provided a sample/profile under another name, date of birth etc)
 - The profiles in the Crime Scene Index (to see if the profile matches to any profiles from crime scenes then held on the index)
 - The Missing Persons and Unknown Persons index

4.5. There are restrictions on the manner in which profiles entered on the Elimination Indexes may be compared with other indexes. In general, the profiles may be compared with the Crime Scene Index where it is necessary to see if a person has contaminated a crime scene sample. Those procedures are subject to directions and protocols to be prescribed by the Director of Forensic Science Ireland.

HOW DOES A PROFILE GET ON THE DATABASE?

5.1. The fundamental concept governing the obtaining of profiles for the DNA database is that of a “relevant offence”. A relevant offence is one for which a person can be detained under a statutory detention scheme⁸, i.e. the minimum requirement is an offence with a maximum sentence of at least 5 years. The Act therefore does not apply to persons suspected or found guilty of purely summary offences, e.g. Public Order Offences. In addition **Section 11(5)** (dealing with the taking of database samples) *requires* the Minister for Justice to specify by order a relevant offence or category of relevant offences which are excluded for the purpose of that section. It is possible that Company Law offences, regulatory offences or offences of a type where DNA profiles are unlikely to assist in an investigation may be excluded. The exclusion of categories of offences from the definition of “relevant offence” only applies to the taking of database samples and not to evidential samples. The purpose of the combined provisions appears to be to set a minimum threshold for the “gravity and nature” of the offence in accordance with the Marper decision.

⁸ S.4 CJA 1984, S.2 CJ (Drug trafficking) Act, 1996, S.30 OASA, 1939, S. 42 CJ Act 1999, S. 50 CJA 2007, S. 16/17 Criminal Procedure Act, 2010 (retrial after acquittal on new evidence)

5.2. There are four main ways in which a DNA profile may lawfully appear on the database:-

- Where a person is detained for a relevant offence
- Where a person is an “offender” or “former offender”
- Where a person is a volunteer
- Where a profile was previously generated under the 1990 Act and entered under the transitional provisions.

5.3. A further distinction should be noted between the function of a “database” sample and an “evidential” sample. The two concepts are separate in the Act. A database sample is one taken for the purpose of entering on the DNA database. An evidential sample is one taken for the investigation of a particular crime although the two concept may merge in certain circumstances.

DETAINED PERSONS

5.4. Section 11 provides that where a person is arrested and detained, a member of An Garda Síochána may take or cause to be taken a sample for the purpose of generating a DNA profile to be entered in the reference index of the Database system, where a Sergeant so authorises. The factors which a Sergeant must consider prior to granting an authorisation are not expressly stated. The power therefore appears to be one which exists simply by virtue of the arrest and detention of a person for a relevant offence. In particular, the power is not expressly related to the investigation of the offence for which the person was arrested and the Sergeant need form no view in that regard. The permitted sample is stated to be one of hair (other than pubic hair) or a swab from the mouth. There are extensive notification requirements as to the information which must be given to a person at the time of taking a sample. Consent is not required and the use of reasonable force is permitted to take the sample.

5.5. Sections 12 & 13 are the main provisions providing for the taking of forensic samples and largely mirror the pre-existing provisions. **Section 12** prescribes the procedure for taking an “intimate” sample from a person detained for a relevant offence. An intimate sample means blood, pubic hair, urine, swabs from genital regions or bodily orifices other than the mouth, or a dental impression. The taking of an intimate sample may be authorised by an officer holding the rank of Inspector for the purposes of forensic testing where he has reasonable grounds for suspecting the involvement of the person in an offence for which he has been arrested and that the sample will tend to confirm or disprove his involvement. The person must be informed of the purposes for which the sample may be used. A written consent must be forthcoming from the accused. In the absence of a consent, Section 19 provides that inferences may be drawn from the refusal to consent at the trial of the person, providing they were informed of the potential consequences and had the opportunity to consult their solicitor.

5.6. There is no power to compel a person to provide an intimate sample. Section 12 (4) expressly provides that the results of testing may be given in evidence. Section 12 holds open the possibility that the sample may also be used as a “database” sample “if appropriate.” A decision to that effect must be made during the detention. The person has to be informed of this dual purpose at the time. It is unclear what the reference to “if appropriate” means. Given that the Act envisages the taking of database samples as a matter of course under Section 11, it is difficult to see why that would not be appropriate in circumstances where evidential samples are deemed necessary. The insertion of a further test of “appropriateness” may be read as introducing a requirement for a separate consideration by the Inspector. A similar procedure exists where a non-intimate sample taken under Section 13 may be entered on the DNA database.

5.7. Section 13 prescribes the procedure for the taking of non-intimate samples e.g. hair other than pubic hair, saliva, a nail or material found thereunder, swabs from the mouth or other non-intimate parts of the body. An authorisation is required from an Inspector in like terms to Section 12 and the person must be informed of the purposes for which the sample may be used. The procedure is for evidential purposes but the sample may also be used “if appropriate”, and so authorised, for the DNA database and the person must be so informed. The consent of the person is not required for the Section 13 procedure.

5.8. Section 24 provides for the use of reasonable force to take Section 11 and Section 13 samples on foot of an appropriate authorisation. The procedure must be authorised by an Inspector and must be electronically recorded, thus echoing the existing provisions in Section 6A of the CJA 1984 in respect of fingerprints. There is one instance where a Section 11 sample may be used for evidential purposes and that is where, after the taking of the Section 11 sample, it appears that an evidential sample may be of use in the investigation, an Inspector may deem the database sample to be an evidential sample if the appropriate test is met, and the detained person must be informed.(**Section 20**).

5.9. Special provisions relate to children and “protected persons” i.e. a person who by reason of mental or physical disability lacks the capacity to understand the general nature or effect of taking a sample from him or her or who is incapable of indicating whether or not they consent. A proper review of those provisions is beyond the scope of this paper but the following are the main provisions:-

- Section 11 does not apply to a protected person, or child under the age of 14 but does apply to child over that age – i.e. database samples may be taken without consent
- Sections 12 and 13 apply to both protected persons and children
- Information should be given to protected persons and children in an appropriate manner
- In the case of a protected person or a child under the age of 14, where the responsible adult declines to consent to an intimate sample or is not available, and in the case of a child over 14 who does consent but the responsible adult does not so consent or is not

available, application may be made to the District Court for an order authorising the taking of the intimate sample (**Sections 16 & 17**). The Judge shall consider, inter alia, the grounds for the giving of the authorisation by the Inspector and “whether it would in the interests of justice in all the circumstances of the case, having due regard to the interests of the person concerned, the interests of the victim of the offence and the protection of society.... to make the order.”

- The inference provisions under Section 19 do not apply to protected persons or to a child under the age of 14 unless a Judge has authorised the taking of an intimate sample from that child.
- The use of reasonable force pursuant to Section 24 shall not apply to a child under the age of 12 but further provision is made for the attendance of responsible adults where the procedure is used in respect of older children and protected persons.

5.10. It is difficult to envisage a scenario where it would be appropriate for a Judge to dispense with the consent of a child under the age of 14 or that of the responsible adult, in respect of an intimate sample. The test to be applied, implying as it does a balancing of the interests of the child against the interest of the victim and the protection of society, is an unusual approach for a Judge who is acting in loco parentis. The provision that the inference provisions may apply in respect of a child who refuses to provide an intimate sample notwithstanding an authorisation from a Judge appear equally strange. It remains to be seen whether any judge, let alone a jury, would draw any adverse inference against a child in those circumstances.

OFFENDERS AND FORMER OFFENDERS

6.1. Part 4 provides for the taking of database samples from offenders and former offenders. Pursuant to **Section 31**, “offenders” are those persons who have been convicted of a relevant offence (at least 5 years maximum to include “excluded” offences) and:-

- At the commencement of the Act are serving a sentence, or on temporary release or the sentence is still extant (i.e. suspended sentence)
- Or who whether convicted before or after the commencement of the Act are sentenced to imprisonment thereafter
- Or who after the commencement of the Act is serving a term of imprisonment on foot of a transfer of prisoners provision (so long as the offence involved corresponds to a relevant offence)
- Or who is a person, who at the time of the commencement of the section or at any time thereafter, is, or becomes, subject to the requirements of Part 2 of the Sex Offenders Act, 2001

6.2. Samples shall be taken before the expiry of the sentence. In prison they may be taken on the authority of the Governor. If a sample is not taken in prison, an Inspector may require the

offender by notice in writing to attend a Garda station for the purpose of providing a sample. This procedure is presumably designed to cover persons on temporary release or under a suspended portion of a sentence. It is a summary offence to fail or refuse to comply without reasonable excuse. The section provides that the sample must be taken within 6 months of the commencement of the Act or, in any event, before the expiry of the sentence, or, in the case of a sex offender, the expiry of the notification period under the Sex Offender's Act, 2001. **Section 32** provides for the taking of similar samples from child offenders subject to a sentence in child detention schools or places of detention. Although it is a criminal offence not to attend a Garda Station when required to provide a sample, there are no express powers to permit the Gardaí to arrest a person for the purpose of taking a sample.

6.3. Section 33 provides for a measured scheme in respect of former offenders, i.e. those who would be offenders as defined by Section 31 (see above) but for the fact that the sentence (or notification period under the 2001 Act) expired before the commencement of the Act or samples were not taken when they were an offender as defined. The Section does not apply where a period of 10 years has elapsed since the expiry of the sentence or notification period. It does not apply to offenders who were convicted of offences whilst a child unless the offences were tried in the Central Criminal Court (or other offences prescribed by the Minister). If a Superintendent, having regard to, inter alia, the previous convictions of a person, the seriousness of the offence and the duration of any term of imprisonment and the period since the expiry of the sentence determines that a sample should be taken from the former offender, a request can be made to that person to attend to give a sample. An application may be made by the Superintendent to the District Court for an Order requiring the former offender to attend to give a sample if the Judge is of the view that it is in the interests of justice so to do. Failure to comply with the Order is a summary offence.

6.4. Section 36 provides for the use of reasonable force to take a sample in prison or a place of detention in respect of offenders whilst serving sentences/periods of detention.

VOLUNTEERS

7.1. The taking of samples from volunteers has been put on a statutory footing in Part 3 of the Act. The procedures are essentially investigative procedures and none of the samples taken will be put on the DNA database save with the express consent of the volunteer. The purpose is presumably to assure any volunteer that any DNA profile will be used exclusively for that investigation. **Section 27** provides that a Garda may take a sample from a volunteer (to include a victim) in respect of an investigation of a specific offence. The volunteer must be informed that a DNA profile may be generated for use in the investigation of the specific offence and must consent in writing to give the sample, which consent must specify the offence which is being investigated. A refusal to consent or a withdrawal of consent shall not of itself constitute reasonable grounds for suspecting that person of the offence in question. A voluntary sample is solely for the purpose of investigation of that crime. A volunteer may consent in writing to the profile extracted from his sample being placed on the DNA

Database but that it a separate procedure controlled by a member of Sergeant rank, and extensive information must be given to the volunteer.

7.2. Section 29 provides for mass screening where authorised by a Superintendent who believes the mass screening of a class of persons is a reasonable and proportionate measure to be taken in the investigation of the offence. The class of persons may be determined by age, gender, location, kinship or any combination of such factors. The sample is voluntary and the volunteer must be informed of this and that the DNA profile obtained from the sample shall be used for the investigation of the particular offence. There is no provision for a volunteer in a mass screening to consent to their profile being added to the database. A refusal of or failure to consent shall not of itself constitute reasonable grounds for arrest.

TRANSITIONAL PROVISIONS REGARDING THE 1990 ACT

8.1. Section 7 details the transitional provisions in relation both to samples taken under the 1990 Act and what are described, somewhat euphemistically, as samples “taken under an arrangement under which bodily samples were taken” i.e. samples taken on foot of an extra-statutory consent. Section 7(1) provides that subject to that section, nothing in the Act shall effect the “operation” of the 1990 Act or “other arrangements” in relation to or under which bodily samples were taken before the commencement of the new Act. Section 7(2) provides that the Act of 1990 shall continue to apply to bodily samples taken under it as if it had not been repealed. The intention of the Oireachtas is not immediately clear. However, those provisions appear to preserve the legality of the previous taking of samples under both procedures. In addition, the retention/destruction provisions of Section 4 of the 1990 Act in respect of bodily samples continue to apply to those samples.

8.2. Section 7(3) and (4) provides that DNA profiles obtained from samples taken under the 1990 Act may be entered on the Database. They shall not be entered into the Database if they are required to be destroyed under Section 4 of the 1990 Act, or, if so entered, they should be removed within 3 months from the [subsequent] date upon which they should be destroyed under Section 4.

8.3. Section 7(5) deals with “voluntary” samples. If a bodily sample taken under an arrangement (other than the 1990 Act) where samples were taken from detained persons, or a DNA profile obtained from such a sample, is required for any purpose other than that for which it was taken, the Commissioner shall inform that person and obtain their consent for that purpose.

8.4. The transitional provisions therefore seem to be in accordance with the general scheme of the Act. Voluntary samples given in connection with the investigation of a particular offence, whether from a volunteer or suspect, may only be used for that purpose. If any alternative purpose is proposed the person must be informed and their consent obtained. That is consistent with the implied terms of the arrangements under which the samples were taken, i.e. that they were taken in the context of a specific investigation, for use in that investigation

and for no other purpose. Further, while preserving the regime under the 1990 Forensic Evidence Act in respect of samples taken under it, the section seeks to ensure that the destruction provisions in that Act are complied with and applied to any DNA profiles entered onto the Database.

THE EXCLUSION OF VOLUNTARY SAMPLES - DPP V BOYCE

9.1. The language of **Section 26** is unusually clear and strident. It states that, subject to Section 165, a member of An Garda Síochána “*shall not, following the commencement of this Part, take or cause to be taken, a sample for forensic testing from a person who is detained under any of the provisions referred to in Section 9(1) other than in accordance with this Part*”. Section 165 refers to other powers to take bodily samples such as the Road Traffic Acts. When read in conjunction with the restrictions on the ability of the Gardaí to take voluntary samples from volunteers and persons not in custody, set out in Part 3, the section effectively prohibits the taking of forensic samples outside of the regulated scheme of the Act.

THE DESTRUCTION REGIME

10.1 Part 10 details the retention and destruction regime in respect of both forensic samples generally and DNA profiles entered on the DNA database. The retention periods are largely in accordance with those from the Forensic Evidence Act, 1990 as amended although with a more detailed scheme by which the relevant periods may be extended. A distinction is drawn between the retention of samples and the retention of DNA profiles obtained from them.

10.2 Section 76 provides that in respect of Section 12 (intimate) and Section 13(non-intimate) samples they shall be destroyed within 3 months from the date of one of the following occurrences:-

- Where proceedings are not instituted within 12 months (providing the person did not abscond or could not otherwise be found)
- Proceedings have been instituted and the person was acquitted, or charges dismissed or discontinued
- A person was the subject of a Probation Act Order and 3 years have passed since the making of an Order during which he has not been convicted of a relevant offence
- A conviction was quashed or declared to be a miscarriage of justice

10.3. Section 77 provides a considerable latitude to the Commissioner in that the samples shall not be destroyed if he or she determines that any of the following apply:-

- A decision has not been taken whether to prosecute the person for the offence in connection with which the sample was taken
- The relevant investigation has not been concluded

- The sample, or any forensic testing thereof may be required (including for disclosure purposes to third parties) for the prosecution of an offence connected with the event or incident which were the subject of the relevant offence
- Having regard to the specific matters below it is necessary to retain the sample *in connection with the investigation of the relevant offence* taking account of the reasons why:-
 - Proceedings have not been instituted in respect of the person
 - Or proceedings resulted without his or her conviction
 - The specific matters are
 - Whether the person has convictions for offences of similar type or gravity
 - The nature and seriousness of the offence
 - Whether the alleged victim was a child, vulnerable person or an “associated person” (spouse, relative etc.)

10.4. Where the Commissioner has determined that the sample should be retained, the person shall be notified and may appeal to the District Court. The Court may confirm the authorisation or allow the appeal. The appropriate basis for the Court’s determination is not made express in the Section. It is unclear whether the Judge can look behind the reasons why no prosecution has been brought or why the investigation has not been concluded. Further, the latter matters approximate to asking the Judge to look behind an acquittal and presume the guilt of the person involved. On the other hand, the class of relevant victim, i.e. child, vulnerable person, “associated person” may indicate that the use of the power is contemplated in cases where matters have not proceeded or resulted in an acquittal due to a reluctance or an incapacity to give evidence. The operation of the section is likely to be limited as the necessity to retain the sample must relate to the investigation of that relevant offence. The extensions of the retention period for evidential samples are for up to 12 months but can be renewed without limit.

10.5. Given the differing purpose of the DNA Database system which is limited to investigative purposes, it is no surprise that **Section 79** provides that samples taken pursuant to Sections 11, 31,32 or 34 should be destroyed as soon as a profile is generated or within 6 months. Where the Commissioner is satisfied that “exceptional” circumstances exist in respect of a Section 11 sample, i.e. that no offence was committed or the person was mistakenly identified or a court determines that the sample was taken while he was unlawfully detained, the sample shall be destroyed as soon as is practicable. The section is curious as it pre-supposes that it is only in “exceptional circumstances” that a person may be subject to a false complaint or be wrongly identified. However, the section imposes a clear obligation on the Commissioner when those circumstances exist.

10.6. Section 80 provides that DNA profiles entered on the database (i.e. taken under S. 11 or “dual purpose” S.12 and S. 13 samples) are to be removed in the same circumstances as are applied to Section 12 and 13 samples by Section 76 i.e. within 3 months of not proceeding within 12 months, acquittal etc. **Section 81** allows the Commissioner to extend the retention period for 12 month periods up to a maximum of 3 years for a child and 6 years for an adult having regard to similar considerations as are set out in Section 77 above. A person may appeal this decision to the District Court. In addition, the Commissioner shall procure the removal of a DNA profile from the database where “exceptional circumstances” exist showing the innocence of the person in question. Section 93 provides a further power to the Commissioner to apply to the District Court to further extend the retention period if the Judge is satisfied there is “good reason” so to do. This provides an additional procedure where the DNA profile may be retained beyond the 3 or 6 year limit for extensions of the initial period.

10.7. Section 83 permits a “former offender” from whom a sample was taken pursuant to Section 34 to apply to the Commissioner to have his profile removed from the database where a conviction, for an offence to which regard was had in determining that a sample should be taken under Section 34, is quashed or declared to be a miscarriage of justice. In determining the application the Commissioner should have regard to whether the person is [now] a former offender within the meaning of Section 33. A decision refusing the application may be appealed to the District Court.

10.8. Section 84 provides that the DNA profiles of former “child offenders” as defined by Section 32(1) shall be removed from the database within a period of 4 years from the taking of the sample if a sentence other than detention was imposed, or within 6 years from the expiry of any sentence imposed on him or her. Persons convicted of offences triable in the Central Criminal Court (or other offences specified by order) are excluded from the operation of the section. The Commissioner may apply to the District Court under Section 93 to extend the period for good reason.

10.9. The destruction regime does not apply where a person is convicted of a “subsequent relevant offence” other than the offence in connection with which a sample was taken, or where proceedings have been commenced in respect of a subsequent relevant offence, or where proceedings for such an offence have not been commenced because the person has absconded or is not otherwise available. (**Section 85**) Therefore, where a sample is taken in respect of an initial offence with which the person is not charged, or is acquitted, it may be retained if they have been charged with a later relevant offence. Presumably the intention is that once a profile is on the DNA database system, further samples will not be taken on subsequent arrest and detention.

10.10. Where a person provides a sample while detained, or as an offender and, when subsequently detained for a relevant offence, no further sample was taken, or an evidential sample was not analysed, because his profile was already entered in the database, then for the purpose of extending the retention of the person’s profile pursuant to Section 81 or

deciding whether a former young offender's profile should be removed the profile will be deemed to be taken on the latter date i.e. later detention (**Section 86**)

10.11. Section 87 provides that where a volunteer requests that samples (Section 27) and DNA profiles where consented to (Section 28) be destroyed and removed from the Database, this should be done within 3 months of the request. The Commissioner may request the volunteer to consent to the retention of the profile off the database system solely for use in respect of the investigation. In any event volunteer samples and profiles, if generated should be destroyed within 3 months of the determination of the relevant proceedings.

THE NEW FINGERPRINT REGIME

11.1. The Act introduces a new power to take fingerprints from anyone arrested for the purpose of being charged with a relevant offence, prior to his charge with the offences. The exercise of the power is to be authorised by a Sergeant and may be taken with the use of reasonable force if required. (**Section 101**). The retention period is governed by the 1984 CJA (see below). It echoes Section 12 of the Criminal Justice Act, 2006 which has similar procedures in respect of photographs.

11.2. Section 6A of the 1984 CJA (use of reasonable force) is amended by Section 102 to empower an Inspector rather than a Superintendent to authorise the use of reasonable force and the advance of technology is acknowledged by requiring recording by electronic or other similar means rather than "video-recorded".

11.3. The destruction regime under **Section 8 of the CJA 1984** is amended to align it with the regime for forensic samples and DNA profiles i.e. within three months of proceedings not being instituted within 12 months, or of an acquittal etc. The power of the Commissioner to determine circumstances exist such as not to warrant destruction are again identical to the procedures for forensic samples and DNA profiles. The regime is also applicable to photographs.

11.4. Section 8F as inserted entitles the Commissioner to delegate to any member of the Garda Síochána, specified by rank or name, his functions under the section. The power of delegation is entirely unrestricted and appear to undermine the traditional reliance on the rank of a senior officer to justify the exercise of powers effecting the rights of citizens. The entrusting of such decisions (extensions of detentions, taking of forensic samples etc.) to an officer of senior rank has traditionally been relied on by the State, and taken into account by the judiciary, as an assurance that decisions will be appropriately taken. The delegation of the power, such as the power to determine that the retention period for fingerprints should be extended, to an officer of lesser rank, provides no such implied assurance. (A similar power to delegate exists in respect of the Commissioner's functions regarding the retention of samples and DNA profiles.)

11.5. The destruction regime in Section 8 of the CJA 1984 is applied to fingerprints taken in detentions under the Offences Against the State, Act 1939 by amendment to section 9 of the

1984 Act. *However, it is notable that there is no express bar on the taking of fingerprints on the basis of an ex-statutory voluntary consent procedure.*

INTERNATIONAL COOPERATION

12.1. As noted above, one of the prime drivers for the introduction of the Act was the State's obligation to adhere to the Prum Council Decision and provide access to the investigative authorities of member states to fingerprint and DNA "files" or databases. The Act sets out procedures governing the access to the DNA database under the Prum decision and also significantly amends the Criminal Justice (Mutual Assistance) Act, 2008 to provide procedural mechanisms for obtaining relevant evidence.

12.2. The Director of Forensic Science Ireland is designated as the national contact point for the purposes of the relevant EU and international instruments. The Director shall allow the national contact point of a relevant state to carry out an automated search of the Crime Scene Index and the Reference Index of the DNA database. In the event of a match, a notification and the reference data attaching to the profile will be forwarded to that authority. However, details identifying the person from whose sample to DNA was extracted will not be forwarded. The DNA profile in this jurisdiction may then be flagged. Reciprocal powers exist where a profile on the DNA database may be searched against foreign databases. The powers include comparing a specific unknown profile with a foreign database, and also comparing crime scene profiles and reference profiles arising from specific investigations referred to as "individual cases".

12.3. In addition the Act provides for the transfer/access to fingerprints or palm prints to foreign authorities. The Act is careful to define dactyloscopic data to include prints taken under any enactment *or rule of law*, thus including fingerprints previously taken under a voluntary consent procedure. The Head of the Technical Bureau of the Garda Síochána is designated as the national contact point. A foreign national contact point may request the comparison of a fingerprint with the fingerprint database held in this country. The head of the Technical Bureau may likewise, in an individual case, compare fingerprint data here with the reference data held abroad.

12.4. The DNA database and fingerprint data held are primarily for investigative functions. The practice in this jurisdiction is, once a suspect is identified by reference to the data held, the person is arrested and appropriate fingerprints or forensic samples are taken during the detention. Similar principles inform the exchange of information with foreign authorities, the purpose of which is to identify suspects. Once a suspect is identified, the procedures available in the Mutual Assistance legislation can be utilised to obtain.

12.5. The Criminal Justice (Mutual Assistance) Act, 2008 is substantially amended by Part 12 Chapter 5. In particular a new Section 79A is inserted into the 2008 to permit the taking of a bodily sample in this jurisdiction on foot of a Mutual Legal Assistance request to generate a DNA profile to be forwarded to the foreign State. The procedures involve a request to attend a Garda station to provide a sample and ultimately an order of the District Court authorising

the Gardaí to arrest and detain a person for the purpose of obtaining a sample, using reasonable force if necessary. (Section 133).

12.6. Similar amendments are made to the International Criminal Court Act, 2006 to facilitate the taking of samples in this jurisdiction.

MISCELLANEOUS

13.1. Second Samples. Section 149 makes clear that the fact that a sample was previously taken under the Act or any other provision is not a bar to a further sample being taken. This repeats a theme which is constant in the Act. The exercise of powers to take either Section 11,12 or 13 samples do not prevent the subsequent exercise of one of the other powers. In addition, all the specified powers to take evidential or database samples provide for the taking of further samples where the sample is “insufficient”. “Insufficient” is defined in the Interpretation Section to mean insufficient in quantity or quality for appropriate forensic testing. However, Section 3(5) also provides that the concept of insufficiency includes circumstances where the sample was lost, destroyed, contaminated or damaged. If the insufficiency is detected while the person is detained a further sample may be taken during the period of detention. If the insufficiency is detected after the release of the person **Section 25** provides the person may be required to attend a Garda station for the purpose of having a further sample taken. If the person fails to attend, application may be made to the District Court for a warrant to detain them for up to four hours for that purpose. Similar procedures exist for re-taking samples from offenders and former offenders.

13.2. Section 152 permits the Commissioner to delegate his or her functions under the Act to members specified by name or rank. Again the power to delegate is without restriction and the comments at Paragraph 11.4 above apply with even greater force in respect of forensic samples and DNA profiles.

13.3. Section 159 creates an offence of unauthorised disclosure of information relating to a sample taken under the Act or information in the DNA database system, punishable on indictment by 5 years imprisonment and a fine of €50,000. This provides a further layer of protection for privacy concerns.

13.4. Section 163 seeks to provide a certificate procedure for the various authorisations required under the Act other than an authorisation to take a DNA sample under Section 11. The exclusion of the Section 11 authorisation is presumably on the basis that the proof of taking a section 11 sample will not be required in court, the sample only being used for investigative purposes. The certificate, with authorisation or a copy thereof is evidence of the matters stated in the certificate. A Judge may, if it is considered to be in the interests of justice, direct that oral evidence be given and adjourn the proceedings to a later date to receive that evidence. The one scenario not directly covered by authorisations is where a Section 11 sample is subsequently deemed to be an evidential sample (**Section 20**). If the results of the analysis of such a sample were to be given in evidence, direct evidence of the Sergeant’s authorisation under Section 11 may be required.

13.5. Prosecutors are loath to rely on certificate evidence. If a decision is made to rely on certificate evidence, the witness will generally not be on call. If a judge holds that the certificate is wanting in any regard at trial, e.g. a mis-typing of an exhibit bag number, it will frequently be impossible to call the witness to clarify that the substance analysed is in fact the substance received. While the section purports to deal with that situation by empowering a Judge to adjourn the matter (a power which clearly exists in any event), the prospect of an adjournment of any length in a jury trial is never appetising to a judge. It may be that facility to adjourn a case may be more relevant in District Court matters. On the other hand, while there is a tendency amongst judges to prefer oral evidence, unless the basis for an authorisation is in substance and fact contested, it may be difficult for an accused to satisfy the Judge that oral evidence is in fact required.

13.6. Section 165 confirms that the Act does not affect the operation of other lawful powers whereby bodily samples may be taken, e.g. samples in drink driving cases under the Road traffic Acts. It further confirms that no DNA profile shall be entered in the database system, other than the Crime Scene Index unless its entry was provided for in the 2014 Act.

13.7. Section 166 provides for altered re-arrest procedures under the statutory detention codes. Where the reason or one of the reasons for applying for the re-arrest of a person is that Gardaí have, since the release of that person obtained a DNA match to a sample taken in the initial detention period, an *Inspector* may make the application under S. 30A of the OASA, 1939, S.10 of the CJA 1984, S.4 of the CJ (Drug trafficking) Act 1996, or S. 51 of the CJA 2007.

13.8. Sections 169 and 170 create presumptions in respect of the handling of intimate, non-intimate and crime scene samples. In brief, there is a presumption that a relevant sample was placed in a tamper-evident, numbered container on the date and by the member whose name is affixed thereto and was forwarded for forensic testing where that appears to be the case. A certificate from a member of staff of FSI stating that the tamper-evident container appeared to be intact, stating the date upon which they opened the container, shall be proof of those facts. Again, the Judge may direct that oral evidence be called “in the interests of justice” and the proceedings may be adjourned for that purpose.

13.9. The presumptions and certificate procedures endeavour to simplify proofs in relation to the chain of custody of samples going into the forensic Science Laboratory as it was. The 2006 Criminal Justice Act specified that the “business records” provisions of the Criminal Evidence Act, 1992 applied to the Forensic Laboratory’s records notwithstanding that the records of handling of samples were clearly created in the course of a criminal investigation. That provision permitted the proof by certificate of relevant documentation proving the chain of custody within the Laboratory. However, in practice, such records were not forthcoming and individual statements had to be obtained from each intermediate handler within the Laboratory. The new section, if properly applied, should circumvent the need for those statements. Where a sample is put into a tamper evident numbered bag and sealed, and the forensic analyst confirmed that the numbered bag had not been interfered with prior to receipt

by him, it was always open to a judge and jury to conclude that the sample had not been interfered with. Absent any concerns requiring that a particular sample had to be kept at a particular temperature or in a specific environment, those proofs should have sufficed. The present sections appear to formalise that basic logic. The presumptions created by section 168 only deal with the “bagging” of the sample. It will still be necessary for the person who took the sample or was present for the taking of it, to give evidence and be available for cross-examination and, in the normal course that person will be responsible for bagging the exhibit.

13.10. Section 170 provides for a new certificate procedure in drug cases in substitution of Section 10 of the Misuse of Drugs Act, 1984. The old certificate was restricted to the examination, inspection, testing or analysis of controlled drugs. The certificate could prove the controlled nature of the substance but did not prove the handling thereof. The new section also provides for certificates relating to the receipt, handling, transmission or storage of a controlled drug. A certificate as to handling or analysis (or both) is evidence, of any fact thereby certified unless the contrary is proved. Once in force, internal handling within the Forensic Laboratory should be capable of proof by a number of certificates, assuming that the certifier will only certify matters within their own knowledge.

POTENTIAL ISSUES IN THE CONTEXT OF CRIMINAL TRIALS

14.1. From the perspective of a trial lawyer the sole concern will be in relation to potential admissibility issues. The exclusionary rule governing the admissibility of evidence at trial as set out in *The People (DPP) v Kenny*⁹ is well known. Where evidence is obtained on foot of a conscious and deliberate breach of a person’s constitutional rights, the evidence will not be admissible at the trial of that person. In the case of forensic samples and DNA profiles two related constitutional interests are at play. Where samples are taken from the body of a person their right to bodily integrity is infringed. Furthermore, where those samples and the results of forensic testing to include the extraction of DNA profiles from the sample, the retention of that “personal data” may amount to a breach of their constitutional right to privacy. The constitutional basis of the right to privacy was confirmed in *Kennedy v Ireland*.¹⁰ The exclusionary rule operates once a constitutional right is breached without distinguishing between the various constitutional rights at play or grading those rights in accordance with a hierarchy of importance or otherwise. The nature, extent and very correctness of the rule in Kenny’s case is currently before the Supreme Court awaiting judgment (*DPP v J.C.*) and any alteration to the rule is likely to have a considerable impact in the manner in which criminal trials are conducted.

14.2. Perhaps of more fundamental and immediate interest in the context of the 2014 Act is the decision of the Supreme Court in *DPP (Walsh) v Cash*¹¹. The 2014 Act clearly distinguishes between “database” samples and “evidential” samples. The DNA database is to be used as an investigative tool. Where a match is found between a profile on the Reference

⁹DPP v Kenny [1990] 2 I.R. 110

¹⁰[1987] I.R. 1

¹¹[2010] 1 I.R. 609

Index and a profile on the Crime Scene Index, the match will provide sufficient cause to arrest the suspect, detain them and obtain a fresh forensic sample pursuant to Section 12 or 13. That latter sample and any profile extracted therefrom will be the evidence which is produced in court and sought to be admitted. The admissibility of the evidential sample or profile extracted therefrom will be subject to standard admissibility rules. However, it is likely that the lawfulness of the taking and retention of DNA profiles on the database will rarely, if ever, be the subject of argument at trials.

14.3. In the *Cash* case, the Applicant has been arrested in respect of a suspected burglary because of a match between crime scene fingerprints and the Applicant's fingerprints held on the Garda computer system. The suspicion of the arresting officer was solely based on that fact. The Applicant's fingerprints had been taken from him during a previous detention. His advisers asserted that there was an onus on the prosecution to prove that the fingerprints were lawfully in the possession of the Gardaí at the time they informed the decision to arrest the Applicant. No further evidence was called to establish whether in fact the prints had been taken under a statutory power or on foot of a voluntary consent. If they had been taken under a statutory power it is likely that they should have been destroyed under the then extant retention/destruction scheme but there was no evidence of this. The Supreme Court (Fennelly J) held that no onus in fact rests on the prosecution to establish the lawful provenance of material relied on by a member of An Garda Síochána to justify an arrest or to prove that such material was obtained without breach of a constitutional right to form reasonable cause justifying an arrest. In arriving at that conclusion the Court made clear that the rule in *Kenny's* case was a rule governing the admissibility of evidence at trial.

14.4. The decision of the Court is clear in respect of the issue before it. Where an officer exercises a statutory power of arrest there is no requirement for the prosecution to prove that the material upon which he based his suspicion was lawfully obtained or obtained without breach of constitutional rights. It should be recalled that there was in fact no evidence before the Court that the fingerprints in question should have been previously destroyed. They could equally have been taken voluntarily and therefore were lawfully retained. Furthermore, the arresting Garda clearly had a bona fide suspicion as to the involvement of the Applicant given the fingerprint match. To the extent that any impropriety had occurred in retaining the prints the arresting member had no involvement or indeed knowledge. There was therefore no nexus between the supposed illegality and the actions of the arresting member.

14.5. For present purposes, the *ratio decidendi* of the decision is clear. If the DNA database matches a profile from a relevant crime scene sample with a profile from the Reference Index, that person will likely be nominated as a suspect. The "match" will likely provide sufficient basis for suspicion that the person was involved in the commission of the offence being investigated and thus reasonable grounds for their arrest. *DPP (Walsh) v Cash* makes clear that there is no onus on the prosecution to prove the lawful taking of Section 11 samples (or other samples) on a prior occasion, or their lawful retention on the DNA database. Once it is proved that the arresting member held a bona fide belief that there were reasonable grounds

for the arrest, there is no onus on the prosecution to prove the lawful presence on the database of the profile in question.

14.6. The facts in *Cash* did not establish any illegality or unconstitutionality. What if the evidence proved Mr. Cash's fingerprints were taken in circumstances where they should not have been on the system? What if on foot of a request under the 2007 Criminal Justice Act, 2007 he had been informed that his fingerprints had been removed? Or, if under this Act, the point at which his DNA profile should have been destroyed had long passed? The comments of the Court appear to suggest that this would not make a difference to the lawfulness of a subsequent arrest. In delimiting the area of operation of the exclusionary rule the Court appears to draw a firm line between the investigative stage and the admissibility stage in proceedings. Fennelly J. commented @ p 634:-

“The lawfulness of an arrest and the admissibility of evidence at trial are different matters which will normally be considered in distinct contexts. Infringement of any of the basic rules regarding the first may give rise to a challenge to the lawfulness of the detention extending potentially to the jurisdiction of the court of trial.”

The comments, though arguably obiter, seemed to suggest that the only relevance of the lawfulness of an arrest was to ground the jurisdiction of the court and was unrelated to any issue as to the admissibility of evidence procured on foot of the arrest or detention thereafter. It appeared to render irrelevant the possibility of any attack on the basis of an arrest, perhaps even where there was clear evidence that material upon which the arrest was based was unlawfully or unconstitutionally obtained.

14.6. This issue arose directly in a case stated before O' Malley J. in *DPP v McDonnell*.¹² The case arose from a refusal to allow a blood specimen to be taken in hospital in a suspected intoxicated driving case. The accused had been involved in a single vehicle collision, had been cut from the car and taken to hospital. His identity had been confirmed by a check with the vehicle licensing database, and he was conscious and coherent when a Garda arrived at the hospital and answered to his name. Notwithstanding the absence of any real doubt, as to his identity the Garda proceeded to check his clothing which had been cut from him for identification and discovered suspected controlled drugs. On that basis the Garda made a requirement of the accused under the Road Traffic Acts that he allow a specimen be taken from him, which he refused. O' Malley J. held that there was no lawful basis for the search of his clothing. However, she concluded:-

"Mr. McDonagh has rightly made the point that the nexus between the unlawful action of the Garda and the opinion formed by her in this case is rather stronger than in Cash, where there was no evidence of illegality to be pointed at. The contention by the defence in that case was that there was an onus on the prosecution to prove positively the lawful provenance of the grounds for suspicion. In the instant case, the opinion of the Garda arose directly as a result of a search which the defence can, on my view of the case, positively prove was

¹² [2014]IEHC 36, 31/1/14

unlawful. However, while the ratio of Cash, strictly speaking, might be limited to the statement that the prosecution does not bear the onus argued for in that case, the logic of the judgment seems to me to lie in the analysis of the difference between investigation and trial. Ultimately, the crucial difference, so far as this case is concerned, is that the rules governing admissibility of evidence cannot simply be transferred to the formation of suspicions and opinions."

14.7. The possibility of a wider application of the decision in *DPP (Walsh) v Cash*, deserves a separate and proper treatment. However, the above authorities suggest that, even if a DNA profile was wrongly entered or kept on the database, that fact would not affect the lawfulness of a subsequent arrest based on a match between that profile and a crime scene profile, or the admissibility of evidence obtained thereafter.