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## **Development of a DNA Database in Ireland – Assessing the Proposed Legislation**

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### **Introduction**

The collection and retention of DNA samples are seen universally as crucial for purposes of criminal investigation and prosecution, as a means of excluding innocent suspects, and of exonerating the wrongfully convicted. However, there is less consistency across jurisdictions regarding whose DNA should be obtained by the state and for how long it should be stored. The need for a measured approach in this context is underlined by the “exceptionalism”<sup>1</sup> of genetic material, given the depth and sensitivity of the information contained within, and the potential for “function creep”,<sup>2</sup> whereby state powers insidiously increase and data gathered for one purpose is used for other less appropriate ends. The purpose of this note is track the evolution of the law in Ireland relating to the collection and retention of DNA, and, in particular, to examine the provisions of the Criminal Justice (Forensic Evidence and DNA Database System) Bill 2010 (as it was introduced in January 2010) from a human rights perspective.

### **The existing legal framework**

At present, there is no DNA database in Ireland, although DNA material is collected, compared with other evidence, and used at trial lawfully. Parallel systems are in operation concerning the collection and retention of DNA samples, insofar as a common law police power based on consent co-exists with the Criminal Justice (Forensic Evidence) Act 1990 and its associated regulations. Collection of a person’s DNA under the common law scheme allows that data to be compared with crime scene evidence, and this assessment may be incriminatory or exculpatory. In contrast, the 1990 Act is somewhat more complex in terms of the demands it places on the police and the types of person from whom data may be gathered. Section 2 (as amended by the Criminal Justice Act 2006) provides for a Garda power, with superintendent authorisation, to take a bodily sample or impression for forensic testing from a person detained under the Offences against the State Act 1939, the Criminal Justice Act 1984 (which applies to offences with a minimum sentence of five years) or the Criminal Justice (Drug Trafficking) Act 1996, or from a person in prison who otherwise

would be so detained in the investigation of such a crime. Written consent must be given to the taking of a sample of blood, pubic hair, urine, a swab from a body orifice or a genital region, or a dental impression.<sup>3</sup> (Notably, section 14 of the Criminal Justice Act 2006 reclassified the mouth as a body part from which a sample may be taken without consent.) Although, ostensibly, the taking of intimate samples must be consensual, if consent is refused without good cause an inference may be drawn which may corroborate any evidence in relation to which the refusal is material, but the inference cannot form the sole basis for conviction.<sup>4</sup>

DNA material, if taken from a sample obtained under section 2, may be used as evidence at trial, and there is nothing precluding indefinite retention of this post-conviction. However, the sample must be destroyed if proceedings are not instituted within 12 months,<sup>5</sup> if the person is acquitted or discharged, or if the proceedings are discontinued,<sup>6</sup> unless a court order directing further retention is made after application by Director of Public Prosecutions or the individual in question.<sup>7</sup> If a person is released conditionally under the Probation of Offenders Act 1907 the sample shall be destroyed within three years.<sup>8</sup>

Significantly, section 2(11) states that the powers in the 1990 Act are without prejudice to other Garda powers, and indeed the decision of the Supreme Court in *Director of Public Prosecutions v Boyce*<sup>9</sup> confirmed that the 1990 Act did not abolish the existing ability under common law to request a sample from a detainee and compare it with crime scene evidence. Boyce had given a sample of blood voluntarily for the purpose of having it tested in connection with the offence for which he was being detained, but was not informed that the evidence might be used in connection with other offences. The Gardaí relied on common law to take the sample, which was admitted at trial as evidence and contributed to his being found guilty of rape, attempted rape, indecent assault and sexual assault. The Court of Criminal Appeal refused to grant leave to appeal against conviction but certified a question for the Supreme Court as to whether it was lawful for a Garda when taking a blood sample from a consenting person in custody to do so without invoking the 1990 Act. Denham J., in the most thorough judgment, concluded that the intent of the Oireachtas, construed from the words of the 1990 Act, evinced no intent to change the common law.<sup>10</sup> As noted, section 2(11) expressly retains the powers of the Garda Síochána and according to Denham J. “[b]y inference it is referring to the establishment of a scheme which does not alter the powers of the Garda Síochána.”<sup>11</sup> She noted that there is no express mandatory application of the scheme to all persons detained in the manner referred to in the Act, and that the Act operates

“in tandem with the common law” as “an alternative”.<sup>12</sup> Finnegan J. echoed the tenor of Denham J.’s judgment, taking a somewhat consequentialist view in stating that “[t]he benefit to be derived from forensic evidence in the investigation and prosecution of crime, in enabling the guilty to be detected and the innocent to be vindicated and the object of the statute strongly support a contention which preserves existing powers.” However, Fennelly J. dissented, noting that the 1990 Act applies to detention under certain provisions only, and that it would be “absurd ... inherently inconsistent and potentially unfair” if the Oireachtas intended to lay down a regime which the Gardaí could “simply ignore ... by seeking consent based on common law”. Despite the cogency of this argument, it was not that of the majority of the Supreme Court.

### **Recommendations for reform**

The co-existence of common law and statutory schemes for collecting and retaining DNA samples may lead to the latter being circumvented lawfully by the Gardaí and seems to undermine the logic of having a statute in the first instance. Nevertheless, the Law Reform Commission in its Report on the Establishment of a DNA Database did not consider the abolition of the common law position, but recommended that there should be a review of the statutory procedures for sampling with a view to consolidation.<sup>13</sup> Moreover, the Commission approved of the creation of a DNA database with its purposes stated in precise terms in primary legislation,<sup>14</sup> and did not advocate an expansion of the offences to which sampling applies.<sup>15</sup> DNA profiles of suspects should be temporarily retained on the DNA database, but both the profile and the sample must be destroyed if after 12 months proceedings for a relevant offence have not been instituted or are discontinued, or when the person is acquitted or discharged,<sup>16</sup> although retention could be extended beyond this on application by the DPP.<sup>17</sup> Indefinite retention after conviction was recommended.<sup>18</sup>

Following the Law Reform Commission report, the heads of the Criminal Justice (Forensic Sampling and Evidence) Bill 2007 were published which sought to repeal the 1990 Act and create a DNA database. No mention was made of the existing common law power and the extent to which the 2007 Bill would engage with this. As Liz Heffernan notes, the establishment of such a database would extend DNA profiling from its current focus on identified suspects to the generation of suspects by identifying matches for the crime scene profile electronically from among the profiles stored on the database.<sup>19</sup> Head 8 provided for the taking of a sample, either a mouth swab or plucked hair, from suspects in custody for the

offences covered by the 1990 Act, and reasonable force was permitted to be used where consent was not forthcoming. Together with samples from convicted persons, persons on the sex offenders register (Head 9) and volunteers (Head 10), these would have composed the “investigation” part of the database. Moreover, “evidential samples” were those to be taken in the context of a criminal investigation where the offence was one with a penalty of more than one year imprisonment.<sup>20</sup> Such a sample could be obtained using reasonable force and would be analysed against the relevant crime scene sample and used in court as evidence.

However, before the 2007 Bill was published in full and debated thoroughly, a significant decision was reached by the European Court of Human Rights in *S. and Marper v UK* which found the law on DNA collection and retention in England, Wales and Northern Ireland to be in breach of the European Convention on Human Rights.<sup>21</sup> There DNA is collected from convicted individuals and arrestees, whether adult or child, for all recordable offences; moreover, such samples are retained indefinitely.<sup>22</sup> The “blanket and indiscriminate” retention of DNA profiles, the lack of a time limit and the limited possibilities for removal of data were found by the Grand Chamber to interfere disproportionately with the right to privacy and family life under Article 8 of the ECHR.<sup>23</sup> In contrast, the separate Scottish approach was mentioned explicitly as proportionate and preferable,<sup>24</sup> given that retention of suspects’ samples is permitted for serious violent or sexual offences only, and for a three year period with the possibility of judicially authorised extensions of two years.<sup>25</sup> Despite the disapproval of the English scheme, further case-law from Strasbourg indicates that retention of DNA data from a convicted person is ECHR-compliant,<sup>26</sup> as is retention following conviction of a child.<sup>27</sup> Ireland is a dualist State, and there is no requirement under the European Convention on Human Rights Act 2003 that all domestic legislation comply with the ECHR. Nevertheless, the possible judicial issue of a declaration of incompatibility under section 5, were database legislation to breach the Convention, would put a political imperative, if not legal onus, on the State to amend the law. This seems to have informed the recently published Criminal Justice (Forensic Evidence and DNA Database System) Bill 2010.

### **The Criminal Justice (Forensic Evidence and DNA Database System) Bill 2010**

The 2010 Bill, which was presented on 15 January 2010 and at the time of writing awaits second stage debate in the Dáil, will repeal the 1990 Act and the associated regulations, although the 1990 Act shall continue to apply to samples taken under it.<sup>28</sup> While the Bill itself

currently makes no explicit reference to this, the Explanatory Memorandum states that one of its purposes is to replace the existing common law arrangements also. This is a positive development, both in terms of clarity and fairness. The Bill provides for the taking of various categories of samples, both for purposes of establishing or ruling out involvement in the commission of a specific offence, and for the creation of DNA profiles<sup>29</sup> to be kept on the newly established statutory DNA database.

Part 2 governs the taking of bodily samples from persons held in Garda custody; thus one must be detained, rather than simply arrested, to be subject to the Part. A sample may be taken after authorisation by a Garda sergeant from a person detained under the same provisions mentioned in the 1990 Act and also under the Criminal Justice Act 2007 to generate a DNA profile to be entered in the reference index<sup>30</sup> of the DNA Database System, but such a sample is not for evidential purposes.<sup>31</sup> The range of relevant offences is limited to serious crimes, such as firearms offences, and those which have a minimum punishment of five years. This is more restrictive than the English approach which permits sampling during detention for any recordable offence, that is, any offence punishable by imprisonment,<sup>32</sup> and also the Scottish scheme which does not specify a minimum punishment period but rather applies to a list of violent and sexual offences, including minor assaults.<sup>33</sup> Thus, the proposed Irish approach to sampling in terms of its scope complies with and in fact surpasses the demands of the Grand Chamber in *S. and Marper*.

Moreover, the power to take a sample from a detainee for the reference index of the Database does not apply to protected persons<sup>34</sup> or children below the age of 14.<sup>35</sup> Indeed, Ministerial review within seven years of the commencement of this section is required as it relates to children of 14 years to determine if the age limit should be raised.<sup>36</sup> Again, this is a laudably cautious approach which is cognisant of the statement in *S. and Marper* that that the retention of unconvicted persons' data may be especially harmful in the case of minors "given their special situation and the importance of their development and integration in society".<sup>37</sup> The inclusion of children's DNA in the database may lead to stigmatisation and to the labelling of the child as a criminal, and so this is a positive aspect of the Bill.

Section 13(1) permits the taking of a non-intimate sample from a detained person for forensic testing and, if appropriate, the generation of a DNA profile for entry into the reference index of the DNA Database System. Authorisation from a Garda inspector must be on reasonable grounds of suspicion of the detainee's involvement in the offence and of belief that the sample will confirm or disprove such involvement. Section 24 sanctions the use of force

as is reasonably considered necessary to take such samples or to prevent their destruction or contamination, if authorised by a superintendent, but this does not apply to the taking of a sample from someone under the age of 18. In terms of safe guarding the right to bodily integrity of the child this is to be praised. Section 12 provides the equivalent power of sampling regarding intimate samples, but in this instance consent from the individual is required<sup>38</sup> and the request for the latter must be video-recorded.<sup>39</sup> Akin to the 1990 Act, refusal of consent may lead to an inference being drawn.<sup>40</sup>

In addition to sampling from detainees, samples may be taken from volunteers to generate a DNA profile; consensual mass screenings may be authorised; and samples may be taken from a deceased person suspected of the commission of a relevant offence upon application to the District Court.<sup>41</sup> Part 5 of the Bill permits the taking of samples for elimination purposes from persons (such as Gardaí) whose may accidentally contaminate crime scene samples with their own DNA, due to the nature of their work. Part 6 concerns the taking of samples from persons or bodies for purposes of identification division of DNA database system.

Part 8 governs the DNA Database System, comprising investigation and identification divisions, which will be operated by Eolaíocht Fhóiréinseach Éireann (the renamed Forensic Science Laboratory), and appraised and monitored by the DNA Database System Oversight Committee. The investigation division will contain a crime scene index, a reference index and elimination indexes, all of which may be used to identify persons by their DNA profiles.<sup>42</sup> The identification division shall contain the missing and unknown persons index.<sup>43</sup> These two divisions are not to be compared.<sup>44</sup> Section 57 expressly articulates that the Database shall be used only for the investigation of criminal offences, the identification of missing, seriously ill, or severely injured persons, or unknown deceased persons. More specifically, section 57(2) notes that the Database may be used to facilitate a review of an alleged miscarriage of justice, to compile statistics, and for automated searching and comparison of DNA profiles.

Critically, Part 10 outlines the procedures concerning the destruction of samples and profiles and the removal of profiles from the Database. The “default destruction period” for samples taken from detainees or offenders in the context of investigations is three years from the taking of the sample,<sup>45</sup> and the same period applies to evidential samples when proceedings are not instituted, or after acquittal or discharge.<sup>46</sup> After a conviction is quashed or a miscarriage of justice declared the period is two months. However, these default

destruction periods may be extended by the District Court.<sup>47</sup> The equivalent Scottish law, as cited in *S. and Marper*,<sup>48</sup> permits a similar extension by the Sheriff Court but for two years only,<sup>49</sup> and a similar limiting qualification should be added to the Irish bill.

The Bill proposes that a detainee's DNA profile shall be removed from the Database after ten years where proceedings are not instituted or after acquittal in that time, or after five years in the case of a child or a protected person.<sup>50</sup> A period of two months applies when a conviction was quashed or a miscarriage of justice occurred. Thus, it is evident that a profile may be retained for a lengthier period of time than a sample. This differential in terms of the swifter destruction of the sample is in keeping with the recommendations of Genewatch in the UK on the basis that the profile only is necessary for future identification.<sup>51</sup> Retention of samples holds a heightened risk of abuse given the sensitive nature of genetic material and the possibility of the data being shared with countries with more lax monitoring regulations or being used for commercial purposes. However, retention of full samples is defended by the need to verify the original profile, for quality control, or to extract a more detailed profile.<sup>52</sup> These factors justify the retention period of three years for the sample, echoing the time period in Scotland which was seen as proportionate by the Grand Chamber in *S. and Marper*; however, profiles and samples are treated in the same way in Scotland, in that they are destroyed simultaneously. In Ireland, it is proposed that the profile of an unconvicted person be retained on the Database for ten years, and the Minister for Justice may change this to 15 years.<sup>53</sup> This timeframe represents a disproportionate infringement on the right to privacy under Article 8 and the Irish Constitution and risks stigmatising an innocent individual. Indeed, a comment from the Minister belies his view of the presumption of innocence: "The combination of these two major sources of samples (suspects and convicted persons) will ensure that, within a short time, a significant proportion of the criminal community will have their samples on the database" (emphasis added).<sup>54</sup> This conflation of suspects and convicted persons in political rhetoric should not be translated into legislation. Although indefinite retention for convicted persons may be justified on the basis of a limit on the right to privacy which extends beyond imprisonment (akin to the sex offenders register<sup>55</sup>), the risk of recidivism and the need to protect the public, the restriction of the privacy rights of an innocent person in this way is not justified by reference to the constitutional rights of others or the requirements of the common good or public order and morality.<sup>56</sup>

However, the Bill does indeed provide for application for removal. A person who has volunteered a sample under Part 3 may apply for destruction and this must occur within two



months of the Commissioner receiving the request.<sup>57</sup> Alternatively, samples and profiles must be destroyed within two months of the completion of investigation or proceedings, whichever is the later. The difficulty experienced in England and Wales by volunteers when seeking destruction or removal of their data was criticised in *S. and Marper*,<sup>58</sup> and thus the strict provisions in the Irish context are apposite. Furthermore, a previously detained person may apply to the Garda Commissioner to have his sample and/or profile destroyed when proceedings are not instituted within 12 months from the taking of the sample, or after acquittal, or if the charge is dismissed or discontinued, or the conviction quashed.<sup>59</sup> A person who is the subject of an order under the Probation of Offenders Act 1907 may apply after three years of the making of that order as long as he has not committed another crime in that time. In exceptional circumstances, the person may apply for removal or destruction within 12 months, such as it becoming apparent that the offence for which the person was detained did not occur, in cases of mistaken identity, or if the detention was unlawful.<sup>60</sup> Remarkably, in such instances removal is not automatic, which seems dubious from a human rights perspective. In making the decision, the Garda Commissioner must have regard to whether the sample and/or profile are required for the investigation or prosecution of the offence, the results of the forensic testing of the sample, the seriousness of the offence, the age of the applicant at the time the sample was taken, and if proceedings have not been instituted whether the Garda Síochána still have reasonable suspicions concerning the applicant's involvement in that offence. Expecting the Commissioner to adjudge on the reasonable suspicions of the Gardaí may not provide the most robust safeguard, but appeal does lie to the District Court against the Commissioner's decision.<sup>61</sup> Moreover, a "former offender" whose conviction has been quashed or when a miscarriage of justice is declared may also apply for destruction or removal of the sample/profile.<sup>62</sup> Again, it is notable that this destruction is not automatic.

Although indefinite retention is allowed for the samples of convicted offenders, a convicted child offender's DNA profile must be removed within ten years from the expiry of sentence.<sup>63</sup> This is in accordance with the decision in *W v The Netherlands* that the retention of a convicted child's DNA data was not in breach of Article 8, on the basis that DNA material could be taken only from persons convicted of an offence of a certain gravity, and that retention was for a prescribed period of time dependent on the statutory maximum sentence for the particular offence.<sup>64</sup> This provided "appropriate safeguards against blanket and indiscriminate retention" of DNA records. However, the Irish Bill contains a caveat

which may breach ECHR jurisprudence, in that the removal of a child's data will not occur if the relevant offence is triable by the Central Criminal Court, or if the Minister makes an order regarding other offences to be excluded by reason of their nature and seriousness.<sup>65</sup> This possibility of indefinite retention may contravene the statement of the European Court in *W.*

International cooperation is facilitated by section 96, in keeping with the Text of Council Decision 2008/615/JHA of 23 June 2008 which requires member states to allow others access to reference data in their DNA analysis files. Moreover, a sample taken from a person under Part 2 or 4, and the DNA profile (if any) generated from the sample in respect of the person, may be transmitted outside the State.<sup>66</sup> This sharing of DNA information undermines the logic behind principled schemes which are cognisant of human rights, given that it allows the requesting state to benefit from a perhaps more expansive approach in another jurisdiction.

## **Conclusion**

It is hoped that the new Database and the proposed statutory procedures for DNA collection will improve crime detection and prosecution rates, by facilitating more efficient and effective police investigation through the matching of forensic samples. It is the potential for enhanced crime control, the identification of suspects and the resolution of unsolved cases which leads the Database to being described as a “major step forward in the fight against serious crime”.<sup>67</sup> Indeed, the appraisal of the equivalent UK Database programme focuses on improved detection rates, stating that they almost double when DNA is recovered successfully from a crime scene and loaded onto the National DNA Database; however, official reports are more circumspect about the impact on prosecutions.<sup>68</sup>

DNA databases are at the interface of scientific advances and the criminal justice system with its traditional norms and conventions. Such databases represent a type of mass surveillance, which rather than being directed at any one individual, gathers information in a broader sense for possible future use,<sup>69</sup> and this represents a shift from the classical precept of negative liberty<sup>70</sup> to one in which the State becomes more involved in speculatively monitoring “suspect” populations. In this bid to improve crime control, the worry is that Packer's other element of the criminal justice dyad, comprising due process and human rights, is overcome.<sup>71</sup> The potential impact of such a tactic on civil liberties implies that a cautious approach should be adopted. As the Bill currently stands, the narrow range of relevant offences is to be praised, although the lengthy retention periods for unconvicted

individuals is not appropriate and may not be ECHR-compliant. Moreover, there are some omissions in the Bill which ought to be clarified. The Bill does not explicitly refer to familial searching and the attendant difficulties, given that the partial match of two profiles may indicate a genetic link, which may be unknown to the individuals involved. Thus, while familial searching may be of use in an investigative sense, it holds the potential to encroach on the right to privacy, and thus close monitoring of this aspect specifically is vital. A further concern raised in the UK concerns the overrepresentation of members of black minority ethnic groups on the Database, due to the disproportionate arrest of certain populations.<sup>72</sup> Although there is no equivalent research in Ireland regarding arrest practices on ethnic grounds, it is conceivable that certain groups, based on cultural, ethnic or socio-economic grounds may be more likely to be detained and thus to have a sample taken. These problematic aspects and omissions must be addressed as the Bill progresses through the Oireachtas.

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<sup>1</sup> Annas, G. "Genetic Privacy" in Lazer, D. (ed) (2004), *DNA and the Criminal Justice System: The Technology of Justice* (Cambridge, MA: MIT Press, 2004).

<sup>2</sup> Steinhardt, B. "Privacy and Forensic DNA Data Banks" in Lazer, n.1.

<sup>3</sup> Consent for someone aged 14, 15 or 16 means his consent and that of his parent or guardian, and for someone less than 14 the consent of his parent or guardian (s. 2(10)).

<sup>4</sup> s. 3.

<sup>5</sup> s. 4(2).

<sup>6</sup> s. 4(3).

<sup>7</sup> s. 4(5).

<sup>8</sup> s. 4(4)(a).

<sup>9</sup> *Director of Public Prosecutions v Boyce* [2008] I.E.S.C. 62.

<sup>10</sup> paras. 52-56.

<sup>11</sup> para. 58.

<sup>12</sup> para. 63.

<sup>13</sup> Law Reform Commission, *Report on the Establishment of a DNA Database* (Dublin: LRC 78-2005) para. 2.49.

<sup>14</sup> para. 2.04. For a thorough and incisive analysis of the LRC's Consultation Paper and Report see Liz Heffernan, "The Law Reform Commission's proposed DNA database: issues of scope" (2006) 12(2) *M.L.J.I.* 56-64.

<sup>15</sup> LRC, above n.13, para. 2.47.

<sup>16</sup> para. 2.67.

<sup>17</sup> para. 2.68.

<sup>18</sup> para. 2.69.

<sup>19</sup> Liz Heffernan, "A DNA Database" (2008) 18(4) *Irish Criminal Law Journal* 105.

<sup>20</sup> Head 14.

<sup>21</sup> *S. and Marper v United Kingdom* (2009) 48 *E.H.R.R.* 50.

<sup>22</sup> *Criminal Justice Act 2003*, Part 1.

<sup>23</sup> As a result, English law is being reassessed regarding the requisite degree of seriousness of the "qualifying" offence, the appropriate treatment of minors, and the duration of retention (see Home Office, *Keeping The Right People on the DNA Database* (London: Home Office, 2009)), although change is yet to materialise.

<sup>24</sup> *S. and Marper*, above n. 21, paras. 109-110.

<sup>25</sup> *Criminal Procedure (Scotland) Act 1995*, ss.18 and 19.

<sup>26</sup> *Van der Velden v The Netherlands* no. 29514/05, December 7, 2006.

<sup>27</sup> *W. v The Netherlands*, Application no. 20689/08, January 20, 2009.

<sup>28</sup> ss. 6 and S7.

<sup>29</sup> Section 2 defines a “DNA profile” as “information comprising a set of identification characteristics of the non-coding part of DNA”; in other words a set of identifying characteristics from regions of DNA that are not known to provide for any physical characteristics or medical conditions of the person.

<sup>30</sup> Section 2 states that “reference data” is a DNA profile and a reference number and shall not contain any data from which the subject can be directly identified.

<sup>31</sup> ss. 9 and 11.

<sup>32</sup> Criminal Justice Act 2003, s. 10.

<sup>33</sup> Criminal Procedure (Scotland) Act 1995, s. 18A.

<sup>34</sup> Section 2 of the 2010 Bill defines a protected person 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 communicate in any way whether or not he or she consents to a sample being taken.

<sup>35</sup> s. 11.

<sup>36</sup> ss. 10(6) and 10(7).

<sup>37</sup> S. and Marper, above n. 21, para. 124.

<sup>38</sup> s. 12.

<sup>39</sup> s. 19(3).

<sup>40</sup> s. 19.

<sup>41</sup> Part 3.

<sup>42</sup> s. 56(3).

<sup>43</sup> s. 56(4).

<sup>44</sup> s. 65(2).

<sup>45</sup> s. 76.

<sup>46</sup> s. 77.

<sup>47</sup> s. 88(1).

<sup>48</sup> S. and Marper, above n. 21, para. 109.

<sup>49</sup> Criminal Procedure (Scotland) Act 1995, s. 18A.

<sup>50</sup> s. 78.

<sup>51</sup> Justice Committee Report, 18th Report, 2009 (Session 3) Stage 1 Report on the Criminal Justice and Licensing (Scotland) Bill, para. 355.

<sup>52</sup> Scottish Government, Acquisition and Retention of DNA and Fingerprint Data in Scotland. Consultation Report (2009) para. 41.

<sup>53</sup> s. 90.

<sup>54</sup> Department of Justice Press Release, “Minister Ahern Publishes new DNA Database Bill”, 19 January 2010.

<sup>55</sup> See the Sex Offenders Act 2001, as upheld in *Enright v Ireland and the Attorney General* [2003] 2 I.R. 321.

<sup>56</sup> *Kennedy v Ireland* [1987] I.R. 587 at 592.

<sup>57</sup> s. 82.

<sup>58</sup> S. and Marper, above n. 21, para. 35.

<sup>59</sup> s. 72.

<sup>60</sup> s. 73.

<sup>61</sup> s. 73(10).

<sup>62</sup> s. 75.

<sup>63</sup> s. 79.

<sup>64</sup> *W v The Netherlands*, above n. 27.

<sup>65</sup> s. 79(2).

<sup>66</sup> s. 4.

<sup>67</sup> Department of Justice Press Release, above n. 54.

<sup>68</sup> See for example National Policing Improvement Agency, National DNA Database Annual Report 2007-09, p. 3; Forensic Science Service, Annual Report National DNA Database 2003-2004, p. 23.

<sup>69</sup> House of Lords Constitution Committee - Second Report, Surveillance: Citizens and the State (2009) para. 24.

<sup>70</sup> Berlin, I. *Two Concepts of Liberty* (Oxford: Clarendon, 1958). Also see Kant, I. *Critique of Practical Reason* (Cambridge: Cambridge University Press, 1997) Part 1, Book 1, Ch.1.; Mill, J.S. *On Liberty and Other Essays* (Gray, J., ed.) (Oxford: Oxford University Press, 1991).

<sup>71</sup> Packer, H. *The Limits of the Criminal Sanction* (California: Stanford University Press, 1968).

<sup>72</sup> Nuffield Council on Bioethics, *The Forensic Use of Bioinformation: Ethical Issues* (London: Nuffield Council on Bioethics, 2007) para. 4.66.