



Law Society of Ireland

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

4th March, 2014

Introduction

The Law Society of Ireland (the ‘Society’) welcomes the opportunity to submit its views regarding the Criminal Justice (Forensic Evidence and DNA Database System) Bill 2013 (the ‘Bill’). There is currently no Irish DNA database and forensic samples are taken for purely evidential purposes to prove or disprove a person’s possible involvement.¹ The Bill proposes a statutory basis for the creation of a DNA database. The Bill introduces a substantial change in the importance of DNA to the criminal justice system, moving DNA from the status of an evidentiary tool to an investigative one.

The Society is particularly cognisant of the following remarks of Dr David O’Dwyer in his analysis of the Bill:

In theory, the concept of a DNA database is a phenomenal tool for the criminal process; ranging from its ability to rapidly include and exclude individuals in an investigation, to its ability to provide a genetic silent witness to an otherwise seemingly unsolvable case, to its increasing ability as a “liberator” in exonerating those who have been a victim of miscarriage of justice. However, it is vital that we do not let this phenomenal potential “overbear” or “steamroll” the serious issues that are concomitant with the expanded use of DNA profiling within the Irish criminal process.²

It is in this context that the Society welcomes the potential benefits the Bill will introduce but, at the same time, urges extreme caution and reflection on the practical ramifications for privacy rights.

The ‘CSI’ effect and potential miscarriages of justice

The Society is particularly cognisant of the ‘CSI’ effect whereby public opinion conflates a DNA match with guilt.³ O’Dwyer cautions:

¹ Criminal Justice (Forensic Evidence) Act 1990 and DPP v. Michael Boyce (18 November 2008)

² O’Dwyer, David, ‘DNA profiling and the criminal process: demystifying the silver bullet’ 6 Part I, *Irish Law Times*, (2014) 32(1) ILT 6

³ Kaye, D H, ‘Rounding up the usual suspects: a legal and logical analysis of DNA database trials’ (2007) 87 North Carolina Law Review 425 cited by O’Dwyer *ibid* at note 91

While a match does not automatically imply guilt, it indicates that the person whose profile was matched to the database could potentially have been present at the scene of the crime, thereby creating a useful lead for the police. However, it is imperative that the value of a match is subject to extensive scrutiny: thus it is important that a match should not be allowed to be automatically subsumed by the growing phenomenon of the “CSI” effect (i.e. the conflation of a DNA match with guilt). For example, a match could be the result of a number of factors, such as coincidence, transfer, foul play, adventitious match, legitimate reason, or it may have been subject to contamination or simply a mistake.⁴

O'Dwyer suggests that it will be very difficult for an accused to dispute DNA evidence given the infallibility surrounding DNA profiling.⁵ O'Dwyer identifies the possibilities for human error which have been evidenced to date as arising in coincidental/adventitious matches, false positives, chain of custody issues, the contamination of samples, pre-analytical errors, errors in data handling and misinterpreting DNA profiles.⁶

For example, in New Zealand, the Sharman Inquiry discovered that accidental contamination of samples in the laboratory during early stage processing resulted in a person who had supplied the sample as the victim of an assault being matched to the DNA profile from a murder scene. The victim was arrested and it was later discovered that they had never travelled to the area where the murder had occurred.⁷

In Australia, the Vincent Report found that contamination of and a lack of checks and balances in DNA sampling procedure resulted in the wrongful conviction of an individual for rape.⁸

Recommendation

In light of the “CSI” effect and the potential for miscarriages of justice, the use of DNA database evidence must be pursued cautiously.

Constitutional, due process and procedural rights

Generally, the Society believes that any deviation from the current criminal investigative and prosecutorial model must consider the following constitutional and rule of law issues:

- Changes to the rights of individuals (including suspects, former and current offenders, and volunteers for the purposes of being eliminated from enquiries)
- The extent to which a person is advised of their privacy rights throughout the process of the State collecting DNA evidence through to retention and to removal. Due to the potential life-time ramifications for an individual who consents to or is statutorily obliged to provide a sample, or who voluntarily provides a DNA

⁴ *Ibid* at note 1

⁵ O'Dwyer, David, “DNA profiling and the criminal process: demystifying the silver bullet” Part II, *Irish Law Times*, (2014) 32(1) ILT 22

⁶ *Ibid* The Sharman Inquiry

⁷ *Ibid* at 4

⁸ *Ibid* at 5

sample for profiling, it may be that a person should receive legal advice prior to consent

- The introduction of a new model must ensure that there is no potential damage to the constitutionally protected rights of any individual
- The access to justice rights of individuals in circumstances where a right of appeal is limited by the Bill to the District Court, in particular, where constitutional and human rights questions may merit consideration by a higher Court. There appears to be no statutory right of appeal beyond the District Court in the Bill.

Recommendation

The Bill must preserve the constitutional, due process and procedural rights of individuals.

Privacy rights under Article 8 ECHR

The Society supports the important observations contained in the Regulatory Impact Analysis (the 'RIA')⁹ of the Bill regarding bodily integrity/privacy rights and safeguards:

DNA samples are personal data and the taking and retention of such data is an interference with the right to bodily integrity and privacy rights. Any such interference must be proportionate to the public policy aim sought to be achieved. Accordingly, the establishment of the database must be accompanied by safeguards around the taking of samples including the circumstances in which reasonable force may be used, restrictions on the use that can be made of the samples and the related profiles, restrictions on who may access the data and the length of time for which they may be retained.¹⁰

Recommendation

The Bill and the powers which it will confer must preserve and be exercised in adherence with the privacy rights of individuals as protected by Article 8 ECHR.

Population of the database

A DNA database is dependent upon being populated with profiles of people so that trace evidence collected at scenes of crimes can be cross-referenced with data stored on the DNA database. The Bill envisages the collection of such data from:

- convicted individuals for all 'relevant offences'¹¹ who are currently under a sentence of imprisonment, without their consent (section 31) (and similarly from convicted juveniles (section 32));

⁹ [Criminal Justice \(Forensic Evidence and DNA Database System\) Bill 2013 Regulatory Impact Analysis](#)

¹⁰ *Ibid* at paragraph 3.3.4

¹¹ As defined in the Bill, a 'relevant offence' means an offence in respect of which a person may be detained under any of the provisions listed in section 9(1) or the provisions listed in section 9(1) are as follows: (a) section 30 of the Offences Against the State Act 1939; (b) section 4 of the Criminal Justice Act 1984; (c) section 2 of the Criminal Justice (Drug Trafficking) Act 1996; (d) section 42 of the Criminal Justice Act 1999; (e) section 50 of the Act of 2007; (f) section 16 or 17 of the Criminal Procedure Act 2010

- individuals who have already served their sentence, (a request must be made for a sample and where consent is not given then an application may be made for an order from the District Court compelling the provision of a sample) (sections 33 & 34)
- a deceased person suspected of the commission of relevant offences ó an application to the District Court (section 35);
- volunteers from the public - consent is required (section 27);
- mass screenings - consent is required (section 29); and
- individuals who are detained in custody in respect of relevant offencesó (section 9).

The proposed database type is a limited database as opposed to a comprehensive one which contains the DNA profile of all individuals. The limited database model takes samples from õpersons who fulfil certain criteria.ö¹² In summary, the proposed DNA database will contain DNA profiles from three different sources, crime scene profiles (õcrime scene indexö ó DNA profiles as gathered from crime scenes)¹³, comparator profiles (õreference indexö ó as collected from individuals such as volunteers, individuals detained by the Gardaí, convicted offenders, etc)¹⁴, and elimination profiles (õelimination (Garda Síochána/crime scene investigators/prescribed persons) indexö - based on those who work at crime scenes)¹⁵.

Therefore, the ãreference indexø will include the DNA profile of a broad spectrum of individuals, including suspects, convicted offenders who are currently serving a criminal sentence and former offenders who have completed their sentence, as well as volunteers.

In relation to the detention of suspects, anyone who is detained in Garda custody, without charge, in relation to a very broad range of offences can be subject to having a DNA sample taken. The range of offences specified in section 9(1) generally equates to offences which are subject to a maximum sentence of imprisonment of 5 years or more.ö¹⁶ The threshold is also defined in precisely the same terms for convicted persons. In practical terms, this would appear to encompass the majority of criminal offences and is not limited to offences of a more serious nature.

In respect of volunteers, the justification for requesting the taking of samples is very broadly defined in section 27. The request can be made of a volunteer in relation to ãthe investigation of a particular offenceø (section 27(1)(a)), but it can also be more generally requested as part of an õinvestigation of a particular incident that may have involved the commission of an offenceö (section 27(1)(b)). The Society would consider that the latter threshold, as set out in section 27(1)(b), is far too general and non-specific.

The Society urges caution in respect of placing all DNA profiles onto the ãreference indexø of the database on the same basis, regardless of the origin of the profile ó i.e.,

¹² *Supra* note 9 at paragraph 3.3

¹³ Section 61 of the Bill

¹⁴ Section 62 of the Bill

¹⁵ Sections 63 to 65 of the Bill

¹⁶ *Supra* note 9 at paragraph 3.3.1

irrespective of whether it comes from a convicted offender, a volunteer, or a suspect (who may be innocent).

The Society notes that the size of a database is linked to the sampling thresholds.¹⁷ The Society recognises that the lower the threshold for compulsory sampling, the larger the database will be for investigatory purposes but, nonetheless, the Society urges further consideration of what the minimum threshold should be for entry onto the database.

Recommendation

The Society is concerned that the threshold for the taking of samples from suspects may be too low. Accordingly, the Society urges that caution be exercised when defining the sample threshold. Furthermore, the threshold for placement and retention of volunteer profiles on the database must be carefully considered in the context of proportionate interference with privacy rights. Mechanisms and oversight must be in place to measure the rationale for the selection of classes of persons for sampling and to ensure selection is non-discriminatory.

Samples from detained suspects where of no relevance to the current investigation

As just mentioned, the RIA states that the Government's policy position as regards the type of DNA database to be statutorily introduced is that of a limited database as opposed to a comprehensive database.¹⁸ However, the RIA also states that the Bill provides for a power to take samples from detained suspects 'irrespective of whether the sample will assist the particular investigation in relation to which the person has been detained'¹⁹. It is possible that this broadens the remit of what is intended to be a limited database.

The Society notes that this type of statutory power would certainly go beyond the existing statutory provisions regarding the taking of DNA samples. As stated in the introduction to this submission, the existing statutory framework does not allow for a DNA database, and it restricts the taking of samples to purely evidential purposes ('believing that the sample will tend to confirm or disprove the involvement of the person from whom the sample is to be taken in the said offence').²⁰ It also makes clear that a sample can only be taken from a suspect where it is 'relevant to the offence for which he/she has been detained'.²¹

It would appear that sections 9 and 11 of the Bill facilitate such speculative gathering of DNA samples. The Society believes that the speculative taking of samples from suspects where to do so is of no relevance to the offence for which they are being detained may be a disproportionate interference with Article 8 privacy rights. Accordingly, the Society recommends that samples should only be taken where they are relevant to the offence for which a person has been detained.

¹⁷ *Supra* note 9 at paragraph 3.3.2

¹⁸ *Supra* note 9 at paragraph 3.3

¹⁹ *Supra* note 9 at paragraph 4

²⁰ Section 2(5)(b) of the Criminal Justice (Forensic Evidence) Act 1990

²¹ *Supra* note 9 at paragraph 4. See also section 2(5)(a) of the Criminal Justice (Forensic Evidence) Act 1990

Statutory power to take by reasonable force

Where consent is not statutorily required and a non-intimate DNA sample can be taken with reasonable force,²² the Society questions whether there should be some form of independent oversight at this stage. The authorisation of the use of reasonable force by a senior officer with video recording as the only safeguard is of concern.

Recommendation

Authorisation for the taking of samples by force where consent is not required should be made by an independent party on the basis of a sworn Garda statement of reasonable suspicion.

The destruction of samples and the removal of profiles from the database

Firstly, the Society believes that it is crucial to acknowledge the important distinction between a DNA profile and a DNA sample. A DNA profile "contains a very limited amount of what we consider to be personal genetic information."²³ A DNA sample "contains the full genetic information of the individual and it would be possible to derive information about that person and about others."²⁴ Accordingly, the retention of DNA samples involves much more sensitive issues and is not uncontroversial.²⁵

Section 79(1) of the Bill states that, "if not previously destroyed", a DNA sample shall be destroyed either as soon as a DNA profile has been generated, or before the expiration of six months from the taking of the sample.

In light of the potential interference with privacy rights in relation to the scope of material contained in a DNA sample, the period of six months for retention of a DNA sample seems a disproportionate length of time to retain such material.

Sections 79(2) and 79(3) set out "exceptional circumstances" where DNA samples can be destroyed in respect of persons detained in custody in connection with the investigation of a "relevant offence"; these "exceptional circumstances" consist of it being established that no offence was committed, that the person was detained on the basis of mistaken identity, or that a court has determined that the detention was unlawful.

Similarly, section 82 sets out identical "exceptional circumstances" for the removal of DNA profiles from the database in relation to those who were detained in custody.

In relation to convicted offenders, it would appear that there are no "exceptional circumstances" as such to warrant destruction of DNA samples; however, section

²² Sections 13 and 24 of the Bill

²³ *Inside Information: Balancing interests in the use of personal genetic data*, 2002 Report, UK Human Genetics Commission cited by Dr O'Dwyer *Supra* note 1 at page 8

²⁴ *Supra* note 1 at page 8

²⁵ Dr O'Dwyer notes "the retention of biological samples is, unsurprisingly, a more controversial issue" *supra* note 1

76(1)(b-e) outlines circumstances where such destruction is possible, e.g. where the person's conviction is quashed, etc. Similarly, in relation to the removal of offenders' DNA profiles on the database, there are no exceptional circumstances for removal but section 83 details certain circumstances under which they may make an application to the Commissioner for the removal of their profile.

The Society's concern is that the existence of these exceptional circumstances is determined solely by the Commissioner - *if* the Commissioner is satisfied that exceptional circumstance exist. There is no right of appeal of the Commissioner's decision in respect of the non-destruction of DNA samples in exceptional circumstances.

Recommendation

The Society believes that consideration must be given to whether it is reasonable to retain DNA samples, as opposed to DNA profiles, for up to 6 months. The Society cautions against the retention of samples and recommends that samples must be destroyed as soon as possible after profiling. The Society also considers that the establishment of any of the exceptional circumstances should be clarified in the Bill, or that there should be some form of appeal of the Commissioner's decision in respect of the destruction of DNA samples in exceptional circumstances.

Retention of samples and/or profiles of cleared suspects

The process of retaining DNA samples and profiles of those ultimately acquitted of an offence (or where proceedings are discontinued or not instituted within 12 months) is outlined in sections 76(1)(a), 77, 80(1)(a), and 81. The Society notes that retention arrangements originally envisaged were redesigned because of the European Court of Human Rights decision of *S & Marper v. the United Kingdom*²⁶ to prevent disproportionate interference with the right to privacy (article 8 of the ECHR). In particular, the introduction of a presumption in favour of removal of a profile from the database for suspects who are not convicted so that the sample or profile 'shall be destroyed or removed not later than three months after certain specified circumstances first apply to the individual in question. However, the presumption and the subsequent destruction or removal are 'subject to the Commissioner having the power to authorise retention on the database where he is satisfied that this is necessary.'²⁷

It is of concern that the decision to retain such data is left exclusively within the power of the Garda Commissioner, albeit subject to appeal to the District Court. It is also worrying that there is no apparent limit to the number of extension periods of 12 months which can be sought so to extend the retention period on a second *or further* occasion for a period of 12 months commencing on the expiration of the period of 12 months to which the authorisation previously given relates (emphasis added). The appeal process is convoluted and leaves open the question of whether legal aid will be made available for individuals seeking to make such an appeal.

The Society is firmly of the view that, if the Commissioner believes that such data should be retained then, in the interests of the preservation of privacy rights, an application should be brought to Court to consider the proportionality of such

²⁶ Case of S. And Marper V. The United Kingdom, 30562/04 30566/04, Judgment 4 December 2008

²⁷ *Supra* note 9 at pages 19 and 20. See sections 77 and 81 of the Bill

retention. It is likely that independent judicial oversight is required at an earlier stage in the process of reviewing the retention of DNA samples and profiles.

Finally, the Society considers that the retention of such information in respect of those who are not convicted of any offence will have a negative impact upon the fundamental principle of the presumption of innocence, and in this respect the Society suggests that further consideration might be given to the decision of the European Court of Human Rights in *S. and Marper v The United Kingdom*:

121. The Government contend that the retention could not be considered as having any direct or significant effect on the applicants unless matches in the database were to implicate them in the commission of offences on a future occasion. The Court is unable to accept this argument and reiterates that the mere retention and storing of personal data by public authorities, however obtained, are to be regarded as having a direct impact on the private-life interest of an individual concerned, irrespective of whether subsequent use is made of the data (see paragraph 67 above).

*122. Of particular concern in the present context is the risk of stigmatisation, stemming from the fact that persons in the position of the applicants, who have not been convicted of any offence and are entitled to the presumption of innocence, are treated in the same way as convicted persons. In this respect, the Court must bear in mind that the right of every person under the Convention to be presumed innocent includes the general rule that no suspicion regarding an accused's innocence may be voiced after his acquittal (see *Rushiti v. Austria*, no. 28389/95, § 31, 21 March 2000, with further references). It is true that the retention of the applicants' private data cannot be equated with the voicing of suspicions. Nonetheless, their perception that they are not being treated as innocent is heightened by the fact that their data are retained indefinitely in the same way as the data of convicted persons, while the data of those who have never been suspected of an offence are required to be destroyed.*

Recommendation

The Society recommends that the decision to retain the profile of a potentially exonerated suspect must be made by an independent person, preferably by the District Court in the first instance, and not a member of the Garda Síochána. The current process of appeal of the Commissioner's decision, as outlined in sections 77 and 81, is convoluted. Legal representation must be made available to those people who wish to appeal such decisions. The Garda Síochána and Commissioner will have access to legal advice and to State legal representation throughout the process. It is essential access to legal representation is made available to all parties involved.

Additional recommendations

International exchange of DNA samples/profiles

The Society agrees with the observation of the Irish Council of Civil Liberties that it would be helpful if the Bill were to clarify that the role of the Oversight Committee will encompass reviewing the appropriateness of the data protection safeguards in

place in States to which samples/profiles may be transmitted. The Society agrees that "as a matter of principle, samples/profiles should not be transmitted to States that cannot guarantee that they will be protected by appropriate privacy safeguards".²⁸

Children's rights

Section 17 (1) provides for the taking of intimate samples from children in a variety of circumstances where the consent of a parent or guardian cannot be obtained or where the parent or guardian will not provide consent. Section 17(1)(d) specifically allows for an application to be made to the District Court to sanction the taking of such samples where a parent or guardian has refused consent. Section 2(1) defines an intimate sample as including a swab from a genital region or a body orifice other than the mouth. Section 18(3) further provides that such samples shall only be taken by a member of the same sex in so far as practicable.

Sections 32, 33 and 34 provide for the taking of samples from child offenders currently serving sentences and child former offenders (those who have completed their sentence). The Bill provides for the taking of samples in circumstances where the child offender is serving a sentence, without their consent, without any reference to the parent or guardian for consent and without any requirement to obtain permission from the District Court.

In light of the potential disproportionate interference with children's privacy rights, dignity and respect for bodily integrity, the Society suggests that the definition of intimate samples, the procedure for obtaining consent and the taking of such samples, in respect of children, should be pursued cautiously. The Society urges a review of the above sections for compatibility with the Children Act 2001, the 31st Amendment to the Constitution and the UN Convention on the Rights of the Child.

Ex parte applications

Section 34(10) appears to permit the Garda Síochána to make an *ex parte* application to the District Court for an authorisation to take a sample from a former offender. In light of the due process rights of individuals, the Society believes that section 34, as well as any other similar provisions in the Bill which facilitate *ex parte* applications, should be reviewed to consider whether such applications should only be made where the individual concerned is on notice of the application.

Adequate resources

The Society believes that adequate resources must be allocated to the cost bases identified in the RIA, in particular, to the ongoing training of individuals who will be involved in the collection of DNA samples through to the Oversight Committee to ensure that international best practice standards are achieved.

Legal advice/representation

The Society is particularly concerned about the treatment of the right to legal advice and assistance in the current provisions of the Bill.

²⁸ Press Release of the Irish Council for Civil Liberties, 11 September 2013, "Watchdog calls for privacy guarantees on DNA data sharing"

Section 19 deals with inferences from refusal to consent, or withdrawal of consent, to taking of intimate sample. It is made clear under section 19(2)(b) that, when a member of the Garda Síochána seeks consent to the taking of an intimate sample from an individual in Garda custody, the individual must be informed of the right to consult a solicitor before such refusal or withdrawal of consent occurred.

However, section 12 sets out the process for the taking of an intimate sample and, in particular, section 12(5) sets out nine issues or points of information about which the member of the Garda Síochána must inform the individual when seeking their consent to the giving of an intimate sample, e.g. that the results of the forensic testing of the sample may be given in evidence in any proceedings. The right to legal advice and to consult a solicitor is not included in the list of required information to be given to the individual in custody in these circumstances.

Considering both sections together, it would appear that the individual's right to be informed of their right to legal advice is limited to circumstances where the individual indicates that they might or will refuse consent to give an intimate sample.

The Society considers that an individual's right to legal advice, and their right to be informed of this right of access, should not be restricted in this manner. When seeking an individual's consent to give an intimate sample, the individual should be informed of their right to legal advice in addition to the other information which has to be provided under section 12(5).

Consultation with the legal profession

The Society would welcome the opportunity to further participate in the development of this Bill. Solicitors who practice in criminal law have valuable experience and insights which they would happily make available to the process which the legislature is currently undertaking. The Society would welcome the opportunity to contribute to the creation of Garda and Forensic Science Ireland²⁹ (FSI) codes of practice and protocols. The Society believes that criminal law practitioners are and will be uniquely placed to contribute to the work of the Oversight Committee. Accordingly, the Society recommends that both the Law Society and Bar Council of Ireland be asked to each nominate a member to the Oversight Committee.

Awareness campaign

O'Dwyer recommends that relevant stakeholders such as the FSI and Data Protection Commissioner conduct regular campaigns and provide information to the general public to raise awareness of the use (and inherent issues) involved in utilising DNA within the criminal process.³⁰ The Society strongly supports this initiative. In light of the breadth and scope of the powers to be invested in the Garda Síochána and the FSI with the enactment of this Bill, powers which could potentially affect all citizens, the Society is firmly of the view that ongoing *know your rights* campaigns would be a crucial aspect of ensuring the fair and proportionate exercise of these powers.

²⁹ Currently the Forensic Science Laboratory of the Department of Justice and Equality, to be renamed under the Bill as Forensic Science Ireland

³⁰ *Supra* note 5 at page 9

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