AN BILLE UM CHEARTAS COIRIÚIL (FIANAISE DLÍ-EOLAÍOCHTA AGUS CÓRAS BUNACHAIR SONRAÍ DNA), 2013

CRIMINAL JUSTICE (FORENSIC EVIDENCE AND DNA DATABASE SYSTEM) BILL 2013

EXPLANATORY MEMORANDUM

Purposes of the Bill

The main purposes of the Bill are to:

- replace the existing statutory and common law arrangements governing the taking of samples for forensic testing from suspects for use as evidence in criminal investigations and proceedings with an updated statute-only regime,
- repeal the Criminal Justice (Forensic Evidence) Act 1990,
- provide for the establishment of a DNA database system (a commitment in the Programme for Government) for use by the Garda Síochána as an intelligence source for criminal investigations and also to assist in finding missing persons and unknown persons (whether seriously ill or injured persons who are unable to identify themselves or unidentified human remains),
- 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 (persons who are neither suspects nor offenders) for the purpose of generating DNA profiles in respect of such persons in connection with the investigation of criminal offences or incidents that may involve the commission of criminal offences,
- implement the DNA data and dactyloscopic data elements of the Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (The Prüm Council Decision)[1], the Implementing Council Decision[2] and

[1]Council Decision 2008/615/JHA integrates aspects of the Prüm Treaty into the law of the European Union. The Prüm Treaty is a treaty to which 15 Member States of the European Union are party and which is concerned with the stepping up of cross-border cooperation, particularly in combating terrorism, cross border crime and illegal migration.

[2]Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime.

the Agreement with Iceland and Norway and the EU applying those instruments[3], make provision for Prüm-like bilateral or multilateral agreements between the State and other states.

The Bill draws on the Law Reform Commission Report ''The establishment of a DNA Database'' (LRC 78-2005). The Bill builds on the 2010 Bill of the same name which lapsed on the dissolution of the last Dáil.

PART 1

Preliminary and general

This Part contains standard provisions and the necessary interpretations for the Bill.

Section 1 contains the short title and commencement arrangements.

Section 2 provides the necessary interpretation provisions.

Key definitions in subsection (1) include: ''FSI'', ''DNA profile'', ''intimate sample'', ''non-intimate sample'', ''match'', ''protected person''.

''FSI'' refers to Forensic Science Ireland — the new name for the Forensic Science Laboratory of the Department of Justice and Equality.

''DNA profile'' in relation to a person is confined to information derived from the non-coding part of DNA which refers to the chromosome regions of a person's DNA that are not known to provide any functional properties of the person.

''intimate sample'' refers to: a sample of blood, pubic hair or urine; a swab from a genital region or a body orifice (other than the mouth), or a dental impression.

''non-intimate sample'' refers to: a sample of saliva, hair other than pubic hair or a nail or any material found under the nail; a swab from any part of the body including the mouth but not from any other body orifice or a genital region; or a skin impression (such as a foot print). Subsection (4) provides that references to the mouth are to be interpreted as including references to the inside of the mouth.

''match'' refers to the relationship between two DNA profiles and ''means that there is such a degree of correspondence between them that they are indistinguishable and it is probable that they relate to the same person, and the degree of probability can be indicated statistically.''

''missing person'' refers to ''a person who, whether before or after the commencement of this section, is observed to be missing from his or her normal patterns of life, in relation to whom those persons who are likely to have heard from the person are unaware of the

[3]Agreement between the European Union and Iceland and Norway on the application of certain provisions of Council Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime and Council Decision 2008/616/JHA on the implementation of Council Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime and the Annex thereto done at Stockholm on 26 November 2009 and Brussels on 30 November 2009.

whereabouts of the person and that the circumstances of the person being missing raises concerns for his or her safety and well-being.'' It is defined in this way in order to exclude persons who may have no wish to be found.

''protected person'' refers to a person (including a child) who by reason of a mental or physical disability lacks the capacity to understand the general nature and effect of the taking of a sample from him or her, or to indicate (by speech, sign language or any other means of communication) whether he or she consents to a sample being taken from him or her. Subsection (2) excludes intoxication whether by alcohol, drugs or other substances from the meaning of ''mental or physical disability''. Subsection (7) provides that the fact that a person is regarded as a protected person for the purposes of the Bill does not have any bearing on whether he or she lacks capacity for other purposes.

Subsection (3) specifies the type of sample that may be taken for the purposes of the DNA Database System or from a volunteer. In the case of a person the type of sample is restricted to a sample of hair other than pubic hair or a mouth swab (i.e. non-intimate samples). In the case of human remains sample means a sample of biological material from the body of the person from which a DNA profile in respect of the person may be generated.

Section 3 contains some supplementary provisions relating to samples. It specifies how certain references in the Bill are to be construed, including references to the giving of information regarding the effect of the entry of a DNA profile in any index of the DNA Database System, a person giving his or her consent in writing, and a sample proving to be insufficient.

Subsection (3) details the process by which a sample of hair other than pubic hair is to be taken from a person.

Section 4 provides that samples taken under Part 2 or 4 of the Bill and DNA profiles generated from such samples (if any) may be transmitted outside the State pursuant to a request under Chapter 3 of Part 5 of the Criminal Justice (Mutual Assistance) Act 2008 (which concerns requests for identification evidence) or from the International Criminal Court. The section also provides that DNA profiles generated from samples taken under Part 2 or Part 4 may be provided to Europol (which has the meaning it has in section 1 of the Europol Act 2012 i.e. the European Police Office established under Council Decision 2009/371/JHA of 6 April 2009) under the Europol Act 2012.

Section 5 provides that the Minister may make such orders as are provided for in the Bill and regulations prescribing anything which is referred to in the Bill as prescribed or to be prescribed or for the purpose of enabling any provision of the Bill to have full effect.

Section 6 repeals the Criminal Justice (Forensic Evidence) Act 1990 and revokes the regulations made under that Act.

Section 7 contains the necessary transitional provisions to save samples taken under the Criminal Justice (Forensic Evidence) Act 1990 or under the common law in order that they may continue to be retained and used in accordance with the rules applying at the time of their taking.

Section 8 provides that any expenses incurred by the Minister for Justice and Equality in the administration of the Act, shall to the

extent sanctioned by the Minister for Public Expenditure and Reform be paid out of moneys provided by the Oireachtas.

PART 2

Taking of samples from persons in custody of Garda Síochána

This Part makes provision for the taking of samples from persons in the custody of the Garda Síochána i.e. persons who are suspected of being involved in the commission of criminal offences but have not been charged.

Section 9 provides that a sample or samples may be taken from a person who is detained under any of the existing Garda Síochána detention powers: section 30 of the Offences Against the State Act 1939, section 4 of the Criminal Justice Act 1984, section 2 of the Criminal Justice (Drug Trafficking) Act 1996, section 50 of the Criminal Justice Act 2007 or section 16 or 17 of the Criminal Procedure Act 2010. A sample or samples may be taken from a person in prison who is arrested and detained by the Garda Síochána under section 42 of the Criminal Justice Act 1999 for the purposes of the investigation of an offence other than the offence in respect of which he or she is in prison.

Linking the power to take samples with the detention powers means that in general the offence threshold for the taking of a sample is a maximum sentence of imprisonment of 5 years or more subject to limited exceptions in the case of the Offences Against the State Act 1939 and the Criminal Justice (Drug Trafficking) Act 1996 which contain a small number of offences which do not meet the 5 year threshold.

An ''avoidance of doubt'' declaration is included to make it clear that references to the detention powers include their application to a person who is arrested again and detained under one of the powers whether subject to modifications or otherwise.

The three categories of samples that may be taken are specified: a sample under section 11 i.e. a sample for the purpose of the generation of a DNA profile in respect of the person for entry in the DNA Database System which is to be established under section 59 and intimate and non-intimate samples under sections 12 and 13 for the purpose of proving or disproving the involvement of the person in the offence in respect of which he or she is detained i.e. for evidential purposes.

Section 10 provides that it is the responsibility of the member in charge of the Garda station in which a person is detained under any of the Garda detention powers listed in section 9(1) to determine whether that person is a protected person. This determination is required because Part 2 of the Bill provides additional safeguards in respect of detained persons who are protected persons. 'Member in charge' is defined in section 2 and refers to the member in charge appointed under the Criminal Justice Act 1984 (Treatment in Custody) Regulations 1987. In the event that the taking of an intimate sample is authorised under section 12 the opinion of the member in charge that the person is a protected person must be certified by a medical practitioner.

Section 11 permits a member of the Garda Síochána to take a sample from a detained person for the purpose of generating a DNA profile for entry in the reference index of the DNA Database System — the sample is not taken for evidential purposes. A member not

below the rank of sergeant must authorise the taking of the sample. Notwithstanding that the consent of the person to the taking of the sample is not required the person is to be informed of various matters before the sample is taken, including (where applicable) that reasonable force may be used in the event that he or she fails or refuses to allow the sample to be taken. Protected persons and children under 14 years of age are excluded from the application of this section. The Minister, by order, shall exclude certain offences from the scope of this section because their nature is such that evidence relating to DNA would not assist with their investigation or prosecution. As regards the application of this section to children who are 14 years or older the Minister is required to review this within 6 years of the commencement of the section and may, having regard to the outcome of the review, vary the application of the section to such children.

Section 12 concerns the taking of an intimate sample from a detained person for the purposes of the investigation of the offence in respect of which the person is detained and for evidential purposes in any proceedings. If the sample taken is one which may be used to generate a DNA profile in respect of the person then the sample may also be used for the purpose of the DNA Database System. A sample of this type may only be taken if a member of the Garda Síochána not below the rank of inspector has authorised it and the appropriate written consent has been given by the detained person concerned. Before giving the necessary authorisation the member must be satisfied that there are reasonable grounds for suspecting the involvement of the person in the offence in respect of which the person concerned is detained and for believing that the sample will tend to confirm or disprove the involvement of the person in the offence. Before the detained person is requested to consent he or she must be informed of various matters including the consequences of not consenting which are detailed in section 19. If the person gives the appropriate consent but then withdraws it (or withdrawal can reasonably be inferred from the conduct of the person) before or during the taking of the sample the withdrawal will be treated as a refusal and the provisions of section 19 will apply. The withdrawal must be recorded in writing. Once the sample has been taken it will not be possible for the detained person to withdraw consent.

Section 13 concerns the taking of a non-intimate sample from a detained person for the purposes of the investigation of the offence in respect of which the person is detained and for evidential purposes in any proceedings. If the sample taken is one which may be used to generate a DNA profile in respect of the person then the sample may also be used for the purpose of the DNA Database System. A sample of this type may only be taken if a member of the Garda Síochána not below the rank of inspector has authorised it. Unlike in the case of intimate samples under section 12 the consent of the person concerned is not required. Before giving the necessary authorisation the member must be satisfied that there are reasonable grounds for suspecting the involvement of the person in the offence in respect of which the person concerned is detained and for believing that the sample will tend to confirm or disprove the involvement of that person in the offence. Notwithstanding that the person's consent is not required he or she is to be informed of various matters before the sample is taken including that reasonable force may be used in the event that he or she fails or refuses to allow the sample to be taken. Non-intimate samples are taken or caused to be taken by a member of the Garda Síochána.

Section 14 provides that any information to be given to detained persons who are children or protected persons under this Part is to

be given in a manner and language that is appropriate to the level of understanding of the protected person or child and is age appropriate in the case of children.

Section 15 defines the meaning of the 'appropriate consent' which is required under section 12 before an intimate sample may be taken. In the case of an adult (i.e. a person aged 18 years or older other than a protected person) his or her consent is required. In the case of a protected person the consent of his or her parent or guardian or an order from a District Court judge under section 16 is required. In the case of a child aged 14 or older, the consent of the child and either a parent or guardian or an order from a District Court judge under section 17 is required. In the case of a child who is below the age of 14 the consent of his or her parent or guardian or an order from a District Court judge under section 17 is required. A parent or guardian may be excluded from giving consent in certain circumstances; namely where he or she is the victim of the offence, has been arrested in respect of the offence or the member in charge has reasonable grounds for suspecting that the parent or guardian is complicit in the offence concerned or is likely to obstruct the course of justice. The exclusion of one parent or guardian on one of these grounds does not prevent another parent or guardian from being asked to give consent. Before consent is sought from a parent or guardian he or she must be given the information that is required to be given to the detained person under section 12.

Sections 16 and *17* concern protected persons and children respectively and provide that in certain circumstances a member of the Garda Síochána not below the rank of inspector may apply to a District Court judge for an order to take an intimate sample from a protected person or child. The circumstances in which such an application may be made are where a parent or guardian: cannot be contacted despite reasonable efforts; has been contacted but indicates that he or she cannot or will not attend at the Garda station within a reasonable period of time; is excluded from giving consent under section 15; refuses to give consent in the case of a protected person or in the case of child where the child's consent is not required (those under 14 years), or where the consent of the child is required (those aged 14 years or older) where the child has consented; or the protected person or child does not have, or it cannot be ascertained, within a reasonable period of time that he or she has a living parent or guardian from whom consent may be sought.

The detained person is to be informed that the application is to be made as is the person's parent or guardian (other than an excluded parent or guardian) in so far as that is practicable. The judge is given the discretion to hear the application in private or to exclude certain persons where the judge is satisfied that this is desirable in order to avoid prejudice to the investigation or is otherwise in the interests of justice.

The matters to which the judge is to have regard when determining the application are specified. They include the grounds on which the authorisation to take the intimate sample was given under section 12, where applicable the reasons for the parent/guardian's refusal to give the necessary consent, the nature of the offence, the best interests of the person concerned, the interests of the victim and the protection of society. An order may not be made under either of these sections before a parent or guardian who has applied to be heard by the judge has been given a reasonable opportunity to be heard. Where the judge makes an order authorising the taking of the intimate sample the judge may make a further order (where the

person is detained under section 4 of the Criminal Justice Act 1984), on the application of the member of the Garda Síochána, authorising the detention of the person for not more than 4 hours for the purpose of having the intimate sample taken.

Section 18 specifies who may take intimate samples (other than urine samples). Registered medical practitioners and nurses are specified and, in the case of dental impressions, registered dentists are also specified. With the exception of blood samples and dental impressions, intimate samples are to be taken as far as practicable by a person who is the same sex as the person from whom the sample is being taken.

Section 19 concerns the consequences that may follow a refusal to consent (or a withdrawal of consent) to the taking of an intimate sample. A refusal to consent or a withdrawal of consent without reasonable cause may give rise to an adverse inference being drawn in subsequent criminal proceedings. Such an adverse inference may be treated as corroborating any evidence to which it is relevant — it may not be the sole or main basis of a conviction. The adverse inference may not be drawn if certain steps have not been followed. The steps are that the person was told in ordinary language that a failure to consent or a withdrawal of consent could give rise to such an inference being drawn, that he or she was given an opportunity to consult a solicitor before refusing consent and that the request for consent was recorded by electronic means or the person consented in writing to it not being so recorded. This section does not apply to: a protected person, a child who is under 14 years, or a child who is 14 years or older who gave the necessary consent but whose parent or guardian refused consent unless the child refuses to comply with a District Court order under section 17 authorising the taking of the sample.

Section 20 concerns the circumstances in which a sample taken for the purposes of the DNA Database System under section 11 may be treated as a non-intimate sample taken under section 13 for evidential purposes. This may occur where during the same period of detention a sample has been taken under section 11 and a decision is subsequently made that a non-intimate sample under section 13 is required for the purposes of the investigation at hand i.e. to prove or disprove the person's involvement in the offence in connection with which he or she is detained. Before a section 11 sample may be treated as a section 13 sample similar procedures that apply to the taking of a section 13 sample must be followed — a member not below the rank of inspector must authorise the change of use of the sample and the person must be informed of certain matters including that the result of forensic tests on the sample may be used in evidence.

Sections 21 and 22 contain special provisions in relation to the taking of samples from protected persons and children. Intimate samples may only be taken where a person other than a member of the Garda Síochána is present while the sample is being taken unless the protected person or child indicates that he or she does not wish to have such a person present. The person may be the parent/guardian or other adult who attends at the Garda station, or in their absence or exclusion under subsection (4) or removal under subsection (5), another adult nominated by the member in charge. The nominated adult must be a person who is, in so far as practicable, of the same sex as the person from whom the sample is to be taken. In addition the nominated adult must, in so far as practicable, in the case of protected persons, be suitable by reason

of his or her training or experience with persons who have physical or mental disabilities.

Non-intimate samples, where it is reasonably practicable, will be taken in the presence of a parent/guardian or other adult who attends at the Garda station, unless the person indicates that he or she does not wish the person to be present.

The exclusion of a parent/guardian and other adult relative from the place where the sample is to be taken may be authorised by the member in charge if the parent etc. is a victim of the offence under investigation, has been arrested in respect of the offence concerned or the member in charge has reasonable grounds for suspecting the person is complicit in the offence or is likely to obstruct the course of justice. The member in charge may also authorise the removal of a parent etc. from the place where the sample is being taken if he or she attempts without reasonable cause to obstruct the taking of the sample. Parents etc. (other than persons who are excluded) attending at the station are also to be given the information that is required to be given to the detained person before a sample is taken where it is reasonably practicable to do so.

Section 23 addresses the situation where a protected person's parent/guardian does not attend at the station for the purposes of Part 2 i.e. to be present when the sample is being taken from the protected person and to receive certain information before the sample is taken. It places an obligation on the member in charge to inform the protected person without delay that he or she is entitled to have an adult relative or other adult reasonably named by him or her requested to come to the station without delay for the purposes of Part 2. The member in charge is further obliged to request the named person to be notified as soon as practicable. It is not necessary to make similar provision in relation to children as section 58 of the Children Act 2001 already addresses this matter.

Section 24 sets out the circumstances in which a section 11 or section 13 sample may be taken with the use of reasonable force. The use of force is not permitted to take section 11 samples from children or section 13 samples from children under 12 years. Force does not apply in the case of samples taken under section 12 i.e. intimate samples. Reasonable force must be authorised by a member of the Garda Síochána not below the rank of superintendent. The detained person must be informed in advance of the intention to use reasonable force and that the necessary authorisation has been given. The use of reasonable force must be observed by a member not below the rank of inspector who is to determine the number of members necessary. The taking of a sample with the use of reasonable force must be recorded by electronic means. Special provisions apply in case of protected persons and children (where section 13 samples are required) — a person other than a member of the Garda Síochána must be present when force is being used to take a sample unless the protected person or child indicates that he or she does not wish to have the person present. The person may be the parent/guardian or adult relative or other adult reasonably named by the person who attends at the Garda station or in their absence or exclusion under section 21 or 22 another adult nominated by the member in charge.

Section 25 sets out the circumstances in which a sample which proves to be insufficient (as defined in section 2(1)) may be re-taken. Different procedures apply depending on: whether the insufficiency comes to light while the person is still in detention or after he or she

has been released, and on the type of sample, whether it is a sample taken under section 11, 12 or 13.

In the case of section 11, 12 or 13 samples, where the person is still in detention and the insufficiency of the sample becomes apparent after more than 1 hour has elapsed the sample may be re-taken only if a fresh authorisation under the relevant section is given. A fresh authorisation may be given on one occasion only during a period of detention.

In the case of section 13 samples where the insufficiency becomes apparent after the person has been released from detention without charge the sample may only be retaken if a member not below the rank of superintendent authorises it and the person attends at a Garda station for the purpose of having it taken. The necessary authorisation may only be given if the member giving it has reasonable grounds for suspecting the involvement of the person in the offence concerned and that the sample will tend to prove or disprove the person's involvement. Such an authorisation may be given on one occasion only and may not be given if more than 6 months have elapsed since the taking of the first sample. Where the necessary authorisation has been given the person is required by notice in writing to attend at the Garda station for the purpose of having the sample taken. If the person fails or refuses to attend without reasonable cause a member not below the rank of superintendent may apply to a District Court judge for a warrant to arrest and detain the person for the purposes of taking the sample. The period of detention may not exceed 4 hours. The matters of which the judge is to be satisfied before issuing the warrant are specified.

In the case of section 13 (having regard to their evidential importance) inadequate labeling (as defined in section 2(1)) is also a ground for re-taking such a sample in accordance with the procedures in this section.

Section 26 provides that a member of the Garda Síochána shall not take a bodily sample from a detained person other than in accordance with Part 2 following the commencement of this Part. The purpose of this section is to abolish the common law power to take samples from a suspect in custody with his or her consent notwithstanding the existence of a statutory regime.

PART 3

Taking of samples from volunteers to generate DNA profiles

This Part governs the taking of a sample from a volunteer for the purposes of generating a DNA profile in respect of that person. The Part does not govern the taking of samples for other purposes from a volunteer e.g. the lifting of material from the victim of an offence that may have been left by the perpetrator. The Part also sets out the circumstances in which a mass screen (an intelligence-led screen of a class of persons) may be conducted. The samples that may be taken under this Part are limited to mouth swabs or head hair (section 2(3)).

Section 27 provides that a member of the Garda Síochána or an authorised person may request a person i.e. a volunteer to have a sample taken for the purpose of generating a DNA profile in respect of him or her in relation to the investigation of a particular offence or an incident that may involve the commission of an offence. This section does not apply to persons in the custody of the Garda

Síochána or offenders who may be sampled under sections 31 or 32. An authorised person refers to a person appointed in writing under section 136 by a member not below the rank of superintendent for the purposes of Parts 3, 5 and 6. In the event that the DNA profile of a victim or a person reasonably considered to be a victim is required in relation to the investigation of an offence or incident this section applies i.e. he or she is to be treated as a volunteer. Before seeking the consent of a volunteer to the taking of a sample the member or authorised person must inform the volunteer of certain matters including that he or she is not obliged to provide the sample. The volunteer's consent must be in writing. If a volunteer consents but then withdraws it (or withdrawal can reasonably be inferred from the conduct of the volunteer) before or during the taking of the sample the withdrawal will be treated as a refusal. The withdrawal must be recorded in writing. The section states that a refusal to consent to the taking of a sample shall not of itself constitute reasonable cause for a member to suspect the person of having committed the offence concerned for the purpose of arresting and detaining him or her under any of the detention powers listed in section 9 in connection with the investigation of that offence.

Section 28 concerns the circumstances in which a DNA profile generated from a sample taken under section 27 may be entered in the reference index of the DNA Database System. Such profiles will not be entered in the DNA Database System routinely. Their entry will instead be subject to the specific written consent of the volunteer, which consent is a separate consent from that under section 27 required for the taking of a sample under that section. A member not below the rank of sergeant may at the time that a sample is being taken under section 27 from a volunteer (or afterwards), inform the volunteer (other than a protected person, a child, or a victim or a person reasonably considered to be a victim) that he or she may consent to the entry of his or her profile in the reference index of the DNA Database System. The person must be informed of certain matters before his or her profile may be entered in the reference index including that he or she is not obliged to consent to its entry, the effect of such entry and the rules governing the destruction of the sample and the removal of the profile from the System.

Section 29 sets out the circumstances in which a mass screening of a class of persons defined by certain characteristics may be conducted. It provides that a mass screening must be authorised by a member not below the rank of chief superintendent. In order to authorise a mass screening the member must have reasonable grounds for believing that the mass screening of the target class is likely to further the investigation of the offence and is a reasonable and proportionate measure to be taken in the investigation of that offence. A mass screening may only be conducted in respect of a relevant offence which is defined in section 2(1) as an offence in respect of which a person may be detained under any of the Garda detention powers listed in section 9(1) — generally offences which attract a maximum sentence of 5 years or more. The target class may be determined by sex, age, kinship, geographic area, time, or any other matter which the authorising member considers appropriate. A person who comes within the target class is a volunteer and therefore is not obliged to accede to a request to provide a sample. His or her written consent is required. As is the case with all volunteers, he or she must be informed of certain matters before his or her consent is sought. If the person consents but then withdraws it (or withdrawal can reasonably be inferred from his or her conduct) before or during the taking of the sample the withdrawal will be treated as a refusal. The withdrawal must be recorded in writing. A

sample taken as part of a mass screening may not be used for the purposes of the DNA Database System — it is tested and retained for the purposes of the investigation of the relevant offence in respect of which it was taken. The section states that a refusal to consent to the taking of a sample shall not of itself constitute reasonable cause for a member to suspect the person of having committed the offence concerned for the purpose of arresting and detaining him or her under any of the detention powers listed in section 9 in connection with the investigation of that offence.

Section 30 sets out the arrangements for the re-taking of a sample taken under section 27 or 29 which proves to be insufficient or was inadequately labeled or for any other good reason. Essentially the procedures set out in section 27 or 29 must be repeated i.e. the person must be requested again and is under no obligation to consent.

PART 4

Taking of samples from other persons or bodies for reference index of DNA Database System

This Part provides for the taking of samples for the purposes of the DNA Database System from offenders (adult and child), former offenders and from the bodies of deceased persons who are suspected of having committed an offence. The samples that may be taken under this Part are limited to mouth swabs or head hair in the case of persons and to any biological material that may be used to generate a DNA profile in the case of deceased persons (section 2(3)).

Section 31 concerns adult offenders. It provides that a sample may be taken for the purpose of generating a DNA profile in respect of the person for entry in the reference index of the DNA Database System from offenders who: on commencement of the section are still subject to sentence in connection with a relevant offence, are sentenced after commencement (whether convicted before or after commencement) in respect of a relevant offence, are serving sentences of imprisonment in the State following transfer (whether before or after commencement of the section) under the Transfer of Sentenced Persons Act 1995 or the Transfer of Execution of Sentences Act 2005 in respect of an offence that corresponds to a relevant offence, and persons who (on or after commencement of the section) are subject to the registration requirements of Part 2 of the Sex Offenders Act 2001.

The sample is to be taken as soon as practicable after a person comes within one of the eligible categories and in any event before expiry of the sentence or the notification requirements. Where the offender is in prison the sample will be taken by a prison officer following authorisation by the prison governor (who may delegate his/her powers under section 139). Where the offender is not in prison the sample may be taken by a member of the Garda Síochána where an authorisation to do so has been given by a member not below the rank of sergeant and the offender attends at a station for that purpose pursuant to 'a notice to attend' issued by a member not below the rank of inspector. Non-compliance with the notice to attend without reasonable cause may result in the offender being prosecuted summarily. The section specifies the information that is to be given to the offender by the prison officer or the member, as the case may be, before the sample is taken.

Section 32 concerns child offenders. For the purposes of this section 'child' is not limited to persons under 18 years of age — a wider definition is required having regard to section 155(2) of the Children Act 2001 which allows certain offenders detained in children detention schools to remain for a period up to six months after attaining the age of 18 years. The section provides that a sample may be taken for the purpose of generating a DNA profile in respect of a child offender for entry in the reference index of the DNA Database System from children who: on commencement of the section are still subject to sentence in connection with a relevant offence, are sentenced to detention after commencement (whether convicted before or after commencement) in respect of a relevant offence, are serving sentences of detention in the State following transfer (whether before or after commencement of the section) under the Transfer of Sentenced Persons Act 1995 or the Transfer of Execution of Sentences Act 2005 in respect of an offence that corresponds to a relevant offence, and child offenders who (on or after commencement of the section) are subject to the registration requirements of Part 2 of the Sex Offenders Act 2001.

The sample is to be taken as soon as practicable after a child offender comes within one of the eligible categories and in any event before expiry of the sentence or the notification requirements. Where the child offender is in a children detention school or a place of detention (including St. Patrick's Institution in the case of males aged 17 years) the sample will be taken by an authorised staff member of the children detention school or a prison officer as the case may be following authorisation by the director of the children detention school or the prison governor (both of whom may delegate their powers under section 139). Where the child offender is not in detention the sample may be taken by a member of the Garda Síochána where an authorisation to do so has been given by a member not below the rank of sergeant and the child offender attends at a station pursuant to a ''notice to attend'' issued by a member not below the rank of inspector. Non-compliance with the notice to attend without reasonable cause may result in the child offender being prosecuted summarily. The section specifies the information that is to be given to the child offender by the authorised staff member of the children detention school, the prison officer or the member as the case may be before the sample is taken.

Sections 33 and *34* concern the circumstances in which former offenders may be required to provide samples for the purpose of generating a DNA profile for entry in the reference index of the DNA Database System.

Section 33 contains the criteria that must be met before a person comes within the term 'former offender'. A former offender is a person who is no longer subject to a sentence for a relevant offence (or a corresponding offence in the case of convictions in other jurisdictions) or in the case of a sex offender, is no longer subject to notification requirements under the Sex Offenders Act 2001 (or corresponding requirements in the case of convictions in other jurisdictions). A person is not a former offender for the purpose of this section: if his/her DNA profile is already entered in the reference index of the DNA Database (in so far as that can be ascertained) and a member of the Garda Síochána or a judge of the District Court is not satisfied having regard to a range of specified factors that it is appropriate that a sample be taken under section 33; the person concerned is not ordinarily resident in the State or does not have his or her principal residence in the State; and a period of 10 years has elapsed since the expiry of the last sentence for a relevant offence of which the person was convicted or, in the case of a sex offender, since the end of the last notification period to which he or she was

subject. Only certain convictions handed down when the person was a child are eligible for consideration — those triable by the Central Criminal Court and any other offences prescribed having regard to their nature and seriousness.

Section 34 sets out the procedures to apply in the case of former offenders. Where a member not below the rank of superintendent is satisfied that a person is a former offender and that it is in the interests of the protection of society and desirable for the purpose of assisting in the investigation of offences to have a sample taken from the person under this section the member may authorise the taking of the sample. Where such an authorisation has been given a member may request the former offender concerned to attend at the station for the purpose of having the sample taken. The person shall be put on notice that if he or she does not attend an *ex parte* application may be made to a District Court judge for an order authorising the sending of a notice to attend — failure to comply with which is a summary offence. Should an application to a District Court judge be necessary it must be made by a member not below the rank of superintendent. In the event that the person is prosecuted for not complying with the court order it shall be a defence for him or her to show that he or she is not a former offender. Before a sample is taken under this section the former offender must be given certain information.

Section 35 allows a sample to be taken from the body of a deceased person for the purpose of generating a DNA profile in respect of the person to be entered in the reference index of the DNA Database System. The taking of such a sample must be authorised by a District Court judge on the application of a member not below the rank of superintendent. An application may be made where the member has reasonable grounds for suspecting that the person, prior to his or her death, has committed a relevant offence and that the taking of a sample will further the investigation of the offence concerned. The judge may make further orders in relation to entry, search and seizure on the application of the member in order to allow the order to take the sample to be executed. Samples under this section are to be taken by registered medical practitioners or any other prescribed persons. A profile entered in the reference index of the System in accordance with this section may be compared with the other profiles in that index and with the profiles contained in the crime scene index of the System in accordance with section 68(3). Once this exercise has been completed the profile is to be removed from the System and the sample destroyed unless the member in charge of the investigation of the offence concerned is satisfied that the sample and profile should be retained for the purposes of that investigation. This section does not authorise the exhumation of a body.

Section 36 sets out the circumstances in which reasonable force may be used to take samples under Part 4. Reasonable force may only be used to take samples under this Part where the person concerned is in prison, a children detention school (subject to regulations to be made under section 142) or other place of detention. Reasonable force must be authorised by the governor of the prison/place of detention or the director of the children detention school. The person must be informed in advance of the intention to use reasonable force and that the necessary authorisation has been given. The use of reasonable force must be observed by the governor/director of the children detention school who is to determine the number of prison officers/staff of the children detention school that is reasonably necessary for the purposes of the section. The taking of a sample with the use of reasonable force must be recorded by electronic means.

Section 37 provides that any information to be given to a person who is a child or a protected person under this Part before a sample is taken shall, in so far as it is practicable to do so, be given in a manner and in language appropriate to the level of understanding of the person, and in the case of a child, in an age appropriate manner.

Section 38 sets out the circumstances in which a sample taken under section 31 or 32 may be re-taken in the event that it proves to be insufficient. In the case of an offender who is still in prison, a children detention school or a place of detention a fresh authorisation under the relevant section is required other than where the insufficiency becomes apparent within 1 hour of the taking of the sample. In the case of a sample taken from a child offender proving to be insufficient after the child offender has been transferred to a prison on reaching 18 years to serve the remainder of his or her sentence he or she may be re-sampled in accordance with section 31 i.e. the provisions applying to adult offenders. A fresh authorisation may be given on one occasion only.

In the case of an offender or child offender who is not in prison, a children detention school or other place of detention at the time that the insufficiency becomes apparent but is still subject to sentence (or the notification requirement under the Sex Offenders Act 2001) he or she may be sampled on the condition that an authorisation has been given by a member not below the rank of inspector and the offender or child offender attends at a station for that purpose. The authorisation may be given on one occasion only and may not be given if a period of more than 6 months has passed since the insufficient sample was taken. Once the re-taking has been authorised a notice to attend at a station is to be sent to the offender or child offender. Non-compliance with the notice is a summary offence.

Section 39 sets out the circumstances in which a sample taken under section 34 (from a former offender) may be re-taken in the event that it proves to be insufficient. The procedure largely replicates the original procedure for the taking of the sample under section 34.

PART 5

Taking of samples for elimination purposes

This Part provides for: the taking of samples from persons who, in the execution of their duties, are considered to be at risk of inadvertently contaminating crime scene samples with their own DNA, and the entry (subject to limited exceptions) of the related DNA profiles in one of the three elimination indexes of the DNA Database System. The bodies covered include the Garda Síochána, FSI, the State Pathologist's Office and the Garda Síochána Ombudsman Commission.

Section 40 contains the necessary definitions for this Part.

Sections 41 and 42 concern the Garda Síochána. Section 41 provides for the taking of samples from members/trainee members and trainee reserves for the purposes of the elimination (Garda Síochána) index. Section 42 provides for the taking of samples from members/trainee members and civilian staff members who are assigned to duties relating to the investigation or technical examination of crime scenes or anything found at or recovered from a crime scene for the purpose of the elimination (crime scene investigators) index.

Both sections distinguish between existing personnel on commencement and those appointed after commencement. The consent of existing personnel is required whereas personnel appointed after commencement shall be required to provide a sample. Before a sample is taken under either of these sections the person is to be informed of certain matters. The samples may be taken by a member or an authorised person (appointed under section 136).

Section 43 concerns the staff of FSI. It provides for the taking of samples from the staff members for the purpose of the elimination (crime scene investigators) index. The section distinguishes between existing staff members on commencement and those appointed after commencement. The consent of existing staff members is required whereas staff members appointed after commencement shall be required to provide a sample. Before a sample is taken the person is to be informed of certain matters. The samples may be taken by a staff member of FSI who is authorised in writing by the Director of FSI. The section also provides, subject to the consent of the staff member concerned, that a DNA profile generated from a sample taken before commencement for the purpose of ascertaining whether the staff member contaminated a crime scene sample may be entered in the elimination (crime scene investigators) index i.e. it shall not be necessary to take a further sample and generate a new profile for the purpose of the section.

Section 44 makes provision for other categories of persons who are considered to be at risk of contaminating crime scene samples in the execution of their duties. It permits the Minister to prescribe persons including staff members of the State Pathologist's Office and the Ombudsman Commission and any other persons or classes of persons as the Minister considers appropriate. The Minister may make regulations prescribing a range of matters in relation to the taking of samples from such persons and the entry of the related profiles in the elimination indexes of the DNA Database System.

Section 45 provides that, where the Garda Commissioner has good reason to believe that a member/trainee member or reserve member appointed before commencement (i.e. who is not required to provide a sample for the applicable elimination index but who may consent to do so) or a civilian staff member (who is not required to provide a sample for the elimination (crime scene investigators) index) has or may have contaminated a crime scene sample, the Commissioner may direct the person to provide a sample in relation to the particular investigation concerned for the purpose of ascertaining whether the person has contaminated the sample. The profile derived from such a sample will not be entered in the DNA Database System. Before a sample is taken under this section the person is to be informed of certain matters. The samples may be taken by a member or an authorised person (appointed under section 136).

Section 46 makes similar provision to section 45 but in relation to the staff of FSI. The direction is to be given by the Director of FSI.

Section 47 provides for the re-taking of samples taken under this Part where they prove to be insufficient, are inadequately labelled or for any other good reason. In effect the procedure under which the original sample was taken must be repeated.

PART 6

Taking of samples from persons or bodies for purposes of identification division of DNA Database System

This Part provides for the taking of samples: in relation to missing persons (defined in section 2), from seriously ill or severely injured persons who are unable by reason of the illness or injury to identify themselves, and from unknown deceased persons for the purpose of the entry of the DNA profiles generated from such samples in the missing and unknown person index of the DNA Database System.

Section 48 concerns missing persons (whether they went missing before or after commencement) as defined in section 2. It provides that a sample may be taken in relation to such a person from his or her clothing or other belongings or from his or her blood relatives for the purposes of the missing and unknown persons index of the DNA Database System. A sample may only be taken for the purposes of the Garda investigation of the disappearance of the person if a member not below the rank of inspector is satisfied that the circumstances of the disappearance so require or following a natural or other disaster, one or more persons are missing. Authorisation is required at inspector level or above for the taking of the sample. The authorisation may only be given if the member giving it believes that the taking of the sample and the entry of the related DNA profile in the missing and unknown persons index of the DNA Database System may assist with finding or identifying the missing person. Before a sample may be taken from a blood relative his or her consent must be obtained in writing. Such a person is to be given certain information before the sample is taken. If the person consents but then withdraws it (or withdrawal can reasonably be inferred from the conduct of the person) before or during the taking of the sample the withdrawal will be treated as a refusal. The withdrawal must be recorded in writing. A sample, in the case of a blood relative, is restricted to a mouth swab or plucked head hairs (as set out in section 2(3)). A sample relating to a missing person that is in the possession of the Garda Síochána or FSI arising from the investigation into the disappearance of the person may be used for the purposes of this section.

Section 49 concerns persons who are seriously ill or severely injured and who, by reason of that illness or injury, cannot identify themselves. It provides that a sample (restricted to a mouth swab or plucked head hair) may be taken from such a person for the purposes of the missing and unknown persons index of the DNA Database System on the authorisation of the High Court. A court application may only be made where: a medical practitioner certifies that the person concerned is suffering from a serious illness or has sustained a severe injury by reason of which he or she is unable to identify him or herself and that inability is likely to endure for a prolonged period; and the person concerned (other than a child or a protected person) has been consulted with regard to the making of the application in so far as that is possible. A court application may be made by the Health Service Executive, the owner or manager of a hospital or nursing home or the Garda Commissioner. The matters of which the High Court has to be satisfied before making an order are specified. A sample taken under this section must be taken by a medical practitioner/nurse or any other prescribed person.

Section 50 concerns unknown deceased persons. It provides that a coroner to whom the death of the unknown deceased person is reportable may authorise the taking of a sample from the body of the person for the purposes of the missing and unknown persons

index of the DNA Database System where he or she has reason to believe that such a course of action may assist with identifying the person. The coroner is to inform the superintendent of the Garda district in which the unknown deceased person was located of the giving of the authorisation. A sample taken under this section must be taken by a medical practitioner or any other prescribed person. A sample taken from the body of the unknown deceased person already in the possession of the coroner may be used for the purposes of this section.

Section 51 provides for the re-taking of samples taken under Part 6 where they prove to be insufficient or inadequately labelled or for any other good reason. In general the procedure under which the original sample was taken must be repeated.

Section 52 clarifies that the preceding sections of Part 6 (which concern the taking of samples solely for the purposes of the missing and unknown persons index of the DNA Database System) are not intended to affect the operation of any other enactment or the exercise of any statutory or common law powers by a member of the Garda Síochána or any other person or body in relation to the investigation of offences or the investigation relating to the deaths of deceased persons.

PART 7

Taking of samples under Parts 3 and 6 from protected persons or children

This Part makes special provision in relation to the taking of samples from protected persons or children under Part 3 (volunteers) and Part 6 (missing and unknown persons).

Section 53 provides that any information to be given to a person before a sample is taken under Parts 3 or 6 is in the case of a protected person or a child, in so far as practicable, to be given in a manner and in language appropriate to the level of understanding of the person and, in the case of a child, in an age appropriate manner.

Section 54 provides that where consent is required to the taking of a sample under Parts 3 or 6 and the person from whom the sample is to be taken is a protected person or child the consent requirement is to be fulfilled as follows: in the case of a child who is 16 years or older, the child's consent; in the case of a child who is 14 years but less than 16 years the child's consent and the consent of his or her parent or guardian; in the case of a child less than 14 years, the consent of his or her parent or guardian; in the case of a protected person, the consent of his or her parent or guardian. Where the consent of a parent or guardian cannot be obtained the consent of a grandparent, adult sibling, or adult child (in the case of a protected person) is sufficient. If the consent of none of the specified persons may be obtained (and in the case of a child aged 14 or 15, the child has consented) an application may be made to a District Court judge for an order authorising the taking of the sample. Certain parents or guardians may be excluded from giving consent e.g. if the parent or guardian has been arrested in respect of the offence concerned. The words 'cannot be obtained' for the purposes of this section refer to the Garda Síochána, despite reasonable efforts, not being able to contact a parent or guardian or other relative, or the protected person or child not having a living parent or guardian or other relatives or the Garda Síochána not being able to ascertain whether that is the case.

Section 55 provides that in the case of a protected person or child the information that is to be given to such persons before a sample is taken is also to be given to the parent, guardian or other relative before the consent of the parent etc. is sought to the taking of the sample from the protected person or child.

Section 56 provides for an application to a District Court judge by a member not below the rank of inspector where the consent of a parent, guardian or other relative to the taking of a sample under Part 3 or 6 from a protected person or child cannot be obtained or the parent or guardian is excluded from giving consent. Matters to which the judge is to have regard when determining the application are specified and include: where the sample is required for the purposes of an investigation, the nature and seriousness of the offence concerned; the best interests of the protected person or child; and their wishes in so far as they can be ascertained.

Section 57 applies the withdrawal of consent provisions under sections 27, 28 and 48 to persons who consent to the taking of a sample from a child aged less than 16 years or a protected person under those sections.

Section 58 specifies that the adult who gave consent to the taking of a sample under Parts 3 or 6 from a protected person or child may, in so far as practicable, be present when the sample is being taken unless the donor objects (the samples are restricted to mouth swabs or plucked head hair). Where the sample is being taken pursuant to a court order under section 56 a relative of the protected person or child may, in so far as practicable be present unless the donor objects. The section also states that notwithstanding that the necessary consent has been given or court order made the sample shall not be taken if the protected person or child objects or resists.

PART 8

DNA Database System

This Part provides for the establishment of the DNA Database System. It is divided into 4 chapters: Chapter 1 concerns the structure and purposes of the System, Chapter 2 concerns the investigation division of the System, Chapter 3 the identification division and Chapter 4 the functions of FSI in relation to the System.

Chapter 1

Section 59 provides that FSI shall establish the DNA Database System as soon as may be after commencement of this section. The System shall comprise 2 divisions: the investigation division and the identification division. The investigation division is to contain the following indexes of DNA profiles: the crime scene index, the reference index and the elimination indexes. The identification division is to contain one index of DNA profiles, the missing and unknown persons index. Each index is also to contain information that may be used to identify the sample from which each profile was generated.

Section 60 restricts the purposes for which the System may be used to the investigation of criminal offences and the finding or identification of missing persons, the identification of seriously ill, or severely injured, persons who are unable to indicate their identity or the identification of the bodies of unknown deceased persons. Subsection (2) is illustrative of these purposes.

Chapter 2

Section 61 provides that the crime scene index shall contain DNA profiles generated from samples of biological material found at, or recovered from, crime scenes. Crime scene samples predating the commencement of the Bill are included. Crime scene is defined for the purposes of the Bill.

Section 62 provides that the reference index shall contain DNA profiles: generated from samples taken from persons under sections 11, 12, and 13 (i.e. from person in Garda custody), section 27 (in accordance with section 28 i.e. certain volunteers who specifically consent to the entry of their profiles in the System), sections 31, 32, 34, (offenders and former offenders) and section 35 (deceased suspects); and received under Part 11.

Section 63 provides that the elimination (Garda Síochána) index shall contain DNA profiles generated from samples taken under section 41 (from certain Garda personnel).

Section 64 provides that the elimination (crime scene investigators) index shall contain DNA profiles generated from samples taken under sections 42 (from certain Garda personnel), 43 (staff members of FSI) and 44 (certain prescribed persons).

Section 65 provides that the elimination (prescribed persons) index shall contain DNA profiles generated from samples taken under sections 44 (from certain prescribed persons).

Chapter 3

Section 66 provides that the missing and unknown persons index shall contain profiles: generated from samples taken under sections 48 (missing persons), 49 (seriously ill or severely injured persons) or 50 (unknown deceased persons); and received under Part 11.

Chapter 4

Section 67 provides that FSI shall establish and operate the DNA Database System in accordance with the Bill. Subsection (2) is illustrative of the functions that FSI will be required to perform in relation to the System. Subsection (3) provides that the Director of FSI may make arrangements with other laboratories to perform one of its functions in relation to the DNA Database System — the generation of DNA profiles from samples taken under the Bill. Any such arrangements must be in compliance with the requirements of the Bill.

Section 68 specifies the rules in accordance with which a DNA profile entered in an index may be compared with another profile in that index or with a DNA profile in another index. The only purpose for which a profile may be compared with another profile other than in accordance with the specified rules is for the purpose of the administration of the System. In all cases a profile entered in an index may be compared with other profiles in the same index. As regards comparisons between profiles entered in different indexes: a profile in the crime scene index may be compared with a profile in the reference index and with profiles in the elimination indexes under certain conditions; a profile in the reference index may be compared with a profile in the crime scene index or in the missing and unknown persons index; a profile entered in the missing and unknown persons index may be compared with a profile in the reference index or the crime scene index but only for the purposes

of identification. Searches of the System may only be conducted by a staff member of FSI. Profiles entered in the System may not be compared with profiles that are not entered in the System except in accordance with Part 11 which concerns international cooperation.

Section 69 clarifies that FSI may process the information in the System for statistical and analytical purposes once the data does not contain any identifiers.

Section 70 requires the Director of FSI to submit an annual report to the Minister regarding the performance of its functions under the Act. Copies of the report are to be laid before the Houses of the Oireachtas.

PART 9

DNA Database System Oversight Committee

This Part provides for the establishment of a committee, which is to be independent in the performance of its functions, to oversee the management and operation of the DNA Database System. Some details in relation to the Committee are contained in the first schedule.

Section 71 provides for the establishment of a committee to be known as the DNA Database System Oversight Committee. The Committee, subject to Part 9 is to be independent in the performance of its functions.

Section 72 specifies the function of the Committee. Its function is to oversee the management and operation of the DNA Database System for the purposes of maintaining the integrity and security of the System. To discharge this function it is required to satisfy itself that the provisions of the Act in relation to the System are being complied with. The Committee may make recommendations to the Minister and the Director of FSI in relation to the management and operation of the System. The Committee may, and shall at the request of the Minister, review any matter relating to the management and operation of the System and submit a report in writing to the Minister. Any such report shall be laid before the Houses of the Oireachtas by the Minister as soon as practicable and shall be published. In order to avoid prejudicing the security of the System, the security of the State or the investigation of criminal offences or to avoid infringing the rights of any person the Minister may omit any matter from the report to be laid before the Houses or to be published.

Section 73 places an obligation on the Director of FSI and its staff to cooperate with the Committee and to furnish the Committee with such information as it requests. The section places an obligation on the Garda Síochána and the Ombudsman Commission to supply such information as the Committee requests.

Section 74 requires the Committee to submit an annual report to the Minister regarding the performance of its functions under the Bill. The provisions of section 73 permitting certain information to be omitted from a report under that section before it is laid before the Houses or published apply to an annual report under this section.

PART 10

Destruction of samples and destruction, or removal from DNA Database System, of DNA profiles

The Part concerns the circumstances in which samples taken under the Bill are to be destroyed and DNA profiles removed from the DNA Database System. It is comprised of 5 Chapters having regard to the different circumstances in which samples may be taken under the Bill. Chapter 1 concerns the arrangements to apply to certain samples taken under Parts 2 and 4 (persons in Garda custody and offenders), Chapter 2 applies to samples taken under Part 3 (volunteers), Chapter 3 to samples taken under Part 5 (elimination purposes), Chapter 4 to Part 6 (identification purposes) and Chapter 5 deals with miscellaneous matters.

Chapter 1

Section 75 provides the definitions for this Chapter.

Section 76 sets out the circumstances in which an intimate or non-intimate sample taken from a person is to be destroyed. Where the section applies the sample concerned is to be destroyed before the expiry of a period of 3 months from the date on which the applicable circumstance first applied. The circumstances are that: the person was not proceeded against within 12 months for a relevant offence, or if proceeded against was acquitted or the proceedings were dismissed or discontinued; the person is subject to an order under section 1 of the Probation of Offenders Act 1907 and has not been convicted of a relevant offence during a period of 3 years from the making of the order; or the person's conviction was quashed or declared to be a miscarriage of justice. In the case of a person who was not proceeded against the failure to institute proceedings must not be due to the fact that the person absconded or could not be located. The period between the taking of the sample and the expiry of the 3 month period is called the ''retention period''. This section is expressed as being subject to section 77 as that section permits an extension of the retention period in certain circumstances.

Section 77 provides a procedure by which the retention period referred to under section 76 may be extended in certain circumstances. The procedure requires the Commissioner to determine whether any of the specified circumstances apply. Where he or she so determines he or she may authorise the retention of the sample for a period of 12 months from the expiry of the retention period. The 12 month period is renewable. The determination to extend the retention period must be made before the expiry of the period. The specified circumstances are that: the investigation concerned has not been concluded, a decision on whether to institute proceedings against the person has not been taken, the sample and any results of the forensic tests conducted on it are likely to be required for the prosecution of an offence, all the circumstances of the case and the reasons that no proceedings have been instituted or, if instituted, that they did not result in a conviction make it necessary to retain the sample. Certain matters to which the Commissioner is to have regard when considering whether this last circumstance applies are set out. They include whether the person has any previous conviction for an offence similar in nature or gravity, whether the victim or intended victim was a child, a vulnerable person or a person associated with the person (as defined in section 75). Where the Commissioner authorises the extension of a retention period he or she is required to cause the person (or in the case of a child or protected person, their parent or guardian) to

be notified in writing. Such a person will have 3 months from the date of the notification to appeal to a District Court judge. The appeal will be heard in private.

Section 78 provides that an intimate or non-intimate sample shall be destroyed (other than as permitted by section 76) where the Commissioner is satisfied that exceptional circumstances exist. Where this section applies it will not be possible to extend the retention period under section 77. Subsection (2) specifies what constitutes exceptional circumstances.

Section 79 concerns samples taken under section 11, 31, 32 or 34 i.e. samples taken for the purposes of generating a profile for entry in the reference index of the DNA Database System. Subsection (1) provides that such samples are (if not previously destroyed) to be destroyed as soon as the DNA profile has been generated from the sample or within 6 months of the taking of the sample, whichever is the later. Provision is made in subsection (2) for the destruction of such samples earlier where the Commissioner is satisfied that exceptional circumstances apply. Subsection (3) specifies what constitutes exceptional circumstances.

Section 80 sets out the circumstances in which a DNA profile generated from a sample taken from a person under section 11, 12, 13, 31 or 32 and entered in the reference index of the DNA Database System is to be removed. Where a profile comes within the section it must be removed before the expiry of a period of 3 months from the date on which the applicable circumstance first applied. The circumstances are that: the person was not proceeded against within 12 months for a relevant offence, or if proceeded against was acquitted or the proceedings were dismissed or discontinued; the person is subject to an order under section 1 of the Probation of Offenders Act 1907 and has not been convicted of a relevant offence within a period of 3 years from the making of the order; or the person's conviction was quashed or declared to be a miscarriage of justice. In the case of a person who was not proceeded against the failure to institute proceedings must not be due to the fact that the person absconded or could not be located. The period between the generation of the DNA profile from the sample and the expiry of the 3 month period is called the ''retention period''. This section is expressed as being subject to section 81 as that section permits an extension of the retention period in certain circumstances.

Section 81 provides that the retention period referred to under section 80 may be extended where the Commissioner determines that it is necessary to retain the DNA profile concerned in the reference index of the DNA Database System to assist in the investigation or prosecution of offences. The determination to extend the retention period must be made before the expiry of that period.

The circumstances in which the Commissioner may determine that the profile is to be retained are either: (i) a decision on whether to institute proceedings against the person has not been taken or the investigation concerned has not been concluded; or (ii) having regard to specified factors the Commissioner believes that it is necessary, in all the circumstances of the case and taking account of the reasons why no proceedings have been instituted or, if instituted, that they did not result in a conviction, to retain the profile.

The specified factors in relation to (ii) include whether the person has any previous conviction for an offence similar in nature or gravity, the nature and seriousness of the offence, whether the victim or intended victim was a child, a vulnerable person or a person

associated with the person (as defined in section 75) and the age of the person at the time the sample was taken.

The length of the permitted extension period varies depending on the ground on which the extension is authorised. However, in all cases it is subject to a maximum of 6 years in the case of an adult or 3 years in the case of a child or protected person from the date on which the sample from which the profile concerned was generated or, if appropriate, the date on which the sample is deemed under section 86 to have been taken from the person concerned. In relation to the maximum periods of 6 years and 3 years referred to above the Commissioner may make an application under section 93 to the District Court to retain a profile beyond the applicable period where he or she has good reason to do so.

Where the Commissioner authorises the extension of a retention period he or she is required to cause the person (or in the case of a child or protected person, their parent or guardian) to be notified in writing. Such a person will have 3 months from the date of the notification to appeal to a District Court judge. The appeal will be heard otherwise than in public.

Section 82 provides that a DNA profile generated from a sample taken under section 11, 12 or 13 shall be removed from the reference index of the DNA Database System (other than as permitted by section 80) where the Commissioner is satisfied that exceptional circumstances exist. Where this section applies it will not be possible to extend the retention period under section 81. Subsection (2) specifies what constitutes exceptional circumstances.

Section 83 concerns former offenders. It provides that a person from whom a sample was taken under section 34 may apply to the Commissioner to have the profile generated from that sample removed from the DNA Database System in the event that any conviction to which regard was had when making a determination as to whether he or she was a former offender under section 33 has been quashed or declared to be a miscarriage of justice. A right of appeal lies to the District Court.

Section 84 makes an exception to the indefinite retention arrangements applicable to the DNA profiles of convicted persons entered in the DNA Database System. The exception applies in the case of child offenders (other than those convicted of offences triable by the Central Criminal Court or prescribed by the Minister having regard to their nature and seriousness). A retention period of 4 years or 6 years applies depending on the whether the sentence imposed was non-custodial or custodial. The application of these reduced retention periods is subject to certain qualifications such as the child offender not being convicted of an offence within the default period. In relation to the periods referred to above the Commissioner may make an application under section 93 to the District Court to retain a profile beyond the period applicable where he or she has good reason to do so.

Section 85 provides that where certain circumstances arise during the retention period or authorised extension the obligation under either section 80 or 84 to remove a DNA profile from the DNA Database System will not apply. The circumstances include that the person is proceeded against for another relevant offence or is convicted of another relevant offence during the retention period. Where such circumstances apply the removal of the profile will be governed with reference to the further offence.

Section 86 deals with the application of the time periods under section 81 and 84 where an opportunity to take a sample from a person arose during the period concerned but was not taken (e.g. where the person was arrested and detained but a sample was not taken because his or her profile was already on the System). Where this is the case the date on which the subsequent sample could have been taken is deemed to be the date on which the first sample was taken.

Chapter 2

Section 87 concerns the destruction/removal arrangements for Part 3 (volunteers). A volunteer (or in the case of a child or protected person the person who gave consent) may request the destruction of his or her sample and any profile by notice in writing to the Commissioner. Pursuant to the request the sample/profile is to be destroyed within 3 months subject to section 93. If a sample/profile has not been destroyed previously it is to be destroyed within 3 months of the completion of the investigation or any proceedings in connection with the offence in respect of which it was taken. Where a volunteer consented to the entry of his or her profile in the DNA Database System a request for destruction is to be construed as including a request for removal. In such a case the Commissioner may request the volunteer to agree to his or her profile being removed from the System but retained in connection with the particular investigation in respect of which it was taken. The written consent of the volunteer is required to such a request.

Chapter 3

Section 88 sets out the destruction and removal arrangements for samples taken from Garda personnel under section 41 or 42 and related profiles. In general the samples are to be destroyed as soon as the DNA profile has been generated from the sample or within 6 months of the taking of the sample, whichever is the later. In the case of persons required to provide a sample the related profile will generally be required to be removed from the DNA Database System once 10 years has elapsed since the person has ceased to be a member of the Garda Síochána or a trainee member — where a trainee becomes a full member he or she will be subject to the arrangements that apply to such members. In the case of a person whose consent was required to the taking of a sample he or she may, at any time, and without giving a reason, request the destruction of his of her sample (where it is not previously destroyed) and his or her profile to be removed from the System. The request is generally to be complied with not later than 3 months after its receipt by the Commissioner. These provisions are subject to the right of the Director of FSI, following consultations with the Commissioner, to direct that a particular profile should not be removed from the relevant elimination index where he or she is satisfied that there is good reason relating to the investigation of offences for the profile not to be removed. Such directions are to be reviewed annually.

Section 89 sets out the destruction and removal arrangements for samples taken from the staff of FSI under section 43 and the related profiles. In general the samples are to be destroyed as soon as the DNA profile has been generated from the sample or within 6 months of the taking of the sample, whichever is the later. In the case of persons required to provide a sample the related profile will generally be required to be removed from the DNA Database System once 10 years has elapsed since the person has ceased to be a staff member. In the case of a person whose consent was required to the taking of a sample he or she may, at any time, and without

giving a reason, request the destruction of his of her sample (where it is not previously destroyed) and his or her profile to be removed from the System. The request is generally to be complied with not later than 3 months after its receipt by the Director. These provisions are subject to the right of the Director of FSI to direct that a particular profile should not be removed from the relevant elimination index where he or she is satisfied that there is good reason relating to the investigation of offences for the profile not to be removed. Such directions are to be reviewed annually.

Section 90 sets out the destruction and removal arrangements for samples taken from prescribed persons for elimination purposes under section 44 and related profiles. Similar provisions to those applying under sections 88 and 89 apply. However, they will be supplemented by regulations made under section 44.

Section 91 sets out the destruction arrangements to apply to a sample taken under section 45 or 46. In general once the necessary comparison between the profile generated from the sample taken under either of those sections with the crime scene sample concerned has been completed the sample and profile are to be destroyed as soon as practicable. An exception may be made where the Commissioner, or the Director, as the case may be, is satisfied that there is good reason relating to the investigation of a particular offence why the sample/profile should be retained. If such is the case the sample/profile is to be destroyed not more than 3 months after the completion of the investigation or any proceedings, which ever is the later.

Chapter 4

Section 92 concerns the destruction of samples/profiles relating to Part 6 (identification). A blood relative of a missing person (or in the case of a child or protected person the person who gave consent) may request the destruction of his or her sample and the removal of the profile by notice in writing to the Commissioner. Pursuant to the request the sample/profile is to be destroyed within 3 months. A sample/profile taken from a blood relative (if not previously destroyed) or relating to the missing person is to be destroyed and the profile removed within 3 months of the missing person having been located or identified. Similar arrangements apply in the case of samples taken from unknown persons (living or deceased). Certain qualifications apply in all cases: the section does not authorise the destruction of a sample or the removal of a profile where it is required for the purposes of: an investigation into the disappearance of a missing person or into how the unknown living person became ill or was injured or the unknown deceased person died; or an inquest.

Chapter 5

Section 93 provides that the Commissioner may apply to a District Court judge to retain a profile in the reference index of the DNA Database System beyond the periods permitted under section 80 (and any extension under section 81) or section 84 where there is good reason to do so. It also provides that a member not below the rank of superintendent may apply to a District Court judge to retain a sample taken under section 27 or 29 and the related profile where there is good reason to do so relating to the investigation of the offence in connection with which the sample was taken. An application is to be on notice. The hearing is to be in private. An order may not be made unless the person concerned, where he or she applies to be heard, has been given a reasonable opportunity to be heard.

Section 94 specifies the meaning of certain terms in this Part.

Section 95 provides that the Minister shall conduct a review of the operation of this Part in so far as it concerns the operation of the DNA Database System within 6 years of commencement. It also provides for other similar reviews at such times as he or she considers appropriate.

Section 96 provides that the Minister may by order decrease certain periods specified in this Part having regard to a review conducted under section 95.

Section 97 provides that where a sample is to be destroyed or a profile is to be removed the Commissioner shall request or cause to be requested the Director of FSI or other person having possession of the sample to carry out the necessary actions.

Section 98 specifies the circumstances in which a person is to be notified of the destruction of a sample or the removal of a profile from the System.

Section 99 provides that the references in this Part to the Commissioner, for the purposes of the application of this Part, shall be construed as references to the Ombudsman Commission.

PART 11

International Cooperation

This Part:

- implements the DNA and dactyloscopic data aspects of the Prüm Council Decision (second schedule) and the Implementing Council Decision,
- implements the Agreement between Iceland and Norway and the EU applying the Council Decision (third schedule) and the Implementing Council Decision,
- makes provision for Prüm-like bilateral and multi-lateral agreements between the State and other states,
- makes some amendments to the identification evidence provisions contained in Chapter 3 of Part 5 of the Criminal Justice (Mutual Assistance) Act 2008 having regard to the repeal of the Criminal Justice (Forensic Evidence) Act 1990 and its replacement by this Bill and also the requirements of Article 7 of the Prüm Council Decision,
- makes some amendments to the identification evidence provisions contained in section 50 of the International Criminal Court Act 2006 having regard to the repeal of the Criminal Justice (Forensic Evidence) Act 1990 and its replacement by this Bill,
- regulates police cooperation with Interpol and other police forces in relation to such matters as the searching of the DNA Database System to assist with the investigation of criminal offences in other states and the finding of missing or unknown persons in other states.

The provisions of the Prüm Council Decision and related instruments being implemented by this Bill (referred to in this Part as ''European Union or international instruments'') provide for cooperation between the State and other states in relation to the

automated searching for or automated comparison of DNA data or dactyloscopic data and the exchange of such data relating to them by or between authorities responsible for the prevention, detection and investigation of criminal offences in the State or those other states. The searches are conducted using DNA profiles or dactyloscopic data that does not contain any data from which the person to whom the data relates may be directly identified. In the event that a search reveals a match between the data supplied and data contained on the database being searched any follow-up is by means of national legal assistance rules which in the case of the State are contained in the Criminal Justice (Mutual Assistance) Act 2008.

CHAPTER 1

Section 100 provides the necessary interpretative provisions for this Part. Of particular note is the definition of ''European Union or international instrument'' which specifies the instruments to which the automated searching and comparison provisions of Chapters 2 and 3 of the Part apply. The instruments are:

- the Prüm Council Decision and Implementing Council Decision,
- the Agreement between Iceland and Norway and the EU applying the foregoing,
- a bilateral agreement between the State and a designated state, or a multilateral agreement between the State and other designated states[4],
- any reservation or declaration made in accordance with such an instrument or agreement.

Provision is made for a word or expression used in this Part and in a relevant EU or international instrument to have the same meaning unless the context requires otherwise. Provision is also made for judicial notice to be taken of these instruments in any proceedings.

Section 101 provides for the designation of states (other than EU Member States or Iceland or Norway) for the purposes of this Part or provisions of it. States that will be considered are those that are party to a relevant EU or international instrument for the purposes of cooperation regarding automated searching for or automated comparison of DNA data or dactyloscopic data and the exchange of such data. Any designations will be done by order of the Minister for Foreign Affairs and Trade in consultation with the Minister for Justice and Equality.

Section 102 concerns how any amendments to the Annex to the Implementing Council Decision for the Prüm Council Decision are to be reflected in law. The Annex to the Implementing Council Decision contains detailed technical specifications to be observed in the operation of the automated searching and comparison system permitted by the Prüm Council Decision. In the event that amendments are agreed to these detailed technical specifications this section allows the Minister to provide, by order, that any references to the Implementing Council Decision in this Part are to be

[4]One such agreement — Agreement between the Government of Ireland and the Government of the United States of America on Enhancing Cooperation in Preventing and Combating Serious Crime — was signed on 21st July 2011 and approved by Dáil Éireann on 7 February 2012 as required by Article 29.5.2 of the Constitution.

construed as references to the Implementing Council Decision with the Annex thereto as so amended.

Chapter 2

Section 103 provides that the Director of Forensic Science Ireland is the national contact point in the State in relation to DNA data and will perform the functions of the national contact point as set out in the relevant EU or international instrument.

Section 104 provides that for the purposes of the investigation of criminal offences in a designated state the national contact point (i.e. the Director of Forensic Science Ireland) will allow the national contact point of that designated state access to certain content in the DNA Database System for the purpose of conducting an automated search by comparing a DNA profile in an individual case with the available content in the System. The available content will be profiles in the reference index (excluding profiles arising from samples taken from volunteers under section 27) and the crime scene index. The national contact point will ensure that following a search an automated response is sent to the national contact point of the designated state notifying it of the result of the search. In the event that the search results in a match the response will include the reference data i.e. the matching DNA profile (without any data from which the person may be directly identified). In addition, provision is made for a note to be entered in the System in relation to the matching profile.

Section 105 provides, subject to the consent of the national contact point, that the national contact point of a designated state may access certain content in the DNA Database System for the purpose of comparing unidentified DNA profiles (i.e. crime scene profiles) with the available content in the System. The available content will be profiles in the reference index (excluding profiles arising from samples taken from volunteers under section 27) and the crime scene index. The national contact point will ensure that following a comparison an automated response is sent to the national contact point of the designated state notifying it of the result. In the event that the comparison results in a match the response will include the reference data i.e. the matching DNA profile (without any data from which the person may be directly identified). In addition, provision is made for a note to be entered in the System in relation to the matching profile. The prior consent of the national contact point is required for the conduct of a comparison under this section because the national contact point of the designated state concerned is seeking to conduct a comparison of some or all of its unidentified profiles (rather than those arising from an individual case as is provided for in section 104) against the available contents of the DNA Database System.

Section 106 provides that for the purposes of the investigation of criminal offences in the State an authorised officer for DNA data may supply a DNA profile in the reference index (excluding profiles arising from samples taken from volunteers under section 27) or the crime scene index to the national contact point of a designated state for the purpose of conducting a search of the DNA profiles in the DNA analysis files of the designated state. The automated response from the national contact point in the designated state containing the notification of the result will be received by the national contact point. In the event that the search results in a match the response will include the reference data i.e. the matching DNA profile (without any data from which the person may be directly identified).

In addition, provision is made for a note to be entered in the System in relation to the matching profile.

Section 107 provides, subject to the consent of the national contact point of a designated state, that an authorised officer for DNA data may supply some or all of the content of the crime scene index of the DNA Database System to the national contact of the designated state for the purpose of conducting a comparison with the DNA profiles contained in the DNA analysis files of the designated state. The automated response from the national contact point in the designated state containing the notification of the result will be received by the national contact point. In the event that the comparison results in a match the response will include the reference data i.e. the matching DNA profile (without any data from which the person may be directly identified). The prior consent of the national contact point in the designated state is required for the conduct of a comparison under this section because the national contact point is seeking to conduct a comparison of some or all of the profiles held in the crime scene index of the DNA Database System whereas in the case of section 106 the search relates to an individual case only.

CHAPTER 3

Section 108 provides that the Head of the Technical Bureau of the Garda Síochána is the national contact point in the State in relation to dactyloscopic data and will perform the functions of the national contact point as set out in the relevant EU or international instrument.

Section 109 specifies the dactyloscopic data to which the automated searching powers in sections 110 and 111 will apply.

Section 110 provides that for the purposes of the prevention, detection and investigation of criminal offences in a designated state our national contact point (i.e. the Head of the Technical Bureau) will allow the national contact point of that designated state access to certain content in the automated fingerprint identification system (''AFIS'' which is maintained by the Technical Bureau) for the purpose of conducting an automated search by comparing dactyloscopic data in an individual case with the available content on AFIS. The national contact point will ensure that following a search an automated response is sent to the national contact point of the designated state notifying it of the result. In the event that the search results in a match the response will include the reference data i.e. the matching dactyloscopic data (without any data from which the person may be directly identified).

Section 111 provides that for the purposes of the prevention, detection or investigation of criminal offences in the State an authorised officer for dactyloscopic data may supply certain dactyloscopic data in AFIS to the national contact point of a designated state for the purpose of conducting a search of the dactyloscopic data in the automated fingerprint identification system of the designated state. The automated response from the national contact point in the designated state containing the notification of the result will be received by the national contact point. In the event that the search results in a match the response will include the reference data i.e. the matching dactyloscopic data (without any data from which the person may be directly identified).

Section 112 allows the national contact point for dactyloscopic data, the Head of the Technical Bureau of the Garda Síochána, to delegate his or her functions as the national contact point. This

delegation power is necessary to cater for any absences of the Head of the Technical Bureau.

CHAPTER 4

Section 113 provides the necessary interpretative provisions for the Chapter. The section provides that the terms ''data'', ''processing'' and ''personal data'' are given the meanings they have in the Data Protection Act 1988. Subsection (2) states, that for the purposes of the Chapter, notification of whether or not there is a match, under certain sections, is to be regarded as personal data.

Section 114 applies the Data Protection Act 1988 to (*a*) the processing of personal data under Chapters 2 or 3 of this Part (automated searching and comparison of DNA data and dactyloscopic data) and (b) the processing of personal data under Chapter 3 of Part 5 of the Criminal Justice (Mutual Assistance) Act 2008 pursuant to a request for the collection of DNA sample and supply of a DNA profile under Article 7 of the Prüm Council Decision, (and the Decision as it is applied by the Agreement between Iceland and Norway). The section provides that the application of the Act of 1988 is subject to the modifications provided in the Chapter and any other necessary modifications.

Section 115 amends section 1(1) of the Data Protection Act 1988 (interpretation section) by inserting the terms used in the sections of the Chapter that amend that Act.

Section 116 amends section 8 of the Data Protection Act 1988. Section 8(*b*) which is amended by the insertion of ''subject to subsection (2)'', is designated as section 8(1) and provides, that the restrictions on the processing of personal data in the Data Protection Act 1988 do not apply to the processing of certain information, inter alia, data being processed for the purpose of preventing, detecting or investigating offences, apprehending or prosecuting offenders, in any case in which the detection, apprehension or prosecution is likely to be prejudiced by the application of those restrictions.

Subsection (2) provides that subsection (1) does not apply to personal data processed under Chapters 2 and 3 of Part 11; and to personal data processed pursuant to a mutual assistance request under Chapter 3 of Part 5 of the Criminal Justice (Mutual Assistance) Act 2008 for the collection and processing of a DNA sample and the supply of a DNA profile under Article 7 of the Prüm Council Decision (and the Decision as it is applied by the Agreement between Iceland and Norway).

Section 117 amends section 9 of the Data Protection Act 1988 by inserting a new subsection (1E), to mandate the Data Protection Commissioner as the competent authority in the State for the purposes of the Chapter and the data protection chapter of the Prüm Council Decision (and that Chapter as it is applied by the Agreement with Iceland and Norway). The Data Protection Commissioner is, given the role of monitoring the lawfulness of the processing of personal data in accordance with the data protection requirements of the instruments concerned.

Section 118 provides for the appointment in writing of authorised officers by the relevant national contact points for DNA or dactyloscopic data for the purposes of section 106, 107 or 111. Having regard to the definition of ''authorised officer for DNA data'' and ''authorised officer for dactyloscopic data'' in section 98(1) the national contact points are also authorised officers for DNA data or

dactyloscopic data as the case may be. The section also provides for the revocation of the appointment by the national contact point concerned and provides for the cessation of the appointment once the authorised officer is no longer a staff member of FSI or carries out duties in the Garda Technical Bureau. Provision is also made in the section for the national contact points to provide particulars of the authorised officers to the Data Protection Commissioner. Article 30 of the Prüm Council Decision provides that such details shall be provided to the Data Protection Commissioner on request.

Chapter 5

Section 119 amends section 2 of the Criminal Justice (Mutual Assistance) Act 2008 in order to include Article 7 of the Prüm Council Decision (and that Article as applied by the Agreement with Iceland and Norway) in the definition of ''international instrument'' and to make a consequential amendment to the definition of ''member state''. Article 7 imposes an obligation on the State (subject to certain conditions) to provide assistance to other Member States in the form of collecting a DNA sample (to be defined as a mouth swab or plucked head hair in section 76 of the 2008 Act by means of amendment contained in section 120) from a person in the State who is the subject of a request for assistance where the DNA profile of that individual is not already in the possession of the Garda Síochána. Accordingly, it is necessary to add this provision to the list of international instruments to which the mutual assistance arrangements in the 2008 Act apply.

Section 120 amends section 76 of the Criminal Justice (Mutual Assistance) Act 2008 which sets out the definitions for the purposes of Chapter 3 of Part 5 of the 2008 Act by inserting such further definitions as are necessary for later amendments to the Chapter including definitions of ''DNA'', ''DNA profile'', ''DNA sample'', ''child'' and ''protected person''. The definitions are aligned with the definitions in the Bill in so far as possible.

Section 121 amends section 78 of the Criminal Justice (Mutual Assistance) Act 2008 which specifies what a request for identification evidence for use outside the State must contain. The amendments largely arise from the requirements of Article 7 of the Prüm Council Decision (and that Article as applied by the Agreement with Iceland and Norway). In addition, an explicit requirement for a statement of confirmation by the requesting authority that any evidence furnished in response to a request will not, without the consent of the Minister, be used for any purpose other than that specified in the request, is added.

Section 122 amends section 79 of the Criminal Justice (Mutual Assistance) Act 2008 which concerns the action to be taken by the Minister on foot of a request for assistance under section 78. The amendments are largely for the purpose of ensuring that the safeguards applying to the taking of identification evidence for the purposes of a request and the transmission of evidence pursuant to a request are not lower than those applying in the domestic context. The amendments address such matters as the meaning of ''consent'' where a person who is the subject of a request is asked to consent to the taking of identification evidence under section 79(2), and the destruction of identification evidence supplied for use outside the State pursuant to a request under section 78. Some amendments to section 79 also arise from section 79A (to be inserted by section 123) which provides for the implementation of Article 7 of the Prüm Council Decision (and that Article as applied by the Agreement between Iceland and Norway and the EU).

Section 123 inserts a new section 79A in the 2008 Act for the purpose of implementing Article 7 of the Prüm Council Decision (and that Article as applied by the Agreement between Iceland and Norway and the EU). The new section sets out the process to be followed for obtaining identification evidence in relation to a request under section 78 that is pursuant to Article 7 and is for a DNA profile of a person who is suspected of having committed the offence which is the subject of the criminal investigation or proceedings to which the request relates.

The process set out in new section 79A applies where the Garda Síochána do not already have a DNA profile relating to the person in its possession. The process involves in the first instance the Commissioner requesting a member to seek the consent of the person concerned to the taking of a DNA sample from him or her from which the required DNA profile may be generated. In the event that the person does not consent a senior Garda may apply to a District Court judge for an order authorising the Garda Síochána to take two further actions: firstly sending a notice in writing to the person concerned requiring him or her to attend at a station on a specified date for the purpose of having the DNA sample taken, and secondly, in the event that the person does not comply with the notice, arresting and detaining the person for up to four hours for that purpose.

The powers and safeguards that apply to the taking of samples from a detained person under the Bill are applied (subject to any necessary modifications) to the taking of a sample from a person who is arrested and detained pursuant to an order under new section 79A. In addition the provisions of section 79 applying to the taking of identification evidence under that section are applied as are the arrangements under that section for the destruction of identification evidence supplied for use outside the State. New section 79A also sets out the process for the taking of a second or subsequent DNA sample where a sample proves to be insufficient or inadequately labelled.

New section 79A makes it clear that if the conduct alleged to constitute the offence concerned would not meet the offence threshold for the taking of a sample from a suspect in the State section 79A will not apply. Instead the provisions in section 79 which are limited to the taking of a sample with consent will apply.

Section 124 inserts a new section 79B in the 2008 Act. New section 79B provides a judicial process for obtaining consent to the taking of identification evidence from a child or a protected person in specified circumstances (such as where the parent or guardian cannot be contacted despite reasonable efforts by a member of the Garda Síochána to do so) for the purpose of complying with a request under section 78 for assistance in obtaining identification evidence for use outside the State.

Section 125 amends section 108 of the 2008 Act in order to insert a reference to section 79A(5) or (16) and thereby bring any orders issued under those provisions within section 32A of the Courts (Supplemental Provisions) Act 1961. Section 32A provides that in the case of certain warrants, orders and such like a District Court judge may exercise his or her powers in relation to his or her district while physically outside the District Court district.

Section 126 amends section 109 of the Criminal Justice (Mutual Assistance) Act 2008 which concerns the ministerial power to make regulations for the purpose of enabling any provisions of the 2008

Act and any of the international instruments to which it applies to have full effect. The amendment is for the purpose of clarifying that the Minister may make regulations regarding the obtaining or transmission of identification referred to in Chapter 3 of Part 5 of the 2008 Act.

Chapter 6

Section 127 amends section 50 of the International Criminal Court Act 2006 which concerns a request from the International Criminal Court for assistance in obtaining identification evidence and sets out what action is to be taken by the Minister on foot of such a request. The procedure to be followed largely mirrors that of section 79 of the 2008 Act and the purpose of the amendments (as with the main purpose of the amendments to that section contained in section 122) is to ensure that the safeguards applying to the taking of identification evidence and the transmission of evidence pursuant to a request are not lower than those applying in the domestic context. The amendments address such matters as the meaning of ''consent'' where a person who is the subject of a request is asked to consent to the taking of identification evidence under section 50(4) and the destruction of identification evidence supplied for use by the Court.

Section 128 inserts at new section 50A in the 2006 Act. New section 50A provides a judicial process for obtaining consent to the taking of identification evidence from a child or a protected person in specified circumstances (such as where the parent or guardian cannot be contacted despite reasonable efforts to do so by a member of the Garda Síochána) for the purpose of complying with a request from the International Criminal Court for assistance in obtaining identification evidence.

Chapter 7

Section 129 contains the definitions required for this Chapter.

Section 130 facilitates the transmission by the Commissioner of a DNA profile entered in the missing and unknown persons index of the DNA Database System to a law enforcement agency for the purpose of that agency conducting a search of its collection of DNA profiles. The transmission and the search are with a view to finding or identifying the missing person, identifying an unknown person or the remains of an unknown deceased person as the case may be. The transmitted profile may only be used for the purpose for which it is transmitted and the Commissioner may specify conditions regarding the number and frequency of searches that may be conducted by the recipient law enforcement agency and the arrangements for the return or destruction of the profile.

Section 131 applies to designated states (i.e. EU Member States, Iceland, Norway and any state designated under section 97). It facilitates the entry in the missing and unknown persons index of the DNA Database System of a DNA profile relating to a missing or unknown person (including an unknown deceased person) received from a law enforcement agency in a designated state for the purpose of conducting a search of the System as permitted by section 68. The search is with a view to finding or identifying the missing or unknown person concerned. In the event that the search results in a match the Commissioner may supply particulars of the identity of the person to whom the matching profile relates to the law enforcement agency. The received profile may be removed from the System once the search has been conducted or may be retained for further searching in accordance with the instructions of the law enforcement agency.

The profile shall be removed in accordance with any condition to do so specified by the law enforcement agency that supplied the profile.

Section 132 applies to states other than designated states (i.e. states other than EU Member States, Iceland, Norway and any state designated under section 101). It facilitates the entry in the relevant index of the DNA Database System of a DNA profile received from a law enforcement agency for the purpose of conducting a search of the System as permitted by section 68. The search is for the purpose of the investigation of criminal offences in that place or with a view to finding or identifying a missing or unknown person (including an unknown deceased person). In the event that the search results in a match in respect of a missing or unknown person the Commissioner may supply particulars of the identity of the person to whom the matching profile relates to the law enforcement agency. No provision is made for the supply of particulars where the match is in relation to the investigation of criminal offences as in such cases the supply of any further information in relation to the matching profile must be by means of the Criminal Justice (Mutual Assistance) Act 2008. The received profile may be removed from the System once the search has been conducted or may be retained for further searching in accordance with the instructions of the law enforcement agency. The profile shall be removed in accordance with any condition to do so specified by the law enforcement agency that supplied the profile.

Section 133 concerns the circumstances in which an intimate or non-intimate sample taken under the Bill may be compared with crime scene evidence received from a law enforcement agency for the purposes of the investigation of criminal offences (whether within or outside the State). Following the comparison the Commissioner may provide information relating to the results of the comparison but not relating to the identity of the person to whom the intimate or non-intimate sample concerned relates. Such information may only be provided by means of the Criminal Justice (Mutual Assistance) Act 2008.

Section 134 is a saver provision intended to ensure that nothing in Chapter 7 affects the operation of section 28 of the Garda Síochána Act 2005 or the Criminal Justice (Mutual Assistance) Act of 2008. Section 28 of the 2005 Act provides that the Commissioner may, with the prior consent of the Government, enter into an agreement with a police service or other law enforcement agency outside the State in relation to the cooperation of the parties or the exchange of information or such other matters the Commissioner thinks fit. The 2008 Act gives effect to certain international agreements or provisions of such agreements in relation to various forms of assistance.

PART 12

Miscellaneous

Section 135, in order to avoid any doubt about the matter, declares that subject to particular restrictions specified in the Bill, a sample may be taken under any provision of the Bill even if a sample has been taken from the person previously under the Criminal Justice (Forensic Evidence) Act 1990 or otherwise prior to the commencement of the Bill or under the same or any provision of the Bill.

Section 136 provides that a member not below the rank of superintendent may appoint persons (other than members of the Garda Síochána) in writing for the purposes of Parts 3 (volunteers)

and 6 (missing and unidentified persons) and section 41 and 42 of Part 4 (elimination indexes).

Section 137 provides that the Director of a children detention school may appoint in writing a member of the staff of the school as an authorised member of the staff for the purposes of Part 4.

Section 138 provides that the Garda Commissioner may delegate any of his or her functions under the Bill to members of the Garda Síochána.

Section 139 provides that the governor of a prison or a place of detention or the Director of a children detention school may delegate any of his or her functions under the Bill.

Section 140 provides that the Director of FSI may delegate any of his or her functions under the Bill to members of the staff of FSI.

Section 141 makes some further provision in relation to the taking of samples under the Bill — they must be taken in circumstances affording reasonable privacy to the person and shall not be taken in the presence or view of a person whose presence is not necessary for the purposes of the taking of the sample or required or permitted by the Bill. The section states that nothing in the Bill authorises the taking of a sample from a person in a cruel, inhuman or degrading manner. Where a sample is to be taken from a person in Garda custody questioning of the person in relation to the offence in connection with which he or she is in custody must cease while the sample is being taken. This section is applied to the taking of samples under Chapter 3 of Part 5 of the Criminal Justice (Mutual Assistance) Act 2008 and the International Criminal Court Act 2006.

Section 142 provides that the Minister shall make regulations relating to the taking of samples including in relation to the arrangements applying to the taking of samples from child offenders under Part 4.

Section 143 provides that the Garda Commissioner, Ombudsman Commission, the Director of the Irish Prison Service and the National Director of the Irish Youth Justice Service shall, following consultation with the Director of FSI, prepare draft codes of practice providing practical guidance as to the procedures regarding the taking of samples by their respective personnel, for approval by the Minister.

Section 144 provides that Director of FSI, the Garda Commissioner and the Ombudsman Commission shall by written protocols make arrangements concerning: the transmission of samples to FSI; the reporting by FSI of the results of searches; and the operation of Part 10. Arrangements by written protocols shall be made by the Director of FSI, the Director of the Irish Prison Service and the National Director of the Irish Youth Justice Service concerning the transmission of samples to FSI.

Section 145 provides that persons who have access to information relating to samples taken under the Bill or to information contained in the DNA Database System shall not disclose such information except for the purposes specified in the section or any other purpose that is prescribed. The section provides that a person who intentionally or recklessly discloses information in contravention of the section shall be guilty of an offence. The offence may be tried either summarily or on indictment. The maximum penalty on summary conviction is 12 months and/or a class A fine (€5,000). The

maximum penalty on conviction on indictment is 5 years and/or €50,000.

Section 146 creates a number of offences relating to the obstruction or attempted obstruction of a person who is permitted to take a sample under Part 2 or Part 4.

Section 147 provides that specified authorisations given under the Bill may be given orally but if given in that manner are to be confirmed in writing as soon as practicable.

Section 148 provides for evidence relating to the giving of certain authorisations under the Bill to be given by way of certificate.

Section 149 provides that a notice to be served on or given to a person under the Bill may be served in one of the ways specified in the section.

Section 150 provides that a failure by a member of the Garda Síochána to observe any provision of the Bill or any regulations or codes of practice made under the Bill shall not of itself render the member liable to civil or criminal proceedings or affect the admissibility in evidence of the results of forensic tests on a sample taken under the Bill. Such a failure shall render the member liable to disciplinary proceedings.

Section 151 states that nothing in the Bill affects the operation of any other enactment that requires a person to provide bodily samples or any powers exercisable by members of the Garda Síochána or other persons under that enactment, or the performance by a person or body (including the Medical Bureau of Road Safety) of any function under that enactment. It further provides that if a DNA profile is generated from a sample taken under another enactment it shall not be entered in the DNA Database System other than in the crime scene index other than as provided for in the Bill.

Section 152 provides that an application to a judge under section 10(1) of the Criminal Justice Act 1984, section 4(1) of the Criminal Justice (Drug Trafficking) Act 1996, section 30A of the Offences against the State Act 1939 and section 51(1) of the Criminal Justice Act 2007 for a warrant to rearrest a person may be made by a member not below the rank of inspector where the basis for the application is a match between the suspect's DNA and a DNA profile generated from the crime scene concerned. This is an exception to the normal requirement that the application for a rearrest warrant be made by a superintendent or above.

Section 153 amends section 32A of the Courts (Supplemental Provisions) Act 1961 in order to bring the arrest warrant under section 25 within that section. Section 32A provides that in the case of certain warrants, orders and such like a District Court judge may exercise his or her powers in relation to his or her district while physically outside the District Court district.

Section 154 provides that a person who is arrested for the purposes of charge with a relevant offence (i.e. an offence in respect of which the person could have been detained under any of the statutory Garda detention powers listed in section 9 of the Bill, whether or not he or she was so detained) may have his or her fingerprints and palm prints taken subject to authorisation by a member not below the rank of sergeant.

Section 155 amends section 6A of the Criminal Justice Act 1984 in order to align its provisions concerning the use of reasonable force to take fingerprints, palm prints and photographs of persons in the custody of the Garda Síochána, with the provisions in sections 24 and 36 of the Bill.

Section 156 amends section 9 of the Criminal Justice Act 1984 which applies certain provisions of the 1984 Act to persons detained under section 30 of the Offences Against the State Act 1939.

Section 157 addresses the implications of the Forensic Science Laboratory of the Department of Justice and Equality changing its name to Forensic Science Ireland. It provides that from the date of the commencement of the section existing references on the statute book to that body are to be construed as references to Forensic Science Ireland.

First Schedule relates to section 71 and contains details in relation to the membership, meetings, procedures, funds and facilities of the DNA Database System Oversight Committee.

Second Schedule contains the text of the Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime for reference purposes.

Third Schedule contains the text of the Agreement between the European Union and Iceland and Norway on the application of certain provisions of Council Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime and Council Decision 2008/616/JHA on the implementation of Council Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime and the Annex thereto done at Stockholm on 26 November 2009 and Brussels on 30 November 2009.

An Roinn Dlí agus Cirt agus Comhionannais,
Meán Fómhair, 2013

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