DNA DATABANKS:

The Right to Privacy and Collective Security: Can the twain meet?

A comparative analysis of DNA legislation in the Caribbean and their implications for the Right to Privacy, the Right against Self-incrimination and the Presumption of Innocence

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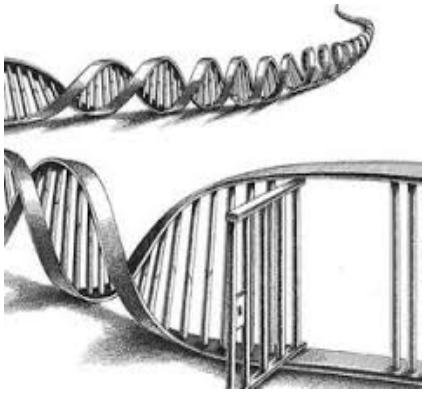

"I certainly respect privacy and privacy rights. But on the other hand, the first function of government is to guarantee the security of all the people". *Phil Crane*

Abstract: The tension created by the competing demands of privacy, law enforcement effectiveness and national security has never been more latent than in the issue of the matter of DNA databanks. Whilst there is consensus in the use of DNA as a forensic tool, issue is taken with the maintenance of databases of persons who are no longer suspects or who have been absolved of a crime, obtaining samples without consent and with the use of force to obtain samples where consent to do so is denied.

This paper will seek to conduct a critical comparative analysis of the nature of the infringement(s) involved in DNA legislation currently in force in the Caribbean and whether they fall with the legitimate derogation permitted under the law.

BACKGROUND

"The information encoded in your DNA determines your unique biological characteristics, such as sex, eye color, age and Social Security number". *Dave Barry*

The uniqueness of deoxyribonucleic acid (DNA) and its' utility in identifying the perpetrators of criminal activity, has led to its' becoming the forensic tool of choice today. Notwithstanding, it is believed that in the absence of a database, that utility will be restricted to confirming

whether a suspect, that has already been identified through traditional investigative means, has committed a crime[1].

DNA databases are said to have the added benefit[2] of:

1. making the investigative process more effective and efficient, in that law enforcement officials can eliminate suspects from the ambit of their investigations more quickly and focus the scope of their investigations.
2. potentially identifying a person as the perpetrator of a crime that would not have otherwise come to attention of investigators, which is especially useful in cases that have gone cold as well as to determine whether crimes have been committed by the same person.
3. deterring some criminals from engaging in criminal activity because of a fear of detection through the comparison and exchange of DNA profiles.

It is also believed that the retention of samples would make it possible to:

- *regenerate the database if it were corrupted in some way;*
- *introduce new, more sophisticated analytical technologies that would require a re-typing of the original sample;*
- *perform necessary quality assurance checks[3]; and*
- *further analysis in investigations of alleged miscarriages of justice or for the purpose of identifying any analytical or process errors.[4]*

Whilst there are some who sing the praises of DNA databases, so much so that they would propose extending it to entire nations, there are others who maintain the view that DNA databases are antithetical to fundamental human rights. Concerns derive from the fact that

[1] The Report of the Law Commission of Ireland (LRC 78-2005) at para. 1.12
[2] Ibid at para. 1.11
[3] ***The Forensic Use of Bioinformation: Ethical Issues*** Nuffield Council on Bioethics September 2007 at para.. 4.44
[4] Waller LJ in ***The Queen on the application of Marper and Another v Chief Constable of South Yorkshire/ Secretary of State for the Home Department*** [2002] EWCA Civ 1275] at para. 61

DNA contains more personal information as opposed to one's fingerprint. The main concerns that have been voiced are that:

(i) DNA testing may reveal personal information such a susceptibility to disease, or sexual orientation, that the individual would rather keep private;

(ii) employers or insurers may discriminate against individuals based on their genetic profiles;

(iii) DNA testing may be misused;[5]

(iv) criminals may become more adept at avoiding leaving or removing their DNA from scenes of crime;[6]

(v) the exacerbation of discrimination in the criminal justice system.[7]

What is more, it is believed that DNA databases may not be the salvation they are touted as being and "*that their presumed usefulness may not only be far from obvious or certain but may turn out to be grossly exaggerated*"[8]. Tracy and Morgan opines in their article ***Big brother and his science kit: DNA Databases for 21st Century crime control?*** that:

> *…isolated successes of databases are interesting and laudatory. However, they do not provide systematic, conclusive and widespread evidence that such databases, especially the expanded or "all inclusive" variety will be proven useful in the fight against crime.*[9]

One only has the word of law enforcement officials regarding their deterrent effect or ability to make investigations more efficient.[10] If anything DNA databases may have a derogatory effect on police investigation due to an over-reliance on them[11].

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[5] Law Reform Commission of Ireland Consultation Paper on the Establishment of a DNA Database (LRC CP 29-2004) at paras. 2.25-2.26

[6] Law Reform Commission of Ireland Consultation Paper on the Establishment of a DNA Database (LRC CP 29-2004) at para 5.17

[7] ***Prejudice, Stigma and DNA Databases*** Paper for the Council for Responsible Genetics July 2008 Helen Wallace, GeneWatch UK page 8

[8] Tracey, P and Morgan V, ***Big brother and his science kit: DNA Databases for 21st Century crime control?*** Journal of Criminal Law and Criminology 90(2), 635-690 at 646

[9] Ibid at page 645

[10] Carole McCartney ***Forensic DNA Sampling and the England and Wales National DNA Database: A Sceptical Approach*** Critical Criminology Vol 12 157-178 at 162

[11] Easton, S. ***Bodily samples and the privilege against self-incrimination*** Criminal Law Review (1991) 18-19 at 28

And therefore even if we accept without question the perceived advantages of DNA databases for society in the prevention and detection of crime as well as the rights of those personally affected to have criminals apprehended; we must *"ensure that the perceived advantages for society in operating an intelligence DNA database to fight crime outweigh the perceived dangers to civil liberties that the use of genetic information presents"*[12]. To that end, it is necessary to weigh their benefits against their cost in terms of the nature of the infringement of our fundamental rights, in particular the presumption of innocence, the right against self-incrimination and the right to privacy.

The scope of this paper is limited to the ***DNA Evidence Act 2016*** in Jamaica, the ***Administration of Justice (Deoxyribonucleic Acid) Act 2013*** in Trinidad and Tobago, and the ***Deoxyribonucleic Acid Act 2013*** in St. Kitts and Nevis being the only DNA legislation in force in the Caribbean that establish DNA databases[13]. It will seek to examine the nature of the aforementioned rights in these jurisdictions and then the legislative provisions that have implications for those rights.

THE PRESUMPTION OF INNOCENCE

"It is more important that innocence be protected than it is that guilt be punished, for guilt and crimes are so frequent in this world that they cannot all be punished. But if innocence itself is brought to the bar and condemned, perhaps to die, then the citizen will say, "whether I do good or whether I do evil is immaterial, for innocence itself is no protection," and if such an idea as that were to take hold in the mind of the citizen that would be the end of security whatsoever." *John Adams*

The presumption of innocence according to the Court in ***Barberá, Messegué and Jabardo v. Spain***[14] safeguards the interests of the accused in that the Court must not maintain any preconceived ideas of guilt, the burden of proof is on the prosecution and any doubts accrue to the benefit of the accused. However the presumption does not bar a shift in the burden of proof to the defendant or its' operation against the accused provided it is *"reasonable limits*

[12] The Law Reform Commission of Mauritius discussion paper 'Forensic Use of DNA, April 2009 at page 7

[13] In the jurisdictions of Antigua & Barbuda, the Turks & Caicos and the Bahamas respectively, the ***Evidence (Special Provisions) Act 2009***, ***Police Force Ordinance 2009*** and the ***Police Force Act 2009***, make provision for taking and analysis of DNA samples and their use as evidence in Court. These jurisdictions do not however have legislation establishing a database for the storage of DNA samples and profiles. In Barbados, the Forensic Procedures Bill has been drafted, but is not yet in force, to make provision for the carrying out of forensic services including DNA forensic analyze and the use of DNA identification services and the administration of a DNA database.

[14] ***Barberá, Messegué and Jabardo v. Spain***, 6 December 1988 para. 77

which take into account the importance of what is at stake and maintain the rights of the defence"[15] and the overall burden of proof remains with the prosecution.

Citizens in Jamaica[16] are constitutionally guaranteed the right to be presumed innocent until guilt is proven or acknowledged, as a part of the right to due process. In Trinidad and Tobago[17] and St. Kitts and Nevis[18] however that right is qualified in that a law may impose the burden to prove particular facts. This qualification is however permissible, as noted in ***Barberá*** because it does not shift the ultimate burden of proof from the prosecution or curtail the rights of the defence. In fact it may be said to accrue to the benefit of the defence as certain facts are within his knowledge and therefore in his interest to disclose.

The presumption though fundamental, is not an absolute right and may be circumscribed in two respects. Firstly, citizens in the enjoyment of their fundamental rights may not prejudice or impair the rights and freedoms of their fellow man[19]. More importantly, Parliament may pass a law or the State may take action that legitimately derogates these rights, despite their general duty not to do so, if such a law or action is demonstrably justified in a free and democratic society[20] and shows a proper respect for the freedoms of the individual.[21]

Jurisprudence and scholarly discourse on the interplay between DNA databases and the presumption of innocence is not as readily available as it is for their impact on the right to privacy. However, two contrasting views prevail. On the one hand there is the view that the inclusion of persons who have not been convicted in a criminal DNA database does not infringe

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[15] Salabiaku v. France, 7 October 1988, para. 28.
[16] Section 13(r) and 16(5) of ***The Charter of Fundamental Freedoms (Constitutional Amendment) Act 2011*** (Jamaica)
[17] Section 5(2) (f) of the ***Constitution of Trinidad & Tobago***
[18] section 10(2)(a) and 10(12)(a) of the ***Constitution of St. Kitts & Nevis***
[19] 13 (1) of ***The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011*** (Jamaica). See also section 3 of the ***Constitution of St. Kitts & Nevis*** - the chapeaux which provides "every person in Saint Christopher and Nevis is entitled to the fundamental rights and freedoms…subject to the respect for the rights and freedoms of others and for the public interest" and the closing provides "the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms *subject to such limitations of that protection as are contained in those provisions*, being *limitations designed to ensure that the enjoyment of those rights and freedoms by any person does not impair the rights and freedoms of others or the public interest*.
[20] 13(1)&(2) of ***The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011*** (Jamaica)
[21] Sections 5(1) and 13(1) of the ***Constitution of Trinidad & Tobago***

the presumption of innocence. Then Minister of Justice the Honourable Herbert Volney, MP in the first reading of the ***Administration of Justice (Deoxyribonucleic Acid) Bill 2011*** (now the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012*** in the Senate expressed the view that:

> *Retention is objective and not linked to guilt or innocence and, therefore, stigmatization. The storage of a profile in the databank does not indicate the innocence or the guilt of the individual to whom it relates. The DNA profile is merely a numerical code derived from a DNA sample from which an individual may be identified.*[22]

In any event, it is also believed that this infringement is justifiable. Sedley LJ in ***R (on appl. of S) v Chief Constable of South Yorkshire and R (on appl. of M) v Chief Constable of South Yorkshire*** posited that:

> *Whilst all citizens are entitled to be regarded as innocent, the different treatment of those who have been the subject of a criminal investigation could be justified since the samples were lawfully taken in conjunction with a bona fide investigation*[23]*.*

On the other hand, concern is expressed about the inclusion of innocent persons in a criminal database; especially where they are included in a 'suspect index' and that retention is indefinite. In ***S and Marper v the United Kingdom***[24] the European Court of Human Rights (ECHR) was of the opinion that the inclusion of innocent persons who are entitled to the presumption of innocence on the same terms and conditions as convicts, risks stigmatizing them as anything but criminal. This is particularly grave given that the presumption of innocence extends beyond the trial. ***Asan Rushti v Austria***[25] held that it means also that no suspicion of guilt may be voiced if a person is acquitted.

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[22] http://ttparliament.org/hansards/hs20111115.pdf at page 244

[23] ***R (on appl. of S) v Chief Constable of South Yorkshire and R (on appl. of M) v Chief Constable of South Yorkshire*** [2002] EWHC 478 at para 87

[24] Applications nos. 30562/04 and 30566/04, December 2008 at para. 122

[25] No. 28389/95, § 31, March 2000

Therefore when an innocent person is included in a DNA database on the same terms and conditions as the convicted person, their perception that they are not being treated as innocent is understandably heightened. A distinction must therefore be drawn between the innocent and the convicted if the legislation aims to fall within the legitimate derogation.

Additionally, the Forensic Genetics Policy Initiative in their paper on ***DNA Databases and Human Rights*** expressed the view that the presumption of innocence is undermined by the inclusion of persons who have simply been arrested in DNA databases because these persons are treated as less innocent than those who are actually convicted. The Initiative is also of the opinion that the burden of proof is shifted to the defence in breach of the presumption as a person may be forced to prove their innocence in the event there is a match between their DNA profile and a crime scene profile. [26]

The legislative provisions that may potentially infringe the presumption of innocence are those that address how such persons are classified, who is considered a suspect as well as those concerning the retention of the DNA samples and profiles of persons who have not been convicted. As retention also raises questions of privacy, this issue will be discussed later in this paper.

Classification of persons in DNA databases

A different approach has been taken on this point in each jurisdiction. Pursuant to section 8 (2) of the ***DNA Evidence Act 2016*** the National DNA Register contains separate indices of DNA profiles for suspects and volunteers. A suspected person under the Act is one who:

(a) has been arrested on suspicion of being involved in a relevant offence;

(b) is charged with a relevant offence; or

(c) has been summoned to appear before a court for a relevant offence.[27]

As in Jamaica, the Forensic DNA Databank in St. Kitts and Nevis classifies the **DNA** profiles and samples it contains. The Databank is comprised of 4 databases namely crime scene, volunteer,

[26] http://dnapolicyinitiative.org/resources/dna-databases-and-human-rights/
[27] Section 2 of the ***DNA Evidence Act 2016***

Police DNA and a non-intimate and intimate sample[28]. It does not therefore maintain a suspect database. A potential *faux pas* is the failure to define suspect in the Act. However as section 4 provides that a non-intimate sample may be taken from a person charged with an offence or a person reasonably suspected of a crime, it is likely that that is the interpretation that will be accorded to the meaning of suspect.

In Trinidad and Tobago however the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012*** has not prescribed the manner in which samples or profiles are to be classified. Of note however is the definition of suspect. A suspect is defined in section 4 as a person whom the police have reasonable grounds for believing—

(a) is about to commit an offence; or

(b) may have committed an offence, and who is being investigated by the police in relation to that offence.

Variances aside, the provisions regarding the classification of persons in the DNA databases in the region are such that persons who are not suspects are not labeled as such and their innocence is therefore preserved. Additionally given the definition of a suspect, a person is not included in a DNA Database unless there is a reasonable connection between them and a criminal offence; in which case it is their association with the crime that detracts from their presumption of innocence and not their inclusion in the DNA Database as a suspect. As a result, it is unlikely that any of the jurisdictions will be found to be outside of the permitted derogation under their Constitutions. Lastly, there is no provision for DNA dragnets or mass screening; it follows therefore that innocent persons are only included in these databases if they volunteer their samples or if law enforcement officials abuse their power and treat persons as suspects for the sole purpose of getting their DNA.

Familial searching

Concerns about the presumption of innocence also arise where familial searches are conducted, in that relatives of suspects tainted with guilt by virtue of their genetic link to

[28] Section 33 of the ***Deoxyribonucleic Acid Act 2013***

persons whose profiles are stored within what is essentially a criminal DNA database and the 'partial match' effectively becomes an 'informant' against his relative, thereby burdening family relationships.[29]. The obvious benefit of familial searching is that when a crime scene profile does not match any stored profiles, investigators can identify the actual perpetrator by testing for partial matches as the suspect may be a genetic relative of someone who is already in the database. There is also a danger that family secrets may be inadvertently uncovered as persons may discover that they have a genetic connection they didn't know existed before[30]. The state may therefore reveal information that the persons involved would have rather been kept private.

Another significant issue arising from familial searching is the potential infringement of the presumption of innocence of persons who find they are tainted by the aura of criminality by virtue only of their connection to a person whose DNA profile is stored in a criminal database[31].

It is therefore believed that strict protocols must be maintained on the use of familial searching and the confidentiality of the information derived from the process.[32] Additionally, it has been proposed that this technique is not used unless it is necessary and proportionate in a particular case.[33]

On this point, it is to be noted that although none of the legislation makes express provision for familial searching, it appears to be possible as the legislative provision regarding database searches is written in general terms. Section 10(b) of the ***Administration of Justice (Deoxyribonucleic Acid) Act 2013*** and section 35(b) of the ***Deoxyribonucleic Acid Act 2013*** provide that the Custodian shall conduct searches against the forensic DNA databank.

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[29] Khaleda Parven ***Forensic Use of DNA Information v Human Rights and Privacy Challenges*** University of Western Sydney Law Review Vol 17 pages 41-65, 58-9
[30] Ibid.
[31] Khaleda Parven ***Forensic Use of DNA Information v Human Rights and Privacy Challenges*** University of Western Sydney Law Review Vol 17 pages 41-65, 59
[32] ***The Forensic Use of Bioinformation: Ethical Issues*** Nuffield Council on Bioethics September 2007 para 6.8
[33] Ibid para 6.11

The provision in Jamaica though a bit more specific is also general. Section 11(2)(c) of the ***DNA Evidence Act 2016*** provides *inter alia* that the Custodian shall carry out searches of the National DNA Register or the matching of DNA profiles. Additionally, section 12(1) of the ***DNA Evidence Act 2016*** provides that a member of staff of the Forensic Institute may search the Register to compare DNA profiles.

Given the benefits to be derived from familial searching the fact that the infringement posed thereby isn't particularly grave, Custodians of databanks in the region may wish to take advantage of it. However it would have been better is specific provision had been made. They should therefore at minimum take care to implement strict protocols on the use of familial searching and the confidentiality of the information derived from the process.

THE RIGHT AGAINST SELF-INCRIMINATION

"The privilege against self-incrimination is one of the great landmarks in man's struggle to make himself civilized... The Fifth is a lone sure rock in time of storm ... a symbol of the ultimate moral sense of the community, upholding the best in us". *Erwin Griswold*

The utility of sampling volunteers to eliminate persons from suspicion, who may have inadvertently left bodily secretions at a scene of a crime, is beyond question. It saves law enforcement officials from wasting resources pursuing dead-end "leads".[34] However in providing a DNA sample a person runs the risk of providing the information that establishes their guilt. This means therefore that DNA legislation may run afoul of the right against self-incrimination.

The right to a fair trial in criminal cases has been held to include *"the right of anyone charged with a criminal offence … to remain silent and not to contribute to incriminating himself"*.[35] The rationale being, that is inherently cruel to compel a man to expose his own guilt.[36] The Constitutions in Jamaica, St. Kitts and Nevis and Trinidad and Tobago, all make provision protecting the right.

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[34] Law Reform Commission of Ireland Consultation Paper on the Establishment of a DNA Database (LRC CP 29-2004), para 5.83

[35] ***Funke v. France***, 25 February 1993, para. 44.

[36] ***Murphy et al v Waterfront Commission of New York Harbour*** 378 US 52

In Jamaica every person charged with a criminal offence has the right not to be compelled to testify against himself or to make any statement amounting to a confession or admission of guilt as a part of the protection of the right to due process.[37] However for Kittitians, the right only concerns freedom from coercion to give evidence.[38]

Once again the Trinidadian position is bit unique. The Constitution provides that Parliament may not *"authorize a Court, tribunal, board or other authority to compel a person to give evidence unless he is afforded protection against self-incrimination and where necessary to ensure such protection, the right to legal representation."*[39] As with St. Kitts and Nevis, the focus is on giving evidence. The qualification simply directs the manner in which the right is to be protected.

It should be noted however notwithstanding the variations in wording, the provisions all safeguard a person against being compelled to give evidence against himself and as such any the principles concerning the protection and infringement of this right are of general application. Additionally, as with the presumption of innocence, the right against self-incrimination is not absolute in that a person's protection is limited by the fact that others must also enjoy its protection and the state may take action or Parliament pass laws that derogate from the right where it is demonstrably justified in a free and democratic society.[40]

The judicial consensus is that DNA legislation does not breach that right of self-incrimination as the privilege applies to testimonial evidence and not real evidence. The ECHR in ***Saunders v. the United Kingdom***[41] came to the conclusion that:

> *the right not to incriminate oneself… presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the*

[37] Section 16(6)(f) of the ***Charter of Fundamental Freedoms (Constitutional Amendment) Act 2011***
[38] Section 10(7) of the ***Charter of Fundamental Freedoms (Constitutional Amendment) Act 2011***
[39] Section 5(2)(d) of the ***Constitution of Trinidad & Tobago***
[40] See fn. 19-21 above.
[41] ***Saunders v. the United Kingdom***, 17 December 1996, paras. 68- 69.

> *right is closely linked to the presumption of innocence…The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood …it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing.*[42]

Therefore even though DNA samples contain material that is potentially incriminating as they are independent of the will of an individual their extraction and collection is not generally considered to be an infringement of the right against self-incrimination.

However this argument fails to consider that the reaction of a person to a request for their DNA may be evidence that is used against him. Nonetheless, it has oft been posited that the innocent has nothing to fear from having their DNA taken. It follows that only a guilty person would refuse to cooperate. This inference is even more compelling given the widely held belief in DNA's ability to establish guilt or innocence. As Susan Easton writes,

> *The fact that DNA fingerprinting would probably be seen by the public as harder to fabricate, as more objective than a verbal statement, may mean it is more difficult for the individual to refuse and for his refusal to be seen as legitimate.*[43]

The danger of this inference is that even though it is not generally admissible as conclusive proof of guilt; it has in many cases been the sole basis for persons becoming suspects of committing a crime[44]. Furthermore, one must also consider the fact that the recipient of such a

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[42] (1996) 23 EHRR 313 paras. 68- 69; see also ***R v Smith*** [1985] Criminal Law Review 590 where It was held that the taking of bodily samples does not breach the privilege against self incrimination, ***Holt v US*** where Holmes J observed that "the prohibition on compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to exert communications from him not an exclusion of his body as evidence when it may be material" and ***Schmerber v California*** it was held "the privilege protects an accused only from being compelled to testify against himself or otherwise provide the State with evidence of a testimonial or communicative nature".

[43] Susan Easton ***Bodily Samples and the Privilege against Self-Incrimination*** [1991] Crim L.R.18-29, 26

[44] ***Something to Hide: DNA, Surveillance and Self-Incrimination*** Jeremy Gans Current Issues in Criminal Justice Volume 13 Number 2 168-184, 177

request has no real choice in these circumstances. He is placed in the untenable position of submitting to the test or having his refusal read as guilt. Thereby defeating the purpose of the protection afforded by the right, which is to shield a person from the inherent cruelty of compelling them to expose their guilt. What is more, there are a number of innocent reasons for refusing to give a DNA sample such as a lack of faith in existing law to adequately protect individual rights either because of fear, anxiety embarrassment, anger, doubts about the accuracy of the test or accountability of persons involved, a lack of confidence in testing procedures and controls, concerns about the scope of legal restrictions or the absence of prior suspicion.[45]

Therefore even though a person is not "giving evidence" in giving a DNA sample, valid concerns remain for their impact on the right to self-incrimination. The attention of the jury may be misdirected from the nature and strength of the prosecution's case to the case put forward by defence based on the refusal of the defendant to consent to a DNA test[46] thereby impinging on his right to a fair trial. Legislation need therefore to strike an appropriate balance between the benefits to the state in identifying potential suspects or eliminating persons from suspicion with the untenable situation a person is placed in when a request if made of him. In the end it is a matter of proportionality. That balance is likely to be struck by providing that the authorities cannot rely on refusal or withdrawal of consent as evidence of guilt or the basis for reasonable suspicion[47]; in which case it is likely that the infringement posed by the request will pass muster.

It has also been recommended that persons be properly informed before they give consent and that they be allowed to consult with a legal practitioner before doing so. And where consent is

[45] ***Something to Hide: DNA, Surveillance and Self-Incrimination*** Jeremy Gans Current Issues in Criminal Justice Volume 13 Number 2 168-184, 173; See also Susan Easton ***Bodily Samples and the Privilege against Self-Incrimination*** [1991] Crim L.R.18-29, 27

[46] Susan Easton ***Bodily Samples and the Privilege against Self-Incrimination*** [1991] Crim L.R.18-29, 28

[47] Law Reform Commission of Ireland Consultation Paper on the Establishment of a DNA Database (LRC CP 29-2004) at para 5.90

given, the sample and any profile derived therefrom should be used and retained on the same terms as the consent given.[48]

Informed Consent

Informed consent for the taking of samples especially from volunteers is necessary for two reasons. In the first instance consent legitimizes the taking of the sample where the individual is of mature age and full mental capacity as such a person *"may act freely and autonomously so as to give up their right to privacy to a specified extent"* thereby removing any ethical objections thereto. Secondly the justification for taking a sample without consent, that is their perceived or actual involvement in crime, does not exist.[49]

To be truly respectful of that informed consent, however legislative provisions giving persons access to DNA samples and the associated profiles, should be obliged to respect the terms on which that consent was given. In other words*, "it is important that data are held and disclosed in ways that prevent their use for purposes that lie outside the consent given"*.[50]

In Trinidad and Tobago, informed consent is only required from a volunteer[51] or a complainant in a sexual offence[52]. It appears however that provision has only been made for the withdrawal of consent of a complainant.[53] In fact, a person who refuses to or otherwise obstructs or resists the taking of a sample commits an offence.[54] A volunteer may however specify the purpose for which the sample is taken.[55]

More extensive provision is made in St. Kitts and Nevis regarding informed consent. Under the ***Deoxyribonucleic Act 2013*** the informed consent of a suspect for an intimate sample may be

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[48] ***The Forensic Use of Bioinformation: Ethical Issues*** Nuffield Council on Bioethics September 2007, para 3.11
[49] Ibid.
[50] O'Neill O (2002) ***Autonomy and Trust in Bioethics*** (Cambridge: Cambridge University Press), p 107
[51] Section 12 of the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012***
[52] Section 18(2) of the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012***
[53] For the volunteer see section 12 and Form 1 of the Second Schedule of the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012*** and for the Complainant see section 18(5) and Form 3 of the Second Schedule of the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012***
[54] Section 31 of the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012***
[55] See Form 1 in the Second Schedule of the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012***

sought by a police officer only if he has been authorized to do so by the Commissioner of Police[56]. Consent must be given[57] and may be withdrawn[58] before the sample is taken, in writing in the prescribed form. Before giving consent the suspect must be advised *inter alia* that[59]:

- their failure to respond is treated as a refusal to consent;
- they may withdraw consent before the sample is taken; and
- they have the right to consult with an have an Attorney-at-Law or adult of their choice.

Where a suspect refuses to consent, a Court order may be obtained for the taking of an intimate sample.[60] Of note also is the fact that in consulting with an Attorney or adult of their choice may do so in private unless the police reasonably suspect that the person, other than an Attorney, may attempt to destroy or contaminate the sample.[61]

Jamaica is singular however in that informed consent may be sought for the taking of both intimate and non-intimate samples.[62] However the ***DNA Evidence Act 2016*** is similar to the ***Deoxyribonucleic Acid Act 2013*** in that informed consent must be given[63] and withdrawn in writing[64] and where such consent is refused or withdrawn, a Court Order must be obtained.[65]

Another difference, though not necessarily a significant one, is that in Jamaica the information given varies depending on the person from whom informed consent is sought. Before an intimate sample is taken, a person must be informed of:

(a) the nature of the offence

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[56] S. 13(1) & (4) of the ***Deoxyribonucleic Acid Act 2013***
[57] Section 14 of the ***Deoxyribonucleic Acid Act 2013***
[58] Section 15 of the ***Deoxyribonucleic Acid Act 2013***
[59] Section 13(4) of the ***Deoxyribonucleic Acid Act 2013***
[60] Section 18(1) of the ***Deoxyribonucleic Acid Act 2013***
[61] Section 17 of the ***Deoxyribonucleic Acid Act 2013***
[62] Sections 15(1) of the ***DNA Evidence Act 2016*** . It should also be noted that specific provision is made that informed consent may be sought for detainees in section 25(1)(a) of the ***DNA Evidence Act 2016.*** In seeking their consent the person must be informed that the non-intimate sample will be taken using reasonable force: section 15(2) of the ***DNA Evidence Act 2016***
[63] Sections 21(2)(b), 27(4), 36(2),36(4)-(6) and 39(3) of the ***DNA Evidence Act 2016***
[64] Sections 21(5)&(6), 27(8) and 39(6)&(7) of the ***DNA Evidence Act 2016***
[65] Sections 21(4), 23(1), 36(5) and 39(5) of the ***DNA Evidence Act 2016***

(b) that authorization has been granted for the sample to be taken and the grounds; and

(c) if applicable, that initial sample is insufficient and either that further authorization is not required or that a second authorization was given and the grounds.[66]

However a volunteer he must be informed that:

(a) he is not obliged to give a sample;

(b) if relevant, that a further sample is needed;

(c) the sample will be used to generate a DNA profile; and

(d) the sample and DNA profile may be retained or destroyed in accordance with the Act.[67]

Lastly, a sample taken for elimination or from a relative to identify a missing person, they are simply informed that if they refuse, a Court Order will be sought for the taking of the sample.[68]

As regards children and protected persons the various jurisdictions once again take varying approaches. Under the ***DNA Evidence Act 2016*** in Jamaica, informed consent is given by a parent, guardian or other adult relative in the case of a child under the age of 16 years or a protected person.[69] Where a parent or guardian cannot be located, consent may be given by an adult relative or other adult named by the parent or guardian of the child, a child of the protected person or the Children's Advocate.[70] Nonetheless a Court order and not informed consent must be obtained to take a sample if the parent, guardian or other relative was the victim or has been arrested in relation to the offence in question; or the detention officer had reasonable grounds to suspect their involvement in that offence or to believe they may obstruct the taking of the sample.[71]

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[66] Section 19(4) of the ***DNA Evidence Act 2016***
[67] Section 27(3) of the ***DNA Evidence Act 2016***
[68] Section 36(4) and 39(4) of the ***DNA Evidence Act 2016***
[69] Section 14(1) of the ***DNA Evidence Act 2016***
[70] Section 14(7) of the ***DNA Evidence Act 2016***
[71] Sections 14(2) & 22(1) of the ***DNA Evidence Act 2016***

In Saint Kitts informed consent is sought from the parent or guardian of a children or incapable persons before an intimate or non-intimate sample is taken.[72] Where however the child or incapable person has been detained, arrested or charged for an offence, an intimate sample may only be taken by order of the Court.[73]

In Trinidad and Tobago however informed consent is obtained for children and protected persons, this is only in the case of a sexual offence. Section 18(3) of the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012*** provides that

> *Where a complainant is a child or an incapable person, a qualified person shall obtain the consent of the representative of that child or incapable person for the taking of a sample*.

Refusal / Withdrawal of consent

As stated earlier, if a person is unable to withdraw their consent before a sample is taken, that informed consent cannot be moral justification for the invasion of their privacy.[74] In keeping with this ideology, the legislation is all jurisdictions permit the withdrawal of consent at any time before the sample is taken. Where consent is withdrawn, a Court order must be granted to authorize the taking of a sample.[75]

In making an order, by virtue of section 19 of the ***Deoxyribonucleic Acid Act 2013, t***he Court must be satisfied that reasonable grounds exist that the person committed an offence, the sample will likely confirm or disprove their involvement and the taking of the sample is justified.[76] In assessing the last requirement, the Court must balance the public interest in obtaining DNA evidence against the public interest in upholding the physical integrity of the individual.[77] The ***DNA Evidence Act 2016*** provides however that the Court must have regard to

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[72] Section 8(2)&(3) of the ***Deoxyribonucleic Acid Act 2013***
[73] Section 18(2) of the ***Deoxyribonucleic Acid Act 2013***
[74] ***The Forensic Use of Bioinformation: Ethical Issues*** Nuffield Council on Bioethics September 2007 at para 4.60
[75] Section 18 of the ***Deoxyribonucleic Acid Act 2013,*** section 18 of the ***Administration of Justice (Deoxyribonucleic Acid) Act*** and Sections 15(1)(a), 21(4) and 23(1) of the ***DNA Evidence Act 2016***
[76] Section 19(1) of the ***Deoxyribonucleic Acid Act 2013***
[77] Section 19(2) of the ***Deoxyribonucleic Acid Act 2013***

the interests of justice in all the circumstances of the case having due regard to the best interests of the persons concerned, the victim and the protection of society.[78]

The only jurisdiction however to address the adverse inferences that may be drawn from the refusal or withdrawal of consent, is Jamaica. Section 27(9) of the ***DNA Evidence Act 2016*** provides that:

> *A refusal of a person to give consent…shall not of itself constitute reasonable cause to suspect the person of having committed the offence concerned for the purpose of arresting and detaining him…*

The importance of not holding any adverse inference drawn based on a person's refusal or withdrawal of consent cannot be held against you cannot be overstressed. This is due to the fact that the refusal or withdrawal may be read as an indication of guilt and even more gravely, the attention of the jury may be diverted from the nature and strength of the prosecution's case to that of the defendant's[79]; unduly impinging on his right to a fair trial[80].

In failing to make legislative provision in this regard, St. Kitts and Nevis and Trinidad and Tobago have missed an opportunity to include an important protection of the right against self-incrimination and to further legitimize the infringement posed to the right by their DNA legislation. Additionally, it is possible that this principle may be inconsistently applied by their Courts, given that its' application will be dependent on Judges making the appropriate directions or taking the requisite consideration.

However given the position of courts worldwide regarding the right against self-incrimination, that it protects one against having to incriminate oneself testimonially, the legislations in these jurisdictions, may nonetheless be constitutional in this respect.

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[78] Section 23(2) of the ***DNA Evidence Act 2016***
[79] Susan Easton ***Bodily Samples and the Privilege against Self-Incrimination*** [1991] Crim L.R.18-29, 28
[80] Law Reform Commission of Ireland Consultation Paper on the Establishment of a DNA Database (LRC CP 29-2004) at para 5.90 @page 146

The Right to Privacy

"If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion". *William J. Brennan, Jr.*

It has been said that DNA has a public nature in that it is present on any item we touch, *"it exists in hair which is shed in public and in saliva which may be gathered from any used cup, straw or spoon"*; and therefore *"belies and discredits the expectation that it should remain solely within the access of the individual in whose body it originated"*.[81]

Nonetheless DNA databases infringe privacy rights in two main ways. Firstly, the procedure for taking samples is by its' nature intrusive and invades a person's spatial privacy[82] and bodily integrity. Bodily integrity involves the right of a person to control access to his or her own body with the consequence that extremely strong justification must exist for access without consent. The Nuffield Council on Bioethics in its paper ***The Forensic Use of Bioinformation: Ethical Issues*** was of the view that "*activities that not only interfere with a person's privacy but also interfere with their actual body are usually thought to require stronger justification than those that merely infringe informational privacy".*[83]

Secondly, privacy is infringed by the retention of DNA profiles and samples *"which can potentially reveal may personal details about the genetic characteristics of an individual"*;[84] especially when access is granted thereto without consent. This point was upheld in ***Leander v Sweden*** where the Court stated that the private life of an individual is infringed by the mere storage of related data.[85]

What is the right to privacy? This right is most widely stated in Jamaica and is the right of everyone to:

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[81] Leigh Harlan ***When Privacy Fails: Invoking a Property Paradigmto Mandate the Destruction of DNA Samples*** Duke Law Journal Vol. 54, 179-219, 194

[82] Spatial privacy is "a state of non-access to the individual's physical or psychological self": see Laurie G (2002) ***Genetic Privacy: A Challenge to Medico-Legal Norms*** (Cambridge: Cambridge University Press), page 6

[83] ***The Forensic Use of Bioinformation: Ethical Issues*** Nuffield Council on Bioethics September 2007 at para. 3.7

[84] Law Reform Commission of Ireland Consultation Paper on the Establishment of a DNA Database (LRC CP 29-2004) at para 1.16

[85] 26 March 1987, §48, Series A no. 116

(i) protection from search of the person and property;

(ii) respect for and protection of private and family life, and privacy of the home; and

(iii) *protection of privacy of other property and of communication.*[86]

The scope of the right is a bit narrower in St. Kitts and Nevis as the Constitution offers *"protection for his family life, his personal privacy, the privacy of his home and other property"*.[87] The most restrictive interpretation of the right prevails in Trinidad and Tobago. Section 4(c) of the Constitution of that jurisdiction provides that *"the right of the individual to respect for his private and family life"* is one of the fundamental rights and freedoms available to citizens.

Notwithstanding the narrow scope given to the right to privacy in a number of jurisdictions, each jurisdiction protects the personal privacy. In this respect, the right has been analyzed and expounded upon by many to mean that:

> *individuals should be free to determine for themselves what information to disclose to others and also that individuals should be free to go about life without unnecessary intrusion by the State. The right to privacy is plainly violated when people access genetic or other information about a person who does not want to reveal private matters or to be subjected to unnecessary intrusion into their personal affairs.*[88]

One must be reminded however that like all other rights discussed above, this right is not absolute and as such it may be legitimately infringed upon by the state or Parliament in the interests of society where it is necessary to do so.[89] As was noted by Lord Steyn in the ***Attorney General's Reference (No. 3 of 1999)***[90]:

> *It must be borne in mind that respect for…privacy…is not the only value at stake. The purpose of the criminal law is to permit everyone to go about their daily lives without*

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[86] Section 13(3)(j) of ***The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011***

[87] Section 3(c) of the ***Constitution of St. Kitts & Nevis*** and Section 3(c) of the ***Constitution of Antigua & Barbuda***

[88] Law Reform Commission of Ireland Consultation Paper on the Establishment of a DNA Database (LRC CP 29-2004) at para 3.04

[89] See fn. 19-21 above.

[90] [2001] 2 AC 91, 118

> *fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family and the public.*

Several decisions of the ECHR recognize that the establishment of DNA databases infringe the right to privacy but will be justified in a free and democratic society if it:

1. is in accordance with law[91] i.e. there should be a legislative framework in place, which is sufficiently precise and contains a measure of protection against arbitrariness by public authorities;
2. pursues a legitimate aim[92] i.e. it is in the interests of national security, public safety or the economic well being of the country, for the prevention of crime or for the protection of the rights and freedoms of others; and
3. is necessary in a democratic society i.e. the interference corresponds with a pressing social need and in particular is proportionate to the legitimate aim pursued[93].

The first two requirements may be said to have been met by the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012***[94], the ***Deoxyribonucleic Acid Act 2013***[95] and the ***DNA Evidence Act 2016***[96]. These legislations have a clear legislative framework that is sufficiently precise and contains safeguards against abuse by public authorities. As regards the pursuit of a legitimate aim, the protection of the public against and the solution of crimes will undoubtedly be persuasive.[97]

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[91] *Malone v United Kingdom* (1984) 7 EHRR 14
[92] ***X v United Kingdom*** (1981) Application No. 8065/77 14 DR 246
[93] ***Olsson v Sweden***, judgment of 24 March 1988 and ***Dudgeon v United Kingdom*** (1981) 4 EHRR 149. See also ***Handyside v. the United Kingdom***, judgment of 7 Dec. 1976 where it was held: that necessity is not synonymous with 'indispensible'…neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable'.
[94] Trinidad and Tobago
[95] St. Kitts and Nevis
[96] Jamaica
[97] ***S and Marper v the United Kingdom*** at para. 100

Whether the legislation satisfies the necessity requirement that is debatable and will be discussed in some detail below, particularly as it relates to the provisions regarding the retention of DNA material are examined. In this regard we note that states have afforded a certain degree of discretion, known as a ***margin of appreciation***, by virtue of their being in a better position than the Court to determine what is necessary. This principle was first established in the ***Handyside***[98] where it was held that:

> *[b]y reason of their direct and continuous contact with the vital forces of their countries,* ***state authorities are in principle in a better position than the international judge to give an opinion on the … "necessity" of a "restriction" or "penalty"*** *… it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context.*
>
> *Consequently, Article 10 (2) leaves to the contracting states a* ***margin of appreciation****. This margin is given both to the domestic legislator … and to the bodies, judicial amongst others that are called upon to interpret and apply the laws in force.*

Additionally, the breadth of the margin depends on the nature of the right, its importance and the nature and object of the infringement; as a result the greater the infringement, the narrower the margin.[99]

From the jurisprudence on this issue the one thing that is clear is that the right to privacy would be unacceptably weakened if the at all costs mentality was allowed to prevail the potential benefits of the extensive use of DNA was not carefully balanced against that right.[100] What then is to be done? In ***Marper***[101] it was held that:

> *the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the*

[98] ***Handyside v. the United Kingdom***, judgment of 7 Dec. 1976, paras. 48- 49. Although the case which concerned an Article 10 dispute, its ruling applies equally to Article 8 cases.
[99] ***S and Marper v the United Kingdom*** at para. 102
[100] ***S and Marper v the United Kingdom*** at para. 112
[101] Ibid at para. 125

competing public and private interests… constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society.

We know therefore that that balance is not struck if DNA material is retained irrespective of the gravity of the offence, the age of the suspected offender or if the retention is not time-limited[102]. An appropriate balance may however be struck where:

1. samples are destroyed either upon collection or at the same time as the profile;
2. suspects' DNA profiles are retained only if convicted; and
3. convicted persons' DNA are removed a maximum of ten years after the sentence has been served.[103]

Taking of DNA samples

All jurisdictions maintain a distinction between intimate and non-intimate samples in the legislative provision concerning the taking of samples for the purposes of generating a DNA profile; the essence of the distinction being that a non-intimate sample is taken by fairly non-invasive means. In keeping with this distinction, a non-intimate sample is generally taken without consent with reasonable force; whilst informed consent or a Court order must be obtained for an intimate sample and, except in the case of Trinidad and Tobago, for the use of force in taking that sample. Where reasonable force is used, immunity is granted from civil and criminal proceedings in respect of the taking.

Trinidad and Tobago and St. Kitts and Nevis are similar in that their legislation simply provides that a non-intimate sample may be taken from a person without their consent using reasonable force.[104] If however the suspect in St. Kitts and Nevis refuses to allow the taking of a sample, a

[102] Ibid at para. 119

[103] Wallace, H.M., Jackson, A.R., Gruber, J and Thibedeau, A.D. ***Forensic DNA databases – Ethical and Legal Standards: A Global Review*** Egyptian Journal of Forensic Sciences (2014) 4 57-63, 60

[104] For Trinidad & Tobago see: Section 13 and 21 of the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012.*** In the case the use of reasonable force in the taking of a non-intimate sample may be inferred from section 38(1) of the ***Deoxyribonucleic Acid Act 2013***which provides that*: no proceedings, civil or criminal shall be brought*

Court order *may* be obtained directing that the sample be taken without their consent.[105] Additionally and more controversially, in St. Kitts and Nevis this refusal "*may be treated as supporting any evidence given on behalf of the prosecution or as rebutting any evidence given on behalf of the defence*."[106] The fact that a refusal may be used by the prosecution may be said to infringe the presumption of innocence.

The legislation in Trinidad and Tobago takes a more controversial approach than St. Kitts and Nevis to any objections to or obstruction of the taking of a sample in providing that:

> *Where a person from whom a sample is to be taken under this Act, other than a complainant, refuses to give a sample, or otherwise obstructs or resists a police officer or a qualified person in the exercise of his functions under this Act, that person commits an offence and is liable on summary conviction to a fine of ten thousand dollars and to imprisonment for two years.*[107]

The provision is a bit drastic and may be, especially as regards those who simply refuse to give a sample, given that reasonable force may be used to take it and legislative provision could have been made enabling the appropriate person to secure a Court order in such a case as is done in St. Kitts and Nevis[108] and in Jamaica[109].

Another interesting provision in Trinidad and Tobago regarding the taking of a non-intimate sample is section 16(2) of the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012*** which empowers a qualified person to take a non-intimate sample from persons detained by immigration officials without their consent. The justification given for this provision is that *"persons at the Immigration Detention Centre…have literally thrown away all evidence of their identity and identification and want to stay in sweet Trinidad, but the State cannot allow them*

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against a person in respect of the taking of a non-intimate or non-intimate sample using reasonable force in accordance with this Act.

[105] Sections 5(3) of the ***Deoxyribonucleic Acid Act 2013***

[106] Sections 5(5) of the ***Deoxyribonucleic Acid Act 2013***

[107] Section 31 of the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012***

[108] Section 5(3) of the ***Deoxyribonucleic Acid Act 2013***

[109] Section 21(4), 23(1), 36(5) and 39(5) of the ***DNA Evidence Act 2016***

because we do not know who they are. They could be criminals in flight". The hope is that is that the state *"through international sharing of information and intelligence, to be able to trace, from other countries from which they came, who in fact they are so that they can be sent back to where they came from."*[110]

The invasion posed by the provision seems disproportionate on a first reading. However when one considers that as a general rule foreign nationals entering another state are subject to its' jurisdiction, that it is a non-intimate sample and the justification given, the infringement posed by it may be justified.

With intimate samples however in Trinidad and Tobago and St. Kitts and Nevis, informed consent is required[111]. The difference between the two is that in St. Kitts and Nevis the taking of the intimate sample must first be authorized by the Commissioner of Police.[112] Reasonable force may also be used in the taking of intimate samples[113] however in St. Kitts and Nevis; a Court order must be obtained.[114] This consent may be withdrawn in both jurisdictions,[115] however under the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012*** express provision is made in this regard for a complainant of a sexual offence.[116]

As mentioned earlier, Jamaica is the only jurisdiction in which informed consent may be sought for the taking of both intimate and non-intimate samples.[117] Where however that consent is not given or is withdrawn; in the case of a non-intimate sample, it may be taken using reasonable force[118]. Use of reasonable force however must be authorized and does not apply

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[110] http://ttparliament.org/hansards/hs20111115.pdf at page 252

[111] See sections 12 & 18 of the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012*** and Section 13(1)&(2) of the ***Deoxyribonucleic Acid Act 2013***

[112] Section 13(1) of the ***Deoxyribonucleic Acid Act 2013***

[113] Section 21 of the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012***

[114] Section 18(1) of the ***Deoxyribonucleic Acid Act 2013***

[115] For St. Kitts and Nevis see sections 15 & 18 of the ***Deoxyribonucleic Acid Act 2013***

[116] Section 18 (5) of the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012***

[117] Sections 15(1) of the ***DNA Evidence Act 2016*** . It should also be noted that specific provision is made that informed consent may be sought for detainees in section 25(1)(a) of the ***DNA Evidence Act 2016.*** In seeking their consent the person must be informed that the non-intimate sample will be taken using reasonable force: section 15(2) of the ***DNA Evidence Act 2016***

[118] Section 15(1)(a) of the ***DNA Evidence Act 2016***

to child under 12 years of age.[119] In the case of intimate samples, where a person does not consent or withdraws it, a Court order must be made for the taking of that sample.[120]

It is also important to point out that by virtue of the Jamaican ***DNA Evidence Act 2016***, the taking of samples from detainees must be authorized.[121] Such authorization is granted on the belief that reasonable grounds exist for suspecting the person's involvement, believing that the sample will confirm or disprove that involvement and the results may be given in evidence. Authorization is also required for the taking of samples from a convicted person[122] or former offender and may be given for "relevant persons"[123]. For the former offender however, that taking is authorized if the authorizing officer is satisfied that it is in the interests of the protection of society and it is desirable for the purpose of assisting the police in the investigation of offences.[124]

Another important distinction between intimate and non-intimate samples, are the conditions under which intimate samples are taken and the category of persons who may take them. The ***Deoxyribonucleic Act 2013*** of St. Kitts and Nevis and the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012*** of Trinidad and Tobago; both provide that a qualified person taking an intimate sample must ensure that:

> *(a) it is taken in circumstances affording reasonable privacy to the person from whom the sample is being taken;*

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[119] 25(2)&(3). In respect of detainees, reasonable force may also be used to prevent the loss, destruction or contamination of a sample: 25(2) add VOLUNTEER

[120] Sections 15(1)(b), 21(4), 23(1) of the ***DNA Evidence Act 2016***

[121] Section2 of the ***DNA Evidence Act 2016*** provides that authorization may be given by:

(a) the Jamaica Defence Force or an officer in the rank of Sergeant or above in the Rural Police Force;
(b) the Custodian of the Forensic Institute;
(c) the Commissioner of Independent Commission of Investigations;
(d) a person of the rank of Assistant Superintendent or above of the Correctional Services ;or
(e) in any other case, the most senior officer in the place of detention :Section 2 of the DNA Evidence Act 2016.

[122] Section 29(6)&(8) of the ***DNA Evidence Act 2016***

[123] A relevant person pursuant to section 37 of the ***DNA Evidence Act 2016***, is either a member of the Jamaica Constabulary Force (including trainees and civilian staff, a member of the Jamaica Defence Force, a Correctional Officer, an officer or employee of the Independent Commission of Investigations and an employee of the Forensic Institute.

[124] Section 31 of the ***DNA Evidence Act 2016***

(b) it is taken in the presence or view of a person who is of the same sex as the person from whom the sample is being taken;

(c) it is not taken in the presence or view of a person whose presence is not necessary for the purpose of taking the intimate sample;

(d) the taking of the sample does not involve the removal of more clothing than is necessary;

(e) the taking does not involve more visual inspection than is necessary; and

(f) the procedure is carried out in a manner consistent with appropriate medical or other relevant professional standards.

On this matter, the legislation in Jamaica is more succinct. It simply provides that intimate samples are not to be taken within the presence or view of unnecessary or unauthorized persons[125] and as far as is practicable intimate samples (apart from blood and dental material) should be taken by a person of the same sex[126]. An added plus is that volunteers may designate the place at which samples are taken from them, the officer taking the sample agrees thus affording them the opportunity of securing their privacy as much as is possible.[127]

From the preceding discussion it is clear is that there is some variance the legislation provisions concerning the conditions for the taking of intimate samples between Jamaica on the one hand and Trinidad and Tobago and St. Kitts and Nevis on the other. Those variances aside, the provisions may nonetheless be said to appropriately respect the spatial privacy and bodily integrity of a person.

The jurisdictions also align as regards the taking of samples from a protected person[128]. The legislation all provide that a parent or guardian of a child or protected person is to be present

[125] Second Schedule of the ***DNA Evidence Act 2016***
[126] Section 24(3) of the ***DNA Evidence Act 2016***
[127] Section 27(6) of the ***DNA Evidence Act 2016***
[128] The ***Deoxyribonucleic Acid Act 2013*** and the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012*** use incapable person instead of protected person. See for example sections 12(2) and 20 respectively.

when samples are taken from them[129]. For Trinidad and Tobago the provision is worded in stronger language in that the sample may not be taken if the parent or guardian is not present. Jamaica differs by going further to provide that if the parent or guardian is either absent or excluded;[130] another adult (not being a detention officer) and a Justice of the Peace (who should be of the same sex as far as is possible) are to be present, unless the child or protected person objects.[131]

Finally, DNA though private also has a public element arising from the fact that *"it is present on any item touched by an individual; it exists in hair, which is shed in public, and saliva, such as may be gathered from any used cup straw or spoon"*[132]. Jamaica is the only jurisdiction to capitalize on this. Section 61 of the ***DNA Evidence Act 2016*** capitalizes on this by providing that samples may be taken from the clothing or other belongings of a person or from things they reasonably believe belonged to, were used by or that came into contact with, a person.

In sum, it may be said that respect for privacy is demonstrated by the fact that different provision is made for circumstances and conditions for taking of a non-intimate sample and an intimate sample as well as in the circumstances and conditions themselves. It is also evident in provision made for the taking of samples from a child or protected persons as there is a recognition that these persons are not in a position to clearly appreciate their rights.

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[129] Section 12(2) of the ***Deoxyribonucleic Acid Act 2013***, section 20 of the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012*** and section 17 of the ***DNA Evidence Act 2016***

[130] Section 17(3) of the ***DNA Evidence Act 2016*** provides a parent or guardian or other adult relative may be excluded if they are the victim or have been arrested in relation to the offence in question; or the detention officer had reasonable grounds to suspect their involvement in that offence or to believe they may obstruct the taking of the sample.

[131] Section 17 of the ***DNA Evidence Act 2016***

[132] Leigh Harlan ***When Privacy Fails: Invoking a Property Paradigm to Mandate the Destruction of DNA Samples*** Duke Law Journal Vol. 54, 179-219, 194

Retention of samples and profiles

A distinction is drawn between DNA profiles and samples on the basis that: *"...DNA profiles reveal only limited personal information. The physical samples potentially contain very much greater and more personal and detailed information"*.[133]

It is believed that at present DNA profiles do not reveal any more personal information than a fingerprint as they are extracted from the non-coding areas of DNA samples. What is more, Redmayne also argues that concerns about the threat posed to privacy by the collection, use and storage of DNA profiles and samples are overblown in that the only specialists have the training to extract or understand the information they contain. [134] He conceded however one should be careful in making such claims as it has also been noted that enough is not yet known about the areas from which profiles are extracted[135]. Furthermore, the advances in genetics and information technology are such that they may yet be put to uses and reveal person information that today were not conceivable and so one may rightly remain concerned about their storage.[136]

On the other hand, although the ECHR acknowledged in ***Marper*** that profiles contain less personal information than samples, the Court was nonetheless of the view that 'profiles contain substantial amounts of unique personal data'. The capacity of profiles to reveal genetic relationships was sufficient to interfere with the right to privacy and therefore to warrant caution as far as its retention was concerned. The Court came to this conclusion in spite of the fact that profiles are in coded form that may only be read through computer technology by a limited number of persons[137].

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[133] Waller LJ in ***The Queen on the application of Marper and Another v Chief Constable of South Yorkshire/ Secretary of State for the Home Department*** [2002] EWCA Civ 1275] at para. 60

[134] Mike Redmayne ***the DNA Database: Civil Liberty and Evidentiary Issues*** [1998] Crim L.R. 437-454, 438-439

[135] Ibid

[136] ***S and Marper v the United Kingdom***, 4 December 2008, nos. 30562/04 & 30566/04, paras. 70-75 and ***Van der Velden v the Netherlands*** (dec.) no. 29514/05, ECHR 2006

[137] ***S and Marper v the United Kingdom***, 4 December 2008, nos. 30562/04 & 30566/04, para. 75

It is not surprising therefore that a number of jurisdictions vary the period of retention on two bases – the category of person involved (i.e. whether the person is a suspect, volunteer or suspect) and whether the DNA material is a profile or a sample. In general, most jurisdictions since ***Marper*** retain suspects' profiles only if they are convicted and remove them up to a maximum of 10 years after their sentence is served. Samples are destroyed either upon collection or at the same time as the profile.

According to section 47(1) of the Jamaican ***DNA Evidence Act 2016***, samples and DNA profile must be destroyed within 3 months from the date on which a person is either acquitted, the charge against them is dismissed or their conviction is quashed or declared to be a miscarriage of justice. This destruction also extends to every record that is associated with either the sample or the DNA profile that is capable of identifying the person to whom they related.[138] Additionally, not only is the Custodian required to remove the DNA profile from the DNA Register he must also alter the Register to make it impossible to identify the person to whom the profile relates.[139]

However, a Court may nonetheless make an order for retention on the application of the Director of Public Prosecutions, the Commissioner of Police or the Independent Commission of Investigations, if it is satisfied that it is in the interests of justice to do so. In these cases, the person concerned has a right to be heard.[140]

Destruction of samples and DNA profiles may be possible in cases where proceedings have not been initiated within a period of up to 8 years after being taken or generated upon the application of the person to whom they relate.[141] In considering this application the Court must be satisfied that destruction is in the interests of justice. Locus standi is also granted to the Director of Public Prosecutions, the Commissioner of Police and where applicable, the Independent Commission of Investigations.[142]

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[138] Section 47(4) of the ***DNA Evidence Act 2016***
[139] Section 47(7) of the ***DNA Evidence Act 2016***
[140] Section 47(2) of the ***DNA Evidence Act 2016***
[141] Section 48(1) of the ***DNA Evidence Act 2016***
[142] Section 48(2)-(4) of the ***DNA Evidence Act 2016***

Of fundamental importance is the provision that a sample or DNA profile cannot be used as evidence against the person to whom they relate, if they have been retained when they should have been destroyed.[143] The obvious utility of this provision is that it protects the right against self-incrimination of these individuals.

Provision is not made in Jamaica for the removal of the samples or DNA profiles of convicted persons or former offenders in Jamaica. It follows therefore that these profiles are retained indefinitely.

Section 31 of the ***Deoxyribonucleic Acid Act 2013*** in St, Kitts and Nevis, makes provision for the destruction of DNA samples. Samples are to be destroyed 10 years after the date on which they have been analyzed unless a Court orders otherwise. Such an order may be made where the Court is of the opinion that the sample might reasonably be required in an investigation or prosecution of an offence either concerning the person from whom it was taken or any other person in relation to an offence arising out of the same incident. As express provision is not made regarding the retention or destruction of DNA profiles in that Act***,*** it follows that they are retained indefinitely in the Forensic DNA Databank in St. Kitts and Nevis.

In Trinidad and Tobago however express provision is made for the indefinite retention of DNA profiles.[144] This provision is subject to exceptions. The DNA profile of a complainant may be expunged from the Forensic DNA Databank on the Commissioner of Police after consulting with the Director of Public Prosecutions is of the view that that profile is no longer required for an investigation or criminal prosecution. [145]

As regards a complainant, expungement occurs in one of two ways. Either the Commissioner informs the Custodian to expunge the profile, after having notifying the complainant and they

[143] Section 49(2) of the ***DNA Evidence Act 2016***
[144] Section 7(2) of the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012***
[145] Section 26(1) of the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012***

do not respond to the notice within 3 months of its receipt[146] or the representative of a complainant, who is a child or incapable person, makes an application to the Commissioner of Police for same.[147] In the later case, the Commissioner has the power to deny that application if he is comes to view after consulting with the Director of Public Prosecutions, that that profile is needed for an investigation or criminal prosecution. No time period is set for expungement in this regard.[148]

The Custodian must also expunge the profiles of:

(1) a child is within 10 years of its generation;

(2) a person exonerated of a serious crime[149] within 10 years of exoneration; and

(3) a person exonerated of any other offence, within 5 years of that exoneration.[150]

A peculiar situation obtains regarding samples. Even though a person is not suspected, accused or convicted of an offence, their sample and its associated profile may not be expunged unless it has been at least 5 years since the generation of the profile.[151] Samples taken from certain government employees (e.g. members of the police and defence forces)[152] are expunged within 10 years of their retirement[153]. Lastly, the samples of persons who are suspected, detained or accused of a serious crime are retained indefinitely.[154]

The approach taken regarding retention is different in all of the jurisdictions and neither has taken the Scottish approach which has been cited with approval in the seminal ***Marper*** case as well as numerous scholarly articles and publications on the retention of DNA material.

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[146] Section 26(2) & (3) of the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012***
[147] Section 26(5) & (6) of the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012***
[148] Section 26(7) of the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012***
[149] Offences referred to in the First Schedule of the ***Anti-Gang Act 2011*** and Schedule 6 of the ***Administration of Justice (indictable Proceedings) Act 2011***.
[150] Section 26(10)-(12) of the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012***
[151] Section 25(1) of the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012***
[152] Third Schedule of the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012***
[153] Section 25(3) of the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012***
[154] Section 25(2) of the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012***

Indefinite retention of samples or DNA profiles of convicted persons is within accepted practice which is based on the belief that such persons have a diminished expectation to privacy;[155] the interference being easier to justify on the basis that their DNA could be necessary to solve previous crimes and the likelihood that these persons may reoffend.[156] For that reason, the indefinite retention of DNA profiles and samples of convicted persons in Jamaica, Trinidad and Tobago and St. Kitts and Nevis is within the legitimate derogation permitted under their respective Constitutions as the invasion of the privacy of these persons is reasonably justifiable within a democratic society.

It is in the treatment of suspects, persons whose charges have been dismissed, the acquitted and the exonerated that the variances arise. Jamaica is within the permitted derogation as the DNA samples and profiles of suspects, against prosecutions have not been initiated, may be removed at least 8 years after the sample is taken. The DNA profiles and samples, where charges have been dismissed or the person is acquitted or exonerated, are removed within 3 months of the date of the dismissal, acquittal or exoneration.

Issue may however be taken with the apparent general retention of profiles and the imposition of a general period of retention of samples in St. Kitts and Nevis; as well as the 5 year retention of the DNA profiles and samples of a person who is not suspected, accused or convicted of an offence and the period of retention of profiles of a child, complainant, government employee, the acquitted and exonerated in Trinidad and Tobago.

In failing to distinguish between the innocent, acquitted and exonerated in St. Kitts and Nevis and in retaining the samples and profiles of these persons in Trinidad and Tobago, these jurisdictions may be said to infringe the presumption of innocence and right to privacy of these persons because the justification for retention that may be said to exist in the case of a convict or even a suspect does not exist here.

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[155] Tania Simoncelli ***Dangerous Excursions: The Case against expanding Forensic DNA Databases to Innocent Persons*** Journal of Law, Medicine & Ethics Summer 2006 at page 391

[156] Law Reform Commission of Ireland Consultation Paper on the Establishment of a DNA Database (LRC CP 29-2004) at paras 3.28 and 5.73

Additionally given that it is generally practice of having retention for no more than 5 years, the 10 year retention period for samples in St. Kitts and Nevis, especially since it is applied generally and no allowance is made for the category of person and the period of retention for DNA profiles of a complainant, children, the acquitted and the exonerated in Trinidad and Tobago; may be unjustifiably lengthy given the category of persons involved. Nonetheless, the provisions in question do impose a cap on retention and as such may be proportionate based on the circumstances in these jurisdictions.

Use of DNA profiles and samples

Much concern has been expressed regarding the use that is made of DNA profiles and samples due to the personal information they contain. The fear is that if the permitted uses are not clearly defined; it will be easier to give into the temptation to expand the usage of DNA databases i.e. 'function creep'.

The Law Reform Commission of Ireland is of the opinion that the use of a DNA database should be limited to crime investigation purposes and the identification of unknown deceased, severely injured and missing persons[157] as such a limitation:

> *justif[ies] the significant infringement on an individual's privacy…bodily integrity rights and their privilege against self incrimination that the taking of samples and retaining of profiles involves [and] advances the legitimate aim of safeguarding the interests of society and the victims of crime.*[158]

In keeping with this limitation, it is also recommended that any information disseminated or access to the database, should be in keeping with those purposes. Lastly, to ensure that 'function creep' does not occur, specific provision should be made in DNA database legislation

[157] Law Reform Commission of Ireland Consultation Paper on the Establishment of a DNA Database (LRC CP 29-2004) at para 7.39

[158] Law Reform Commission of Ireland Consultation Paper on the Establishment of a DNA Database (LRC CP 29-2004) at para 7.33

clearly specifying its' purpose(s).[159] The circumscription of a DNA database in this manner stands in favour of the interference they pose to constitutional rights of being found reasonably justified in a free and democratic society.

The provision in the ***DNA Evidence Act 2016*** regarding the purpose of the National DNA Register is closest in meeting the recommendations regarding use. Section 6 provides that:

> *The National DNA Register shall be used for purposes relating to-*
>
> *(a) forensic investigation, primarily in the investigation and prosecution of relevant offences;*
>
> *(b) human identification, including-*
>
> *(i) the finding or identification of missing persons;*
>
> *(ii) the identification of seriously ill or severely injured persons who are unable by reason of illness to indicate their identity; or*
>
> *(iii) the identification of the bodies of unknown deceased persons;*
>
> *(c) the administration of justice;*
>
> *(d) the facilitation of a review of an alleged miscarriage of justice;*
>
> *(e) the compilation of statistics;*
>
> *(f) the facilitation of the performance by the Custodian of his functions under the Act; and*
>
> *(g) any other purpose specified the Minister.*

In Trinidad and Tobago and St. Kitts and Nevis, the provision is simply that the legislation "applies to the investigation and prosecution of offences…"[160] This does not necessarily mean however that the DNA databanks in these jurisdictions will necessarily fall prey to 'function creep' as it may be inferred from the general tenor of their legislation that the focus is on crime investigation purposes and the identification of persons.

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[159] The Law Reform Commission of Mauritius Discussion Paper on the 'Forensic Use of DNA April 2009 at para. 60

[160] Section 3 of the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012*** and Section 3 of the ***Deoxyribonucleic Acid (DNA) Act 2013***

Another use that is made of the DNA databases is research. The staff of the Forensic Institute in Jamaica is empowered to process and use the information in the DNA Register for statistical purposes and analysis.[161] This use is however subject to the restriction that the identity of the persons associated with any of DNA profiles in the Register are not to be disclosed unless a request was made by a detention officer, a Central Authority under the ***Mutual Assistance (Criminal Matters) Act*** or a Court.

The only other jurisdiction, in which research on DNA data is possible, is Trinidad and Tobago. Section 29(1)(g) of the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012***, provides that DNA data may be disclosed to an approved governmental agency or an educational institution for the sole purpose of research provided no personally identifiable information is disclosed. Even though personal information cannot be disclosed, issue may be taken with the failure clearly specify the type of research allowed.[162]

In spite of the variances, it is clear that the legislation in all jurisdictions have made adequate provision to ensure that the purpose of the DNA databases they establish are limited to criminal investigation purposes and the identification of persons; safeguarding against function creep. It may also be said that in limiting the purpose of DNA databases in that manner, respect for the fundamental rights of persons whose DNA material is stored and recorded therein. As far as purpose is concerned therefore the databases would satisfy the proportionality test.

Access to DNA databases & Disclosure

The DNA Register in Jamaica may be only accessed by staff of the Forensic Institute[163] who may search it for the purpose of and to the extent necessary for comparison of DNA profiles and for its' administration[164]. It is only the Custodian who may disclose the result of DNA analysis either

[161] Section 13 of the ***DNA Evidence Act 2016***
[162] ***The Forensic Use of Bioinformation: Ethical Issues*** Nuffield Council on Bioethics September 2007 at para. 6.21
[163] 12(6) of the ***DNA Evidence Act 2016***
[164] 12(1) of the ***DNA Evidence Act 2016***

to a detention officer in the course of an investigation, a Central Authority under the ***Mutual Assistance (Criminal Matters) Act*** and a Court[165].

A further protection is that samples are packaged, sealed and appropriately labeled as soon as is practicable after being taken and delivered to the Custodian. Such samples may only be opened by a forensic officer.[166]

The restrictions on access and disclosure are support by sections 11, 51 and 53. The Custodian must *inter alia* ensure the security, integrity and confidentiality of the National DNA Register[167]. By virtue of section 51(e) a person commits an offence if he conducts any unauthorized research on any sample or DNA profile generated under the Act. It is also an offence to gain or give access to any sample or DNA profile[168]; or to gain or attempt to gain access to information stored in the Register except in accordance with the Act[169]. Lastly, it is an offence to communicate or to permit the communication of any information contained in the Register[170].

The provisions regarding access and disclosure are very similar in Trinidad and Tobago and St. Kitts and Nevis. The Custodians of the Forensic DNA Databanks in these jurisdictions are the only persons empowered to conduct searches against the databank. Additionally the Custodian, as is the case in Jamaica, must ensure that DNA data is securely stored and remains confidential.[171]

DNA data may be disclosed by the Custodian or a person authorized by him under the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012*** to:

(a) a police officer in the course of a criminal investigation or proceeding;

(b) the person from whom the sample was taken or his representative;

(c) a country under an accepted request for mutual assistance in a criminal matter;

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[165] Section 11(f) of the ***DNA Evidence Act 2016***
[166] Section 45 of the ***DNA Evidence Act 2016***
[167] Section 11 of the ***DNA Evidence Act 2016***
[168] 51(i) of the ***DNA Evidence Act 2016***
[169] 53(d) of the ***DNA Evidence Act 2016***
[170] 53(f) of the ***DNA Evidence Act 2016***
[171] Section 10(b)&(c) of the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012*** and section 35(b)&(c) of the ***Deoxyribonucleic Acid Act 2013***

(d) a Forensic DNA analyst;

(e) a person under an Order of the Court for disclosure;

(f) a Court;

(g) a government agency or educational institution for approved research provided no personal identification information is disclosed.[172]

Additionally, the fact The Custodian, the Deputy Custodian and any other person employed to or assigned duties at the Forensic Institute must take an oath of secrecy.[173]

Disclosure in St. Kitts and Nevis is almost identical to Trinidad and Tobago save and except that DNA data may only be disclosed only by the Custodian and instead of the DNA Analyst, disclosure may be made to a tester who has requested a profile from the Police DNA Database and disclosure may not be made for the purposes of research[174].

As in Jamaica, offences are created that support the provisions regarding access and disclosure. In both jurisdictions, it is an offence to disclose or obtain DNA data or profiles. It is also an offence to gain or attempt to gain access to the Forensic DNA Databank; or to access or gain access to samples.[175] In Trinidad and Tobago a person who discloses DNA data otherwise than as prescribed by section 29(2) of the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012*** commits an offence. A similar offence exists in St. Kitts and Nevis; however it is only the Custodian who may be found guilty.[176] He may also be terminated if he is guilty of misconduct or fails to carry out his duties or functions.[177]

Differences also obtain in the manner in which samples are handled. In Trinidad and Tobago once samples have been sealed and labeled by the police officer or qualified person who has

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[172] Section 29(1) the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012***
[173] Section 29(3) the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012***
[174] Section 36 of the ***Deoxyribonucleic Acid Act 2013***
[175] Section 30(1)((g)& (h) of ***Administration of Justice (Deoxyribonucleic Acid) Act 2012*** and section 42(h) &(i) of the ***Deoxyribonucleic Acid Act 2013***
[176] Section 36 of the ***Deoxyribonucleic Acid Act 2013***
[177] Section 34(5)(d)&(e) of the ***Deoxyribonucleic Acid Act 2013***

taken the sample, it is submitted as soon as is practicable thereafter to the Forensic Science Centre.[178] That person must also and must ensure it is properly stored between the time of receipt and delivery. In Saint Kitts and Nevis however the DNA samples are packaged, sealed and labeled by the qualified person and must immediately thereafter be handed over to a police officer after complete the appropriate chain of command documents.[179] The officer must then deliver it as soon as it is practicable to a forensic DNA laboratory, which must be accredited internationally.[180]

From foregoing paragraphs one can safely conclude that the differences observed in the various provisions regarding access and disclosure are not in any way significant and nonetheless should afford adequate protection of DNA material. In general, access is limited and disclosure is restricted to serving the primary purpose of the DNA database, criminal investigation and identification of persons. Additionally, the offences created by the legislation should ensure that these provisions are obeyed.

Conclusion

For the most part, it would appear that the DNA legislation in the Caribbean at present fall within the legitimate derogation permitted under their Constitutions save and except the:

- the 5 year retention of samples and DNA profiles of persons who are not suspected, accused or convicted of an offence; the period of retention of the DNA profiles of samples of children, a complainant, the acquitted or exonerated and government employees; and punishment of a person who refuses to allow a sample to be taken in Trinidad and Tobago; and

- the apparent indefinite retention of profiles; and the general period of retention of samples in St. Kitts and Nevis.

[178] Section 22 & 23 of the ***Administration of Justice (Deoxyribonucleic Acid) Act 2012***
[179] Section 26 of the ***Deoxyribonucleic Acid Act 2013***
[180] Section 32 of the ***Deoxyribonucleic Acid Act 2013***