Submissions by the Jamaica Constabulary Force on the National Identification and Registration Act, 2020

The National Identification and Registration Act, 2020 ("the Act") will come into operation on a day appointed by the Minister published in the Gazette. The purpose of the Act can be found in its Memorandum of Objects and Reasons which notes, inter alia, that the Act aims to:

> *"… provide a legal framework for a National Identification System that provides safe, reliable and robust verification and authentication of identity information for citizens of Jamaica and persons ordinarily resident in Jamaica, thereby allowing for the strengthening of identity security, cyber security, and the simplification of bureaucracy…"*

The Jamaica Constabulary Force ("JCF") welcomes the invitation extended to us to make submissions on this critical piece of legislation. In this regard, we have conducted a review and have the following comments:

1. **Sections 9(8) –**

    i. Section 9(8) creates three offences that are contained in subsections (a), (b) and (c). The penalty for all three subsections is contained in subsection (c). However, based on how the section is formatted, it may appear that the penalty is only in relation to the offence in subsection (c) as opposed to all the subsections. It is therefore recommended that the words from "*and shall be liable…*" be removed from subsection (c) and be placed in a separate paragraph under subsection (c) to make it clear that the penalty is applicable to all three subsections.

2. **Section 9(11) -**

    ii. Section 9(8)(c) makes it an offence if a person, without lawful authority, wilfully "*intercepts, or causes to be intercepted, any function of the National Databases*." No guidance is however provided on the meaning of the term "*function*" and the absence of clarity in this regard may prove problematic in a prosecution.

iii. It is however noted that the meaning of other terms used throughout the section such as *"access", "data" and "program"* are clarified in section 9(11), where it is stated that they shall be construed in accordance with the Cybercrimes Act. It is noted that the term *"function"* is also defined in the Cybercrimes Act. It is therefore submitted that, in order to provide clarity on the meaning of the word *"function"*, reference to the Cybercrimes Act should also be made.

iv. It is therefore recommended that section 9(11) be amended to read:

> *""access", "data"* ***"function"*** *and "program" shall be construed in accordance with the Cybercrimes Act."* (emphasis supplied to highlight proposed amendment)

3. **Section 9(12) –**

i. This section clarifies that the acts alleged to constitute an offence under subsection (9) *"need not be directed at – (a) any specifically identifiable program or data, or type of program or data; or (b) any program or data held in a specifically identifiable computer*." However, this clarification is only in relation to offences under subsection (9). It is submitted that this clarification should also apply to offences under subsection (8) as, even though not expressly stated in subsection (8), those offences will also concern programs, data and computers.

ii. It is therefore recommended that section 9(12) be amended to include a reference to offences under subsection (8).

4. **Sections 10(7)(a)(i), (ii) and (iii) –**

i. These sections make it an offence if a person provides false information or makes a false statement of a material nature with the intention of obstructing or misleading the Authority when providing information for an entry, making modifications to an entry or making a confirmation of an entry in the National Identification Databases. However, the offences only relate to the National Identification Databases as opposed to the National Databases.

ii. As highlighted in section 9(1), the National Identification Databases are ones in which identity information is stored. The National Databases include the National Identification Databases as well as the Civil Registration Databases in which the information collected by the Registrar-General for the purpose of civil registration is stored. It is

submitted that the offences should not be limited to only the National Identification Databases but should extend to the National Databases so that any false statement made in relation to the Civil Registration Databases would also be covered. It is therefore recommended that the phrase "National Identification Databases" in the sections be replaced with the phrase "National Databases".

5. **Section 10(7)(c) –**

   i. This section makes it an offence if a person knowingly enrols or attempts to enrol more than once in the National Identification Databases. However, the Act itself provides legitimate instances where this can occur. For example, sections 14(1) and (2) provide for the cancellation of a person's enrolment. However, section 14(4) provides that a person can apply for a subsequent enrolment and allows the Authority to re-enrol the person. The offence of enrolling more than once is therefore inconsistent with the provisions of section 14.

   ii. It is submitted that the mischief which the offence is trying to address is where someone enrols or attempts to enrol in the National Identification Databases in circumstances where the person already has an existing enrolment, therefore creating two separate existing enrolments. In this regard, it is recommended that section 10(7)(c) be amended to read:

   > "*… knowingly enrols or attempts to enrol in the National Identification Databases* ***where, at the time of this enrolment, the individual has an existing enrolment in the National Identification Databases that has not been cancelled****;*" (emphasis supplied to highlight proposed amendment)

6. **Section 10(7) –**

   i. This section creates several offences that are contained in subsections (a) to (e). The penalty for all the offences is contained in subsection (e). However, based on how it is formatted, it may appear that the penalty is only in relation to the offence in subsection (e) as opposed to all the subsections. It is therefore recommended that the words from "*commits an offence and shall be liable…*" be removed from subsection (e) and be placed in a separate paragraph under subsection (e) to make it clear that the penalty is applicable to all the subsections.

7. **Section 10(8)(a)–**

    i. This section provides the mens rea that is required for committing the offences in subsection (7) and provides that the person must have known or believed the information to be false. It is proposed that the word *"believed"* in the section be removed and replaced with the words *"had reasonable grounds to believe"*. In this regard, guidance is taken from the offences under sections 92 to 97 of the Proceeds of Crime Act where the words *"reasonable grounds to believe"* have been used in relation to the required mens rea for the offences. Accordingly, the mens rea for the offence would be satisfied once the prosecution is able to prove that reasonable grounds existed for the person to believe the information to be false.

8. **Section 11(3) –**

    i. This section creates an offence if a person, without lawful authorisation, collects identity information from an individual. The offence is however vague and it is unclear if it is meant to relate to a person who is falsely purporting to act on behalf of the Authority in the collection of the information or if it is meant to have general applicability to any person who collects identity information without authorisation. If it is the latter, it may be more appropriate for the offence to be covered under the Data Protection Act.

9. **Section 14(5) –**

    i. Section 14(5) contains two subsections; subsections (a) and (b). However, as currently drafted, subsection (b) is subsumed in subsection (a). It is therefore recommended that the format be amended to separate the two subsections.

10. **Section 14(6)(a) –**

    i. This section provides that an individual who is given notice that his enrolment has been cancelled shall no longer use a National Identification Number. However, as highlighted in item 5 above, a person can apply for a subsequent enrolment. If approved, this person would be assigned the same National Identification Number that was assigned to him on the previous enrolment. The prohibition against the person using **a** National Identification Number in these circumstances should therefore not apply.

i. It is submitted that what the section is trying to achieve is to prevent a person whose enrolment has been cancelled from using a National Identification Number unless the person is subsequently re-enrolled. It is therefore recommended that this section be amended as follows for clarity:

> *"…shall no longer use* ***the*** *National Identification Number* ***unless he is subsequently enrolled under section 14(4);"*** (emphasis supplied to highlight proposed amendment)

11. **Section 16(10) –**

i. This section creates the offence of wilfully tampering with a National Identification Card. The penalty is a fine not exceeding one million dollars. It is submitted that the penalty is low and is not sufficiently commensurate to the nature and consequences of the offence. It is recommended that the penalty be similar to the penalty for the offence in section 9(10) which is that the person will be liable on conviction before:

(a) a Parish Court, to a fine not exceeding three million dollars; or

(b) a Circuit Court, to a fine, or imprisonment for a term not exceeding twenty-five years, or both such fine and imprisonment.

12. **Section 16(11) –**

i. This section creates the offences of wilfully taking possession or retaining a National Identification Card knowing that the card was improperly obtained or that the card is counterfeit. It is submitted that the section should also include an offence for using the card in these circumstances in addition to the offences of possessing it or retaining it. It is therefore submitted that the words *"or uses"* should be inserted after the word *"retains"*.

v. It is also noted that the offences are separated into subsections (a) and (b). The penalty for both subsections is contained in subsection (b). However, based on how the section it is formatted, it may appear that the penalty is only in relation to the offence in subsection (b) as opposed to both subsections. It is therefore recommended that the words from "*and shall be liable…*" be removed from subsection (b) and be placed in a separate paragraph under subsection (b) to make it clear that the penalty is applicable to all three subsections.

ii. Further, the penalty provided is a fine not exceeding five hundred thousand dollars. It is submitted that the penalty is low and is not sufficiently commensurate to the nature and consequences of the offence. It is recommended that the penalty be similar to the penalty for the offence in section 9(10) which is that the person will be liable on conviction before:

(a) a Parish Court, to a fine not exceeding three million dollars; or

(b) a Circuit Court, to a fine, or imprisonment for a term not exceeding twenty-five years, or both such fine and imprisonment.

13. **Section 17(2) -**

iii. This section creates the offences of using, or permitting or inducing another person to use a National Identification Card in order to impersonate an enrolled individual. The penalty provided is a fine not exceeding three million dollars. Given the nature and the gravity of the consequences that can flow from this offence, particularly for the innocent person that was impersonated, it is submitted that the penalty should also include an option for imprisonment. In this regard, it is recommended that the penalty be similar to the penalty for the offence in section 9(10) which is that the person will be liable on conviction before:

(a) a Parish Court, to a fine not exceeding three million dollars; or

(b) a Circuit Court, to a fine, or imprisonment for a term not exceeding twenty-five years, or both such fine and imprisonment.

14. **Section 22(b) -**

i. By the use of the word *"shall"*, this section requires an individual to surrender to the Authority any National Identification Card that has expired. This requirement is however inconsistent with section 18(4) which provides that the Authority *"may"* require an individual seeking renewal of the card to surrender the existing card whether it is still current or expired. Both sections should therefore be made consistent.

15. **Section 24 (1) –**

i. Section 24 provides a procedure to be followed by the police in the event that identity information held by the Authority is needed for the prevention, detection or investigation of crime or in the interest of

national security. The procedure to be followed is provided under section 24(2) and requires that the Commissioner of Police apply to and obtain an order from a Judge of the Supreme Court authorising the Authority to disclose the identity information. This therefore imposes an additional step for the police to take and overcome in order to obtain the information.

ii. It is recognised that the requirement for the police to obtain such an order from a Judge of the Supreme Court is a safeguard that has been imposed to protect the confidentiality of the identity information held by the Authority under the Act. However, it must also be recognised that the Act itself creates several offences which the police are obligated to investigate and prosecute. These several offences have also been created in recognition of the confidentiality of the identity information held by the Authority and the need to deter and punish persons who act in a way that threaten or breach the confidentiality. Further, several of these offences are committed against the Authority itself and the Authority would be the one reporting the matter to the police and would also be the compliant in the matter. The Authority would however be precluded from providing any identity information needed to investigate an offence that it has reported and that was committed against it unless the police first obtain an order from the court. It is submitted that this is counterproductive and that the requirement for the police to have to obtain an order from the court for identity information should not apply to the prevention, detection or investigation of offences under the Act itself. Instead, the Authority should be able to provide all information, including identity information, to the police once the matter in question involves an offence under the Act. In this regard, it is recommended that section 24 (1), which provides the circumstances in which the Authority can disclose identity information, be amended to include the following circumstance:

> *"where same is required for the prevention, detection or investigation of an offence under this Act."*

16. **Section 24(2) -**

i. In circumstances where the police have to apply to the court for an order under this section authorising the Authority to disclose identity information, it is submitted that a constable, as opposed to only the Commissioner of Police, should be empowered to make the application. There may be a plethora of matters for which identification information is needed; it is not practicable for the Commissioner of Police to have to be the applicant for the orders in all these matters. Further, it would be more

appropriate for the officers who are actually investigating the matters and who would have intimate knowledge of same to be the ones to make the application as opposed to the Commissioner of Police. It is also noted that constables are empowered to apply for investigative orders under other legislation such as the Cybercrimes Act, the Financial Investigations Division Act and the Proceeds of Crime Act. It is submitted that constables should similarly be empowered under this legislation.

ii. The application under section 24(2) also limits the disclosure of the identity information, once the order is granted, to a constable not below the rank Superintendent. Accordingly, if the investigating officer in the matter is below the rank of Superintendent, the information could not be disclosed to him. This would mean that the investigation would have to be taken over by an officer not below the rank of Superintendent. It is however not practicable for an officer not below the rank of Superintendent to have to be the investigating officer in all the matters where such an order is obtained. Further, it is noted that there is no such limitation on the rank of the officer to whom the information can be disclosed in other legislation where investigative orders are obtained such as under the aforementioned Cybercrimes Act, the Financial Investigations Division Act and the Proceeds of Crime Act. For example, a disclosure order under the Proceeds of Crime Act which can require a bank to disclose details of a customer's identity information and banking transaction does not limit the rank of the officer to whom the information can be disclosed.

iii. In light of the above, it is submitted that section 24(2) be amended as follows:

> *"A **constable** may, without notice, make an application to a Judge of the Supreme Court, in Chambers, for an order authorising the Authority to disclose to **the constable**, identity information in any case where the disclosure is necessary –*
>
> *(a) for the prevention, detection or investigation of crime; or*
> *(b) in the interest of national security." (*emphasis supplied to highlight proposed amendment)

17. **<u>Section 24(3)(a) –</u>**

i. This section imposes additional obligations for the police to meet in order to obtain an order from a Judge of the Supreme Court authorising the Authority to disclose identity information. It requires the police to satisfy the Judge that other investigative procedures have not been, or are

unlikely to be, successful in obtaining the information. The police are therefore under an additional requirement to either first try other investigative procedures to obtain the information and demonstrate that those have failed or to identify what other investigative procedures may be available but demonstrate that those are unlikely to be successful. It is submitted that these additional requirements are burdensome and time-consuming. It is submitted that once the requirements in section 24(2) are met, this should be sufficient for the Judge to grant the order as they provide an adequate threshold and an adequate safeguard to ensure that the information is provided in legitimate circumstances. It is therefore recommended that the section 24(3)(a) be removed.

18. **Section 24(5)(a)–**

i. This section mandates the destruction of identity information, which was disclosed pursuant to an order under the section, to be destroyed within three months after the date on which the individual concerned is convicted or acquitted of an offence in respect of the matter for which the information was disclosed pursuant to the order. It is submitted that the obligation to destroy the identity information where the person has been convicted should be removed so that this information can be available to assist in future investigations.

ii. The retention of information is essential to law enforcement so that law enforcement will have a sufficient pool of information for intelligence and comparison purposes which can be used to solve crimes. It must also be remembered that the identity information of the person in question would have been lawfully obtained by way of a court order and the person would have been subsequently convicted of an offence. Guidance is also taken from the Finger Print Act and the DNA Evidence Act which do not require the destruction of finger print forms or DNA samples/ profiles in circumstances where the person has been convicted.[1] These Acts therefore recognize and give effect to the importance of retaining information to assist in the detection of crime and the investigation of offences. It is therefore recommended that the instant Act should similarly provide for

[1] There is however an exception in the Finger Print Act concerning children between the ages of 12 and 17 years, as section 4A(2) requires that the finger print form of a person between these ages be destroyed within 3 months of the conviction or acquittal of the person. Besides from this, the Finger Print Act only requires the destruction of finger print forms where the person in question has been acquitted (section 4A(1)), where the person is not charged or where the person is charged but the proceedings are discontinued (section 4B(1)). The DNA Evidence Act only requires the destruction of a DNA sample/profile where the person in question is acquitted, where the charges are dismissed or where a person's conviction is quashed (section 47(1)).

same and that the words "convicted or" in section 24(5)(a) should be removed.

iii. If this recommendation is accepted, consequential amendments would also need to be made to section 24(6) which also refers to a conviction.

19. **Section 24(1)(b) –**

i. This section provides that an individual is entitled to be provided with a record of all requests for verification of identity information of that individual that were received by the Authority from requesting entities and the details of these requests. It is submitted that an exemption should be provided in relation to requests that were received by the Authority for investigative purposes.

ii. Providing a person with a record and the details of the requests that were received from law enforcement agencies for investigative purposes has the potential to prejudice investigations, as it will put the person on notice that they are being investigated. The provision of these records by the Authority to the person may also constitute the offence of "Tipping Off" as provided in sections 97 and 104 of the Proceeds of Crime Act. It is therefore recommended that an exception be made to the provision of these records to a person.

20. **Section 26(5)(b)) –**

i. Paragraph (iii) under this section is subsumed in paragraph (ii) and should be separated.

21. **Section 29 (1) –**

i. This section enables a constable to apply to a Justice of the Peace for a search warrant to search premises and to seize any item at the premises which, in the opinion of the constable, is likely to be of substantial value to an investigation of an offence under the Act. It is recommended that the word "premises" be defined and that a wide definition be ascribed to include any place or conveyance so that a wide range of locations/areas can be searched

22. **Section 29(2)(d) -**

i. This section requires that the search warrant describe the items that can be seized and to specifically state if cash can be seized. This requirement may

prove problematic. It may be difficult to know what items may be found once the search is conducted. Items that were not contemplated at the time of the application for the warrant, and therefore not specifically included in the warrant, may be found on the premises and may be relevant to the investigation. In such a situation, an argument could be made that the constable does not have the authority to seize these items since they were not specified in the warrant. This would be prejudicial to the investigations and contrary to the intent of the section which is to allow all relevant evidence to be seized as required. Further, such a requirement is not generally included in other legislation that provide for search warrants. The absence of this requirement recognizes that fluidity of investigations and gives the police flexibility and space in what can be seized.

23. **Section 29(3)(b) –**

i. This section prohibits the seizure, under a warrant issued under the section, of anything that contains identity information, if such seizure may be reasonably expected to have a negative impact on any aspect of Jamaica's information, communication technology infrastructure. The words "*negative impact on any aspect of Jamaica's information, communication technology infrastructure*" appear vague and it is unclear as to what exactly is meant by the section. It is therefore recommended that the section be clarified.

24. **Section 29(5) –**

i. This section provides for a constable to release an item, that was seized under a search warrant issued under the section, to the person from whom the item was seized or such person as appears to be lawfully entitle to the item. The section however requires that the constable obtain the approval of a Judge of the Parish Courts before releasing the item. It is submitted that the approval of a Judge to release the item is not necessary as, under the common law, a constable is under a duty to return an item where it is no longer needed for the purpose of the investigation or prosecution of an offence. The section therefore imposes an unnecessary obligation on the constable to first apply and obtain the approval of a Judge before releasing the item which will involve time and resources on both the part of the constable and the Judge. It is therefore recommended that the section be removed.

25. **Section 30 –**

i. This section prohibits a person that is involved in the administration of the Act from disclosing information received under the Act except as provided under the Act or as necessary for the due administration of the Act. There may however be other legislation which mandates disclosure of the information in certain circumstances. It is therefore recommended that the words "or under any other law" be inserted at the end of the section.

Jamaica Constabulary Force
February 11, 2021