Te Aka Matua o te Ture
Law Commission

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The Use of DNA in Criminal Investigations

Te Whakamahi i te Ira Tangata i ngā Mātai Taihara

Executive Summary & Recommendations

Executive summary

AN OVERVIEW

1. Our DNA is the blueprint for our individual physical development and represents our family and whānau, providing the genetic link to past and future generations. Every individual has a unique DNA sequence, and DNA analysis can identify a particular individual with a high degree of accuracy. Unsurprisingly, DNA analysis has become an important tool in criminal investigations worldwide.

2. Aotearoa New Zealand was the second country to enact legislation establishing a DNA databank for use in criminal investigations. It has been 25 years since the Criminal Investigations (Bodily Samples) Act 1995 (CIBS Act) came into force. Over that time DNA technology has developed rapidly and shows no signs of slowing. The utility of DNA in criminal investigations has grown in ways not anticipated in 1995. Not only can DNA reveal more information about an individual than was previously possible, but increasingly sensitive analysis techniques can be used to obtain information from tiny traces of DNA, such as a few skin cells. Successive amendments to the CIBS Act have also expanded Police's use of DNA in criminal investigations. Now, close to 200,000 people have a profile on the DNA Profile Databank.

3. Our review has surveyed the expansion of the collection and use of DNA in criminal investigations. We conclude that new DNA legislation is needed. The CIBS Act is no longer fit for purpose, constitutionally sound or accessible to users.

4. We have identified six fundamental problems with the CIBS Act:

   (a) It lacks a clear, robust purpose to guide the collection and use of DNA in criminal investigations.

   (b) It fails to recognise and provide for tikanga Māori and te Tiriti o Waitangi | the Treaty of Waitangi (the Treaty). It is out of step with other legislation that has a significant impact on Māori rights and interests.

   (c) It fails to properly accommodate human rights values. This is inconsistent with other legislation concerning the relationship between the State and individuals, such as the Search and Surveillance Act 2012 and the Intelligence and Security Act 2017.

   (d) It is not comprehensive. The increasing use of DNA in criminal investigations, both in Aotearoa New Zealand and elsewhere, as well as scientific advances in DNA analysis have highlighted significant gaps in its provisions.

   (e) It is confusing and complex. A steady history of amendments has made the legislation difficult to apply in practice.

   (f) There is no statutory provision for independent oversight. This is inconsistent with international best practice.

5. This Report contains 193 recommendations that address these and other concerns. Together they provide a comprehensive regulatory framework for the collection and use of DNA in criminal investigations and the investigation of missing and unidentified people. This summary highlights some of those recommendations by reference to the fundamental problems with the CIBS Act and our objective of fit for purpose, constitutionally sound and accessible legislation.

6. We recognise that navigating the change from the existing DNA regime that Police use every day to a more comprehensively regulated regime poses a challenge. We do not therefore include draft legislation in this Report. Instead our recommendations describe the content of legislation that would enable the continued use of DNA in criminal investigations in Aotearoa New Zealand in a principled, transparent and accountable way.

A CLEAR PURPOSE

7. A fundamental problem identified in this review is that the CIBS Act lacks a clear and robust purpose to guide how DNA should be collected and used in criminal investigations. We recommend that the new DNA legislation include a purpose statement that identifies the policy objectives: to facilitate the collection and use of DNA in the investigation and prosecution of offences and the investigation of missing and unidentified people in a manner that:

   (a) minimises interference with a person's privacy and bodily integrity;

   (b) recognises and provides for tikanga Māori; and

   (c) is otherwise consistent with human rights values.

8. The purpose provision will guide a principled approach to the collection and use of DNA samples, as part of the wider impetus for a fairer and more effective criminal justice system in Aotearoa New Zealand.

9. The purpose provision will also guide the exercise of functions and powers under the proposed new DNA legislation by police officers, the forensic services provider, the courts and other bodies exercising oversight, as we discuss below.

RECOGNISING AND PROVIDING FOR TIKANGA MĀORI AND THE TREATY

10. DNA holds special significance in te ao Māori. DNA contains whakapapa information, which is considered a taonga, and its collection for use in criminal investigations gives rise to certain rights and responsibilities according to tikanga Māori. Whanaungatanga, mana, tapu, manaakitanga and kaitiakitanga are other aspects of tikanga engaged by the DNA regime. The collection and use of DNA in criminal investigations also engages rights and obligations under the Treaty, including the right to exercise tino rangatiratanga.

11. There is, however, no statutory recognition in the CIBS Act of tikanga Māori or the Treaty, no provision for tikanga in the collection and use of DNA and no provision for the exercise of Treaty rights and obligations.

12. In our view, for DNA legislation to be constitutionally sound, it should, at a minimum, provide a framework for Māori to articulate their rights and interests in the DNA regime and to participate in oversight. We therefore recommend that new DNA legislation should recognise that tikanga Māori may be engaged by various aspects of the regime and make provision for its operation, where appropriate.

13. Another concern is that the CIBS Act fails to recognise the over-representation of Māori in the DNA regime. Māori comprise around 16.5 per cent of the general population but since 2009 Māori have provided between 38 and 41 per cent of all DNA samples obtained on arrest or intention to charge. The Crown has an obligation under the Treaty to reduce inequalities between Māori and non-Māori. There are, however, no measures in the CIBS Act to support this obligation, such as independent oversight or reporting requirements.

14. To ensure the Crown does not breach its duties under the Treaty to act fairly to reduce inequities between Māori and non-Māori, we make recommendations that would provide the means for the Crown, working in partnership with Māori, to meet its obligations to take active steps to reduce inequities and promote equity in the DNA regime.

15. A key recommendation is independent oversight of the DNA regime through the establishment of a DNA Oversight Committee. We recommend that at least 3 members of that Committee be Māori to facilitate Māori participating in oversight of the DNA regime. We discuss oversight further below.

16. We recommend that new DNA legislation include more comprehensive reporting requirements for Police, broken down by ethnicity and other relevant factors. This will facilitate effective oversight, including monitoring the impact of the DNA regime on Māori.

17. We also recommend that new DNA legislation should prohibit the use of analysis techniques that predict the likely ancestry of a person whose DNA was found at a crime scene.

INCREASED RECOGNITION OF HUMAN RIGHTS VALUES

18. There is no recognition in the CIBS Act of the need to accommodate human rights values, including privacy and bodily integrity, alongside law enforcement values. Advances in DNA technology have only served to increase the intrusive nature of DNA analysis on fundamental human rights values.

19. We are also concerned that some of the broad powers granted to police officers under the CIBS Act appear inconsistent with human rights values. For example, the power to require a DNA sample from a young person or an adult when arrested or intended to be charged with a qualifying offence appears inconsistent with the right to be secure against unreasonable search and seizure under section 21 of the New Zealand Bill of Rights Act 1990. We adopt the view of the Attorney-General at the time the CIBS Act was amended in 2009 to introduce this power: that section 21 requires both a sufficient and specific basis for the taking of a sample and prior independent approval (except for emergency or other special circumstances).

20. A re-balancing is required so that intrusions on human rights values are reasonable and proportionate to the public interest in law enforcement. We consider the CIBS Act is out of step with more recent legislation in the wider law enforcement and security and intelligence contexts in terms of setting that balance. We seek to address this in a number of ways. Some are set out below.

21. We recommend that suspect samples should only be obtained from young people where, as is already the case with children, an order is made by a Youth Court Judge.

22. We recommend that suspect samples should not be obtained by consent from adults lacking the ability to give informed consent and that there are improved safeguards generally when samples are being obtained from adults.

23. We recommend constraining Police discretion in the collection of pre-conviction samples by establishing statutory considerations, such as the nature and seriousness of the suspected offending and any history of prior offending. We also recommend that the comparison of pre-conviction DNA profiles to profiles from unsolved cases should only occur if a court makes an order.

24. We recommend lifting the offence threshold for storage of a DNA profile upon conviction (which means it may be searched in future criminal investigations) to an offence punishable by imprisonment for two years or more.

25. We recommend removal of certain adult DNA profiles after a seven year period without reoffending and, otherwise, that an offender's profile should be removed upon their death rather than being retained indefinitely.

26. We suggest a separate regime for retaining the DNA profiles of youth offenders that is consistent with the rehabilitative focus of the youth justice system and seeks to take advantage of the specialist skills of the Youth Court.

27. We recommend prohibiting any external research of the databank.

A COMPREHENSIVE REGIME

28. Our view is that a fit for purpose, constitutionally sound and accessible statutory regime must regulate, or provide a framework for regulating, all significant aspects of the DNA regime. The CIBS Act does not regulate many of the uses of DNA in criminal investigations such as the analysis of crime scene samples or the processes of elimination sampling, mass screening or familial searching. Their legal foundation for use lies outside the Act, resulting in a fragmented legal picture. The Act is also silent on the forensic services provider who has a central role in the operation of the DNA regime, analysing DNA samples, generating DNA profiles, maintaining the profile databanks and managing the retention and destruction of samples and profiles.

29. One key recommendation is for a new comprehensive DNA databank (the proposed DNA databank). This will replace the current DNA Profile Databank and the Temporary Databank established by the CIBS Act and provide a statutory basis for the Crime Sample Databank that is currently unregulated.

30. We recommend the proposed DNA databank contains indices to enable comparisons that are currently conducted outside the legislation to be conducted within the new legislative regime, where that is permitted by matching rules. We also propose the inclusion of a set of indices to assist in the identification of missing and unknown people to close a gap in the current legislation.

31. The proposed DNA indices are listed below:

    (a) Elimination index: for profiles derived from elimination samples and mass screen samples in the course of criminal casework.

    (b) Pre-conviction index: for profiles from samples obtained from suspects and on arrest or intention to charge with a qualifying offence.

(c) **Offenders index**: for profiles from people convicted of an offence punishable by imprisonment for two years or more.

(d) **Crime scene index**: for profiles obtained from DNA samples collected at crime scenes.

(e) **Missing and unidentified index**: for profiles of people who are missing and people who are unable to identify themselves due to incapacity.

(f) **Unidentified deceased index**: for profiles of unidentified deceased people and from human remains.

(g) **Relatives index**: for profiles of relatives of missing people obtained for the purpose of assisting identification.

32. We also recommend that only those DNA analysis techniques that have been approved and set out in regulations may be used in the investigation and prosecution of offences (and in the investigation of missing and unidentified people). We recommend that the DNA Oversight Committee should assess any proposals from the forensic provider or Police to add or remove analysis techniques and advise the Minister regarding these proposals. We discuss oversight further below.

33. We propose regimes to regulate elimination sampling (the taking of DNA samples to exclude people as suspects) and for mass screening (the taking of samples from a class of people who share characteristics with the suspected offender to identify a suspect).

34. We also provide a regulatory basis for familial searching (the use of DNA databank profiles to identify a near match with a crime scene profile which might identify a potential family member). We recommend authorisation by court order before such a search can be conducted. We also propose regulating the future use of genetic genealogy searching, where an external genetic ancestry database can similarly be searched for a near match, as we consider it inevitable that Police will seek to use this as an investigative technique.

35. We also recommend that the role and obligations of the forensic services provider should be set out in the proposed DNA legislation.

REPAIRING THE OVERSIGHT GAP

36. The absence of independent oversight of the DNA regime is a fundamental regulatory gap and places Aotearoa New Zealand out of step with most comparable jurisdictions. This gap also results in a lack of Māori participation in oversight of the regime, inconsistent with the Treaty guarantee of tino rangatiratanga, the principles of partnership, active protection and equity, and the responsibilities that arise for Māori in this context in accordance with the applicable tikanga.

37. We address the question of independent oversight in several ways: increasing the role of judicial authorisations for the exercise of certain powers to collect and use DNA, providing for the establishment of the new DNA Oversight Committee and external auditing.

38. We recommend an increased role for the judiciary in authorising some investigative practices that are currently not regulated by the CIBS Act; for example, decisions whether to authorise a mass screen, a familial search or, in future, a genetic genealogy

search. This restores judicial oversight as a more central part of the DNA regime, a feature of the original legislation.

39. As mentioned, we recommend a new DNA Oversight Committee be established. This recommendation is key. It is intended both to mitigate existing problems or gaps and to serve as a future proofing mechanism, monitoring developments in the operation of the proposed DNA legislation and contributing to the recalibration of the regime to ensure it remains properly aligned to its purpose.

40. The DNA Oversight Committee will perform a broad set of functions including: evaluating proposals to make or amend regulations under new DNA legislation (including those related to new DNA analysis techniques as outlined above); advising Police and the forensic services provider on the development of practice, policy and procedure in numerous areas, including to provide for tikanga Māori; monitoring the operation of the DNA regime, including its impact on Māori; approving applications for the use of the proposed DNA databank for permitted internal research; promoting awareness and understanding of the DNA regime; and advising the Minister of Justice on any issues the Committee is notified of or self-identifies.

41. We propose that membership of the DNA Oversight Committee requires expertise in forensic science, ethics, criminal law and procedure, te ao Māori and tikanga Māori, privacy, or human rights. We recommend between five to seven members with, as noted above, at least three being Māori (the Māori caucus). We think a strong Māori membership will facilitate a partnership approach to oversight and avoid issues inherent in a dual-committee structure.

42. We recommend that the DNA Oversight Committee should have the power to determine its own procedures, including whether the Māori caucus should have specific responsibilities within the Committee's broad functions, such as advising on Māori interests or tikanga, or exercising a form of kaitiakitanga over Māori DNA and data.

43. We also propose that a member of the Independent Police Conduct Authority be an additional member of the DNA Oversight Committee. We do not propose that Police and the forensic services provider be members but consider they should have a right of attendance at Committee meetings.

44. We also propose that auditing of the operation of the proposed DNA databank be carried out by the Independent Police Conduct Authority.

A FINAL COMMENT

45. We conclude with a matter that falls outside our Terms of Reference. We note the rapid pace of technological developments in relation to other biometric information, such as facial recognition software, remote iris recognition and other behavioural biometrics (for example, voice pattern analysis). We are also aware of concerns in relation to existing and emerging forensic science techniques other than DNA analysis. Many of these are largely unregulated in Aotearoa New Zealand. In light of such developments, and concerns that have arisen in other jurisdictions, we recommend that the Government considers the adequacy of existing oversight arrangements in the fields of biometrics and forensic science.

Recommendations

CHAPTER 3: A NEW ACT

R1 The CIBS Act should be repealed and replaced with a new statute that comprehensively regulates the collection and use of DNA in the investigation and prosecution of offences and the investigation of missing and unidentified people (new DNA legislation).

R2 New DNA legislation should include a provision that identifies the specific measures that give practical effect to the Crown's responsibility to consider and provide for Māori rights and interests under the Treaty. Specific measures identified should include:

a. providing that the purpose of the new DNA legislation includes facilitating the collection and use of DNA in a manner that recognises and provides for tikanga Māori (see R3);

b. establishing a multi-disciplinary DNA Oversight Committee, which must include Māori members (see R8–R11);

c. requiring the development of practice, policy and procedure in consultation with the DNA Oversight Committee to ensure the collection and use of DNA is consistent with the purpose of the new DNA legislation (see R38, R44, R59, R73, R80, R96, R104, R134, R150, and R187);

d. requiring Police to report on how the collection and use of DNA under the Act affects Māori (see R23); and

e. empowering the DNA Oversight Committee to monitor the operation of the DNA regime on Māori (see R14.c).

R3 New DNA legislation should include a purpose statement that confirms that the purpose of the Act is to facilitate the collection and use of DNA in the investigation and prosecution of offences and the investigation of missing and unidentified people in a manner that:

a. minimises interference with a person's privacy and bodily integrity;

b. recognises and provides for tikanga Māori; and

c. is otherwise consistent with human rights values.

CHAPTER 4: A NEW DNA DATABANK

R4 The existing DNA Profile Databank, Temporary Databank and Crime Sample Databank should be replaced with a single DNA databank with an index system (the proposed DNA databank).

R5 The proposed DNA databank should be used to store all DNA profiles that are generated from DNA samples obtained in the investigation and prosecution of offences and the investigation of missing and unidentified people.

R6 No comparison between a crime scene profile and any other profile on the proposed DNA databank should be permitted outside the proposed DNA databank.

R7 The Government should consider whether the proposed DNA databank should include a law enforcement elimination index.

CHAPTER 5: OVERSIGHT OF THE DNA REGIME

R8 New DNA legislation should establish a DNA Oversight Committee to exercise independent oversight of the DNA regime.

R9 New DNA legislation should require the Minister of Justice to appoint members of the DNA Oversight Committee comprising:

a. between five and seven members who, between them, have expertise in the areas of:
   i. forensic science;
   ii. ethics;
   iii. criminal law and procedure;
   iv. te ao Māori and tikanga Māori;
   v. privacy;
   vi. human rights; and
   vii. any other area the Minister considers relevant having regard to the Committee's functions; and

b. one member who is a member of the Independent Police Conduct Authority (IPCA).

R10 No less than three members of the DNA Oversight Committee must be Māori members.

R11 The Minister should consult with Māori before appointing any Māori members.

R12 A representative of Police and a representative of the forensic services provider should be able to attend each meeting of the DNA Oversight Committee, but these representatives are not members of the Committee and may be excluded from deliberations and decision making.

R13 The primary function of the DNA Oversight Committee should be to support and promote the operation of the DNA regime in a manner that is consistent with the purpose of the new DNA legislation.

R14 In order to carry out its primary function, the DNA Oversight Committee should have the following statutory functions:

a. Evaluating proposals to make or amend regulations under new DNA legislation, including proposals to approve new DNA analysis techniques, and advising the Minister of Justice about whether regulations should or should not be made.

b. Advising (with or without a request) Police and the forensic services provider on practice, policy and procedure relating to the operation of the DNA regime to support and promote the purpose of the new DNA legislation.

c. Monitoring the operation of the DNA regime, which should include monitoring the impact of the DNA regime on Māori.

d. Approving applications for the use of the proposed DNA databank for research purposes.

e. Promoting awareness and understanding of the DNA regime.

f. Advising (with or without a request) the Minister of Justice on any aspect of the operation of new DNA legislation and the desirability of any amendments to the legislation or regulations.

R15 Police (and the forensic services provider, if relevant) must have regard to the advice of the DNA Oversight Committee and notify it of any action taken to give effect to that advice. When advice is not acted on, Police (or the forensic services provider) must give reasons for not doing so and explain any alternative action taken.

R16 The DNA Oversight Committee should have all the powers necessary to perform its functions, including powers to regulate its own procedures, require information from Police and the forensic services provider, establish subcommittees or advisory panels on a standing or ad hoc basis and consult with members of the public or any person or body who, in the opinion of the Committee, can assist it to perform its functions.

R17 The DNA Oversight Committee should report annually on the performance of its functions, and that report should be published (including online) and tabled in Parliament.

R18 New DNA legislation should give IPCA the function of conducting audits of the collection, use, storage and retention of DNA samples and profiles by Police and the forensic services provider to ensure compliance with new DNA legislation and any relevant policy, practice or procedure. IPCA must convey the results of audits to Police and the forensic services provider and make any recommendations it considers appropriate to facilitate compliance.

R19 Audits should be conducted at regular intervals and at any other time as IPCA may decide.

R20 In performing its audit function, IPCA should regularly consult with the DNA Oversight Committee and brief it on its audit findings and outcomes.

R21 IPCA should provide a briefing to the DNA Oversight Committee, at least once a year or at more regular intervals, on any complaints received in relation to the DNA regime and the outcome of such complaints.

R22 New DNA legislation should deem DNA samples obtained in the investigation and prosecution of offences and the investigation of missing and unidentified people to be "personal information" for the purposes of the Privacy Act.

R23 New DNA legislation should include comprehensive reporting requirements that require Police to publicly report annually on the collection, use, storage and retention of DNA samples well as on the operation of the proposed DNA databank.

R24 The Government should consider whether there is a need to improve oversight of the use of other forms of biometric data and forensic science techniques.

CHAPTER 6: REGULATING DNA ANALYSIS

R25 New DNA legislation should regulate the analysis of all DNA samples obtained in the investigation and prosecution of offences and the investigation of missing and unidentified people.

R26 New DNA legislation should provide that only those DNA analysis techniques that have been approved in regulations made under that Act may be used in the investigation and prosecution of offences and the investigation of missing and unidentified people.

R27 Regulations approving the use of DNA analysis techniques should describe the purpose for which their use has been approved and any other parameters or conditions on their use. Any new ways of using approved techniques outside of these limitations should require separate approval.

R28 Regulations approving DNA analysis techniques or new uses of such techniques should only be made or amended on the recommendation of the Minister of Justice after the Minister has received and considered advice from the DNA Oversight Committee.

R29 New DNA legislation should require that, when evaluating proposals relating to new DNA analysis techniques, the DNA Oversight Committee should consider:

a. to what extent scientific validity has been established;

b. the extent to which the proposal is consistent with the purpose of the new DNA legislation (see R3);

c. whether the proposal has any implications for the Crown's obligations under the Treaty; and

d. any other matters including ethical, legal or cultural considerations that it considers appropriate.

R30 When advising the Minister on new DNA analysis techniques, the DNA Oversight Committee should advise on the purpose for which the technique should be approved and any other parameters or conditions that should be put in place.

R31 New DNA legislation should define "DNA profile", for the purposes of that Act, as information, in relation to a person, that comprises a set of identification characteristics generated from DNA analysis of a sample of biological material obtained from that person that:

a. is clearly identifiable as relating to that person;

b. reveals the least amount of information possible about that person's personal genetic characteristics; and

c. is able to be compared with information obtained from an analysis (using the same technique) of another sample of biological material for the purpose of determining, with reasonable certainty, whether or not the other sample is from that person.

R32 Consideration should be given to amending the Solicitor-General's prosecution guidelines to require caution in relation to a case based on DNA evidence alone.

R33 Consideration should be given to amending the Evidence Act 2006 to require that a Judge in a criminal proceeding warn a jury of the special need for caution before finding a defendant guilty in reliance on DNA evidence alone.

R34 New DNA legislation should anticipate and provide for the regulation of other types of genetic or genome-based analysis.

CHAPTER 7: THE FORENSIC SERVICES PROVIDER

R35 New DNA legislation should expressly provide for a forensic services provider to perform functions under the Act on behalf of Police, which may include forensic analysis and databank administration services.

R36 New DNA legislation should require the forensic services provider to:

a. act impartially in performing any functions under the Act;

b. hold and maintain accreditation to the accepted international standard, together with any relevant additional requirements considered broadly applicable to forensic services providers and laboratories; and

c. apply all quality standards and assurance processes required by accreditation.

R37 New DNA legislation should permit the forensic services provider to access DNA samples obtained from known people under that Act and profiles generated from those samples to complete internal validation for any proposed new DNA analysis techniques.

R38 The forensic services provider, in consultation with Police and the DNA Oversight Committee, should be required to develop and publish (including online) policy on how it obtains and stores anonymised population data for the purpose of assessing allele frequencies in subpopulation groups within Aotearoa New Zealand to ensure that data is obtained and stored in a manner that:

a. is consistent with the purpose of the new DNA legislation (see R3); and

b. ensures proper recognition of and respect for cultural and spiritual values.

R39 New DNA legislation should require the proposed DNA databank to be maintained in a way that:

a. complies with all relevant requirements in new DNA legislation;

b. ensures the security of the databank, including the maintenance of appropriate back-up and disaster recovery procedures; and

c. keeps information held on the proposed DNA databank secure from inappropriate access or misuse.

R40 Comparison of profiles within and between the offenders and pre-conviction indices of the proposed DNA databank should be permitted for the purposes of administering the databank.

CHAPTER 8: SUSPECT SAMPLING

R41 The adult suspect sampling regime should continue to be based on informed consent, with the improved safeguards outlined in R42–R46.

R42 A police officer should only be able to request a suspect sample from an adult suspect if satisfied that:

a. there are reasonable grounds to suspect that the suspect has committed an imprisonable offence;

b. there are reasonable grounds to believe that analysis of the suspect sample would tend to confirm or disprove the suspect's involvement in the commission of the offence; and

c. the request is reasonable in all the circumstances.

R43 Subject to R46, an adult suspect should only be deemed to have provided their informed consent to the obtaining of a suspect sample if:

a. they have agreed to the obtaining of a suspect sample after a police officer has:

   i. given them a notice containing specified information;

   ii. explained the information in the notice in a manner and language that is appropriate to their level of understanding;

   iii. given them a reasonable opportunity to consult privately with a lawyer; and

   iv. given them a reasonable opportunity to nominate an adult to act as a support person during the consent process and the obtaining of the suspect sample; and

b. the request for the suspect sample, giving of information at R43.a.i and R43.a.ii and giving of consent is, where reasonably practicable, recorded on a video record or otherwise recorded in writing.

R44 Procedures and practices for explaining the specified information should be developed in consultation with the DNA Oversight Committee and should include visual aids and materials produced in English, te reo Māori and other languages commonly spoken in Aotearoa New Zealand.

R45 Consideration should be given to further ways of supporting suspects with brain and behaviour issues to provide informed consent to the obtaining of a suspect sample, within the Government's broader work on responding to brain and behaviour issues in the criminal justice system.

R46 A suspect sample should not be obtained by consent from any adult who lacks the ability to give informed consent.

R47 Suspect samples and the results of any analysis of suspect samples should only be used for the criminal investigation for which they are obtained unless a High Court or District Court Judge authorises a one-off comparison against the crime scene index of the proposed DNA databank under R145.a.

R48 A suspect should be able to withdraw their consent, orally or in writing, before, during or immediately after the sample is obtained and while the suspect is still in the presence of the police officer supervising the sampling procedure. If consent is withdrawn, the suspect should be deemed to have refused to give consent, and any sample obtained should be destroyed immediately.

R49 A police officer should be able to apply to a High Court or District Court Judge for a compulsion order in respect of an adult suspect if the suspect:

a. has refused to consent to the obtaining of a suspect sample; or

b. has failed to give their informed consent within two working days of the request for the suspect sample being made; or

c. lacks the ability to give informed consent; or

d. was the subject of an indirect sample obtained or analysed in accordance with R88–R91.

R50 A Judge should be able to issue a compulsion order in respect of an adult suspect if satisfied that:

a. there are reasonable grounds to suspect that the suspect has committed an imprisonable offence;

b. there are reasonable grounds to believe that analysis of the suspect sample would tend to confirm or disprove the suspect's involvement in the commission of the offence; and

c. making an order is reasonable in all the circumstances.

R51 A suspect sample should only be obtained from a prosecutable child or a young person if a compulsion order is issued by a Youth Court Judge. The Judge may issue a compulsion order if satisfied of the matters in R50.a–R50.c.

R52 For the purposes of legal aid, legal services provided under new DNA legislation in relation to the investigation and prosecution of offences should be classified as "criminal legal aid".

CHAPTER 9: ELIMINATION SAMPLING

R53 New DNA legislation should prescribe an elimination sampling regime based on informed consent.

R54 In the investigation into the commission of an imprisonable offence, a police officer should be able to request an elimination sample in relation to any person who is not a suspect in that investigation.

R55 An elimination sample should only be obtained from a person (the donor) if informed consent is given to the collection of that sample. Informed consent should usually be given by the donor, subject to the following situations where the informed consent of another responsible adult is required:

a. If the donor is under the age of 14, informed consent must be given by a parent or guardian.

b. If the donor is aged between 14 and 18, informed consent must be given by both the donor and a parent or guardian.

c. If the donor lacks the ability to give informed consent, informed consent must be given by a parent or guardian (if the donor is aged between 14 and 18) or by a welfare guardian or principal caregiver (if the donor is aged over 18).

R56 If informed consent is given on behalf of a donor under R55.a or R55.c, new DNA legislation should also provide that:

a. the requesting officer must ensure that, where reasonably practicable, the request for the elimination sample, the procedure for obtaining the elimination sample and how the sample will be used is explained to the donor in a manner and language that they are likely to understand; and

b. no sample shall be taken if the donor objects or resists.

R57 In limited circumstances, a District Court or High Court Judge should be able make an order authorising the collection of an elimination sample from a child or young person or from a donor who lacks the ability to consent. An order would replace the need for informed consent to be obtained from the responsible adult identified in R55 but would not displace the provisions in R56 or, if the donor is a young person who does not lack the ability to consent, the requirement that the young person give informed consent in R55.b. An order should only be able to be issued if the Judge is satisfied that the informed consent of a responsible adult cannot be reasonably obtained or that the responsible adult is a suspect in the investigation and that making the order is reasonable in all the circumstances.

R58 A person should be deemed to have provided their informed consent to the collection of an elimination sample only if:

a. they have agreed to the obtaining of an elimination sample after a police officer has:

   i. given them a notice containing specified information;

   ii. explained the information in the notice in a manner and language that they are likely to understand;

   iii. given them a reasonable opportunity to consult privately with a lawyer; and

iv. where the person giving informed consent is the donor, given them a reasonable opportunity to nominate an adult to act as a support person during the consent process and the obtaining of the elimination sample; and

b. the request for the elimination sample, giving of the specified information at R58.a.i and R58.a.ii and the giving of consent is recorded on a video record, where reasonably practicable, or otherwise recorded in writing.

R59 Procedures and practices for explaining the specified information should be developed in consultation with the DNA Oversight Committee and should include visual aids and materials produced in English, te reo Māori and other languages commonly spoken in Aotearoa New Zealand.

R60 Elimination samples and the results of any analysis of elimination samples should only be used for the criminal investigation for which they are obtained.

R61 An elimination sample or the results of any analysis of that sample should not be permitted to be used as evidence against the donor except by order of a High Court, District Court or Youth Court Judge that authorises an elimination sample to be treated as a suspect sample in the criminal investigation for which the sample was obtained.

R62 A Judge may order that an elimination sample is to be treated as a suspect sample if satisfied that:

a. the elimination sample was lawfully obtained;

b. analysis of the elimination sample has produced information that tends to confirm the donor's involvement in the commission of the offence;

c. if the donor is a child, the offence is one for which the child may be prosecuted; and

d. in all the circumstances, it is reasonable to make the order.

R63 A person who gives consent to the obtaining of an elimination sample should be able to withdraw their consent at any time, orally or in writing, and in these circumstances, consent shall be deemed to have been refused.

R64 If consent is withdrawn before or during the taking of the elimination sample, any sample obtained shall be destroyed immediately.

R65 If consent is withdrawn after the elimination sample has been obtained, the sample and any information obtained from the analysis of that sample shall be destroyed as soon as practicable, subject to an order of a High Court, District Court or Youth Court Judge that the elimination sample is to be treated as a suspect sample under R62 or is to be otherwise retained under R66.

R66 A Judge may order the retention of an elimination sample and any information obtained from the analysis of that sample for the purposes of the investigation for which it was obtained if:

a. there are reasonable grounds to believe that analysis of the elimination sample would tend to confirm or disprove a suspect's involvement in the commission of the offence; and

b. in all the circumstances, it is reasonable to make the order.

R67 A donor's refusal to consent or withdrawal of consent should not be used as evidence against them in any proceedings.

CHAPTER 10: MASS SCREENING

R68 New DNA legislation should prescribe a mass screening regime based on informed consent.

R69 Any mass screen should be authorised by order of a High Court or District Court Judge (mass screen order).

R70 A Judge may issue a mass screen order in relation to a profile on the crime scene index if satisfied that:

a. a databank search has failed to identify a suspect;

b. there are reasonable grounds to believe that the mass screen is likely to further an investigation into the commission of an imprisonable offence; and

c. the mass screen is reasonable in all the circumstances, having regard to:

   i. the nature and seriousness of the suspected offending;

   ii. the stage of the investigation and the availability of alternative investigative methods;

   iii. the size and scope of the class of people who may be affected by the mass screen;

iv. the evidential basis on which the class is proposed; and

v. any other matter that the Judge considers relevant.

R71 The Judge must set out the class of people who may be screened pursuant to the order and may impose any conditions on the mass screen that they think fit.

R72 No mass screen order shall authorise the collection of DNA samples from any person under the age of 18 years.

R73 Police should develop practice guidelines on when to consider applying for a mass screen order and how a specified class of people should be defined. These guidelines should be developed in consultation with the DNA Oversight Committee.

R74 A police officer should be able to request a DNA sample from any person to whom the mass screen order applies (mass screen sample), subject to R76.

R75 The requirements for obtaining informed consent to provide a mass screen sample should be consistent with the requirements that apply to the collection of elimination samples (set out in R58), with the necessary modifications.

R76 A mass screen sample should not be obtained from any person who lacks the ability to give informed consent.

R77 Mass screen samples and the results of any analysis should only be used in the criminal investigation for which they are obtained.

R78 A person who provides a mass screen sample should be able to withdraw their consent before, during or immediately after the sample is obtained, and the provisions for withdrawing consent to the obtaining of suspect samples (R48) should apply, with the necessary modifications.

R79 A donor's refusal to consent or withdrawal of consent to the collection of a mass screen sample should not be used as evidence against them in any proceedings nor to support reasonable grounds to suspect that person of committing the offence under investigation.

CHAPTER 11: CASEWORK SAMPLING PROCEDURES

R80 Police should develop policy in consultation with the DNA Oversight Committee to ensure that sampling procedures under the new DNA legislation are carried out in a manner that is consistent with the purpose of the new DNA legislation (see R3).

R81 New DNA legislation should continue to provide for DNA samples to be obtained by buccal sample, fingerprick sample or venous sample. New sampling methods should be authorised by regulations made under new DNA legislation.

R82 Any person who provides a DNA sample should be given the opportunity to elect one of the sampling methods referred to in R81. If no election is made, the least intrusive method should be used.

R83 Any person who provides a DNA sample should be entitled to have the following people present during the sampling procedure:

a. a lawyer or another adult of the donor's choice;

b. if the donor is under the age of 18, a parent or guardian; and

c. if the donor is over the age of 18 and lacks the ability to understand the general nature and effect of the sampling procedure, a welfare guardian or principal caregiver.

R84 The use of reasonable force to obtain a DNA sample from a person who refuses to comply with a compulsion order should continue to be available, subject to any conditions imposed by a Judge when issuing the compulsion order.

R85 Any exercise of reasonable force to obtain a DNA sample from a person under R84 must be reported to the Commissioner of Police no later than three days after the sample is obtained, and Police should report annually on the use of reasonable force to obtain a suspect sample including:

a. whether the person is a child, young person or adult; and

b. the ethnicity of the person.

R86 No inference should be able to be drawn from a person's refusal to comply with a compulsion order in any criminal proceedings against that person for the offence for which the suspect sample was ordered or a related offence.

CHAPTER 12: INDIRECT SAMPLING

R87 New DNA legislation should prescribe a regime for indirect sampling in criminal investigations.

R88 New DNA legislation should not permit the analysis of a DNA sample obtained indirectly from a suspect unless a High Court or District Court Judge has granted:

a. a search warrant to obtain a physical object or stored sample that is believed to contain or consist of the suspect's biological material for DNA analysis (DNA search warrant); or

b. an order authorising the analysis of a DNA sample that has already been obtained (DNA analysis order).

R89 New DNA legislation should include the power to issue a DNA search warrant in relation to a place, vehicle or other thing if the Judge is satisfied that:

a. there are reasonable grounds to believe that a physical object or stored sample that contains or consists of the suspect's biological material will be found;

b. there are reasonable grounds to suspect that the suspect has committed an imprisonable offence;

c. there are reasonable grounds to believe that analysis of the physical object or stored sample would tend to confirm or disprove the suspect's involvement in the commission of the offence;

d. requiring a police officer to obtain a DNA sample directly from the suspect would prejudice the maintenance of the law, including the prevention, detection, investigation, prosecution and punishment of offences; and

e. in all the circumstances, it is reasonable to make the order.

R90 A DNA analysis order should only be issued if the Judge is satisfied that:

a. there are reasonable grounds to believe that the DNA sample obtained indirectly contains or consists of the suspect's biological material; and

b. the requirements in R89.b to R89.e are satisfied.

R91 A DNA sample obtained indirectly from a suspect and the results of the analysis of that DNA sample should only be used for the criminal investigation for which it was obtained and should not be used as evidence, except in respect of an application for a suspect compulsion order.

R92 The *Memorandum of Understanding: The Disclosure of Newborn Blood Spot Samples and Related Information* between Ministry of Health and Police should be amended to remove the provision for Police to obtain samples relating to a suspect in a criminal investigation under search warrant.

R93 New DNA legislation should prohibit the collection of a DNA sample from a close genetic relative of a suspect for the purpose of obtaining a suspect sample indirectly.

R94 A police officer should be able to obtain an elimination sample indirectly from a physical object or stored sample that is believed to contain or consist of the donor's biological material if:

a. informed consent has been given under R55 by a responsible adult on behalf of the donor because the donor is under the age of 14 or lacks the ability to give informed consent; and

b. the donor objects to or resists the taking of an elimination sample directly from them.

CHAPTER 13: CRIME SCENE EXAMINATIONS

R95 A specific authority to seize items or material for DNA analysis should be prescribed in legislation. This authority should provide that, when exercising a search power under the Search and Surveillance Act 2012 in relation to any place, vehicle or thing or when collecting evidential material in a public place, a police officer may seize any item or material for the purpose of analysis pursuant to new DNA legislation to determine the item's or material's relevance to the investigation (whether by itself or together with other material).

R96 Police should develop, in consultation with the DNA Oversight Committee, practice guidelines on the exercise of powers under the Search and Surveillance Act 2012 to collect biological material for DNA analysis from the body of a person. These guidelines should be published (including online).

R97 Consideration should be given to the need for a separate regime or policy for the collection of other forms of forensic evidential material from suspects.

CHAPTER 14: FORENSIC DNA PHENOTYPING

R98 DNA analysis techniques to infer evidentially visible characteristics should only be used if approved in regulations made under new DNA legislation under R26, and only after following the process recommended in R28–R30.

R99 New DNA legislation should prohibit the use of DNA analysis techniques to conduct ancestry inferencing.

CHAPTER 15: GENETIC GENEALOGY SEARCHING

R100 New DNA legislation should regulate the use of genetic genealogy searching in criminal investigations.

R101 New DNA legislation should not permit the disclosure of any biological material obtained in the course of a criminal investigation, or any information derived from the analysis of that material (including a DNA profile), to a genetic ancestry database for genetic genealogy searching except by order of a High Court or District Court Judge (genetic genealogy search order).

R102 A Judge may issue a genetic genealogy search order if satisfied that:

a. a databank search of the proposed DNA databank has failed to identify a suspect; and

b. conducting a genetic genealogy search is reasonable in all the circumstances, having regard to:

   i. the purpose of the new DNA legislation;

   ii. the nature and seriousness of the suspected offending;

   iii. the stage of the investigation and the availability of alternative investigative methods (including a familial search of the proposed DNA databank); and

   iv. any other matter the Judge considers relevant.

R103 New DNA legislation should provide that the results of a genetic genealogy search order should not of itself constitute reasonable grounds to suspect a person of committing the offence under investigation.

CHAPTER 16: MANAGEMENT OF CASEWORK AND CRIME SCENE SAMPLES

R104 Police and the forensic services provider, in consultation with the DNA Oversight Committee, should establish procedures to govern the storage and destruction of all DNA samples and related information to ensure that DNA samples and related information are managed in a manner that:

a. is consistent with the purpose of the new DNA legislation (see R3); and

b. ensures proper recognition of and respect for cultural and spiritual values; and

c. does not endanger the health and safety of any person.

R105 Storage and destruction procedures should be published (including online) and the notice requirements for people providing a DNA sample should include information on these procedures.

R106 The proposed DNA databank should include a pre-conviction index to store DNA profiles generated from suspect samples and indirect samples as well as samples required from a person arrested or intended to be charged (see R144).

R107 The proposed DNA databank should include an elimination index to store DNA profiles generated from elimination and mass screen samples.

R108 Subject to R110, suspect samples and indirect samples should be destroyed no later than three months after:

a. the expiry of 12 months from the date the sample was obtained if that person is not charged with the offence in relation to which the sample was obtained or a related offence in that time; or

b. the person is charged and the charge is withdrawn; or

c. the person is charged and the person is acquitted of the offence; or

d. the expiry of any appeal period if the person is convicted of an offence that does not meet the threshold for retention of that person's DNA profile on the offenders index of the proposed DNA databank.

R109 If a person is convicted of the offence in relation to which a suspect sample was obtained or a related offence and that offence is punishable by two or more years' imprisonment, the suspect sample should be destroyed no later than three months after a DNA profile has been created for retention on the proposed DNA databank.

R110 A police officer of or above the position of inspector should be able to apply to a High Court, District Court or Youth Court Judge for an extension of the 12-month period in R108.a. A Judge may grant an extension if satisfied that:

a. there are still reasonable grounds to suspect that the person committed the offence or a related offence, there is a good reason for the person not having been charged and it is important to the investigation that the suspect sample and related records be retained; or

b. there are no longer reasonable grounds to suspect that the person committed the offence but it is important to the investigation of the offence, or to proceedings in relation to that offence that the sample and any related records be retained.

R111 Elimination samples and mass screen samples should be destroyed no later than three months after the investigation is concluded or proceedings relating to that investigation are determined if consent has not already been validly withdrawn.

R112 Any material extracted from a suspect sample (subject to R163), elimination sample or mass screen sample and any information derived from the analysis of that sample (including a DNA profile stored on the proposed DNA databank) should be subject to the same retention and destruction rules that apply to that sample.

R113 Any person who provides a DNA sample by buccal (mouth) swab should be able to elect to retain the swab.

R114 Any person who provides a DNA sample should be able to elect to be notified of the destruction of that that sample and any material derived from that sample.

R115 New DNA legislation should require a crime scene sample to be retained for a period of 50 years from the date of collection if a person is convicted of the offence (or a related offence) in relation to which the sample was collected.

R116 The retention period referred to in R115 may be extended by order of a High Court or District Court Judge on application from a police officer or the person convicted of the offence or their representative if the Judge is satisfied that it is in the interests of justice to do so. The Judge must have regard to:

a. whether the convicted person has exercised their rights of appeal against the conviction or the sentence;

b. any requests to have the crime scene sample(s) reanalysed;

c. the nature of any proceedings;

d. any investigation undertaken by the Criminal Cases Review Commission; and

e. any other matter the Judge considers relevant.

R117 Legislation should provide for access to biological material held by or on behalf of Police for reanalysis for exoneration purposes.

CHAPTER 17: THE CRIME SCENE INDEX

R118 The proposed DNA databank should include a crime scene index to store profiles generated from samples collected from crime scenes (crime scene profiles) for:

a. databank searching; and

b. casework comparison.

R119 Databank searching should be defined in new DNA legislation as the process of comparing a profile on the proposed DNA databank to another profile or index of profiles as permitted by the matching rules.

R120 Casework comparison should be defined in new DNA legislation as the process of comparing a crime scene profile to a profile from a known person and determining the likelihood ratio resulting from that comparison.

R121 New DNA legislation should require all profiles loaded to the crime scene index to be classified as:

a. available for databank searching; or

b. limited to casework comparison.

R122 A crime scene profile should be classified as available for databank searching if:

a. the crime scene profile only contains the DNA of one person;

b. a comparison to any profiles on the elimination index that relate to that investigation does not result in a match; and

c. the crime scene profile meets the relevant quality requirements set out in the Crime Scene Index Protocol (see R134).

R123 A crime scene profile that does not satisfy the requirements in R122 should be classified as limited to casework comparison.

R124 No crime scene profile should be loaded to the crime scene index unless it relates to an investigation into the commission of an offence or an offence that is reasonably suspected to have been committed.

R125 Before classifying a crime scene profile as available for databank searching, all reasonable attempts must be made to obtain and analyse elimination samples from people who are not suspects but whose DNA may be present at the crime scene.

R126 A databank search may be conducted between a crime scene profile classified as available for databank searching and:

a. other profiles on the crime scene index that are classified as available for databank searching; and

b. all profiles on the offenders index.

R127 A one-off databank search may be conducted between a crime scene profile classified as limited to casework comparison and profiles referred to in R126.a and R126.b if:

a. a comparison between the crime scene profile and any profiles on the elimination index that relate to that investigation does not result in a match; and

b. a police officer of or above the position of inspector approves a one-off databank search on the basis that it meets the relevant requirements set out in the Protocol (see R134).

R128 The results of any databank search should be used for intelligence purposes only and must not be used as evidence in support of any proceedings, except in support of an application for a suspect compulsion order (subject to R129).

R129 If a databank search results in a match between two crime scene profiles and one or both of those profiles matches to a profile on the elimination index, the results of that databank search must not be used as evidence in support of any proceedings, including any application for a suspect compulsion order.

R130 A casework comparison may be conducted between any crime scene profile on the crime scene index and:

a. profiles on the pre-conviction index generated from suspect samples or indirect samples that were obtained for the investigation to which the crime scene profile relates; and

b. profiles on the elimination index that relate to the investigation.

R131 The result of a casework comparison should be presented as a likelihood ratio and may be used as evidence in support of any proceedings.

R132 A crime scene profile must be removed from the crime scene index upon the resolution of the investigation to which that profile relates.

R133 When a crime scene profile is removed from the crime scene index upon the resolution of the investigation, it may be stored on a non-searchable electronic case file maintained by the forensic services provider and must not be reloaded to the crime scene index unless the relevant investigation is reopened.

R134 The Crime Scene Index Protocol should be developed by Police and the forensic services provider in consultation with the DNA Oversight Committee and be published (including online). The Protocol should outline policy, practice and procedure in relation to the crime scene index and should include:

a. the minimum quality threshold that a crime scene profile must meet to be classified as available for databank searching under R122.c;

b. requirements for conducting a one-off databank search under R127 in respect of a crime scene profile that is classified as limited to casework comparison;

c. parameters for when a match will be reported by the forensic services provider to Police following a databank search; and

d. policy on when an investigation is "resolved" and "reopened" for the purposes of R132 and R133.

CHAPTER 18: DATABANK SAMPLING

R135 The proposed DNA databank should include an offenders index to store the DNA profiles of people convicted of a qualifying offence (see R141).

R136 Profiles stored on the offenders index of the proposed DNA databank should be able to be compared against profiles on the crime scene index to identify potential suspects in unresolved criminal offending.

R137 If an adult is convicted of a qualifying offence, a police officer of or above the position of inspector should continue to have the power to issue a databank compulsion notice requiring that person to provide a DNA sample for the purpose of storing their DNA profile on the offenders index of the proposed DNA databank.

R138 A databank compulsion notice should only be issued if the issuing officer is satisfied that storing the person's DNA profile on the offenders index is reasonable, having regard to:

a. the nature and seriousness of the offence for which the person was convicted;

b. any history of prior offending; and

c. all other relevant circumstances.

R139 A databank compulsion notice must be issued within one year of the date of conviction for the qualifying offence.

R140 The current process for challenging a databank compulsion notice should remain but with the additional ground that issuing the notice was unreasonable.

R141 A qualifying offence for databank purposes should be defined as any offence punishable by two or more years' imprisonment.

R142 A DNA sample should only be required from an adult arrested or intended to be charged with a qualifying offence if a police officer of or above the position of inspector is satisfied that requiring a sample is reasonable, having regard to:

a. the nature and seriousness of the suspected offending;

b. any history of prior offending; and

c. all other relevant circumstances.

R143 No sample should be required under R142 from any adult who lacks the ability to understand the general nature and effect of providing a DNA sample.

R144 Any DNA sample required under R142 must only be used to generate a DNA profile to be stored on the pre-conviction index of the proposed DNA databank (see R106).

R145 Profiles on the pre-conviction index of the proposed DNA databank should not be compared against profiles on the crime scene index, subject to the following exceptions:

a. A High Court or District Court Judge should be able to authorise a one-off comparison of a profile on the pre-conviction index, generated from a suspect sample or a sample required from a person arrested or intended to be charged, against all profiles on the crime scene index if satisfied that:

   i. there are reasonable grounds to suspect that person has committed other offences;

ii. there are reasonable grounds to believe that a comparison may result in a match; and

iii. in all the circumstances, it is reasonable to make an order.

b. A profile on the pre-conviction index that is generated from a suspect sample or an indirect sample should be able to be compared against a profile or profiles on the crime scene index that relate to the investigation for which the suspect sample or indirect sample was obtained.

R146 If an adult provides a suspect sample or a sample when arrested or intended to be charged and their DNA profile is stored on the pre-conviction index, a police officer of or above the position of inspector should be able to issue a databank transfer notice to that adult if they are subsequently convicted of the offence for which the DNA sample was obtained (or a related qualifying offence). A databank transfer notice must notify that person that their profile will be transferred to the offenders index on or after a specified date, which must be at least 14 days after the date on which the notice is served.

R147 A databank transfer notice must only be issued if the issuing police officer is satisfied that retaining that person's DNA profile on the offenders index is reasonable, having regard to the matters specified in R138.

R148 The process for issuing and challenging a databank transfer notice should align with the databank compulsion notice process (including our recommendations in R139 and R140), with the necessary modifications.

R149 There should no longer be any power to obtain a DNA sample for databank purposes from a volunteer.

R150 Police should develop policy in consultation with the DNA Oversight Committee to ensure that databank sampling is carried out in a manner that is consistent with the purpose of the new DNA legislation (see R3). This policy should be published (including online).

R151 A profile on the DPD should transferred to the offenders index of the proposed DNA databank if:

a. the profile was generated from a DNA sample obtained in relation to a qualifying offence and the person was aged 18 or over at the time the offence was committed; or

b. since the profile was loaded to the DPD, the person has been convicted of a qualifying offence and was aged 18 or over at the time that offence was committed.

R152 The Returning Offenders (Management and Information) Act 2015 should be amended to align the regime for requiring DNA samples from returning offenders with the regime for requiring DNA samples from offenders under new DNA legislation.

R153 The regime for requiring DNA samples from offenders under new DNA legislation should apply to military convictions entered by the Court Martial for offences that would constitute qualifying offences if entered by the District Court or High Court.

R154 If a databank compulsion notice hearing is requested in relation to a notice issued in respect of a military conviction, the hearing should be heard by the Court Martial.

CHAPTER 19: DATABANK SAMPLING PROCEDURES

R155 If an adult refuses to provide a sample when arrested or intended to be charged under R142, a police officer should only use or cause to be used reasonable force to assist a suitably qualified person to take a sample if that use is authorised by a police officer of or above the position of inspector being satisfied that:

a. the person has been given a reasonable opportunity to consult privately with a lawyer;

b. the person has been informed of the intention to use reasonable force to obtain the sample;

c. taking the sample does not pose a serious risk to the health and safety of the person; and

d. the use of reasonable force is reasonable in all the circumstances.

R156 If a person refuses to provide a sample pursuant to a databank compulsion notice under R137, or pursuant to an order made under R165, a police officer may use or cause to be used reasonable force to assist a suitability qualified person to take a sample.

R157 Any exercise of reasonable force to assist a suitably qualified person to take a sample under new DNA legislation must only occur if:

a. the sample is taken in the presence of a lawyer or another person of the donor's choice or, if the donor does not choose a person to be present, a person who is not a Police employee; and

b. the sampling procedure is recorded on a video record.

R158 Any exercise of reasonable force under R155 or R156 must be reported to the Commissioner of Police no later than three days after the sample is taken, and Police should report annually on the use of reasonable force to obtain a databank sample, including:

a. whether the person is a child, young person or adult; and

b. the ethnicity of the person against whom reasonable force is used.

CHAPTER 20: STORAGE AND RETENTION OF DATABANK SAMPLES AND PROFILES

R159 Databank samples should be destroyed as soon as practicable after a DNA profile has been obtained from the sample but no later than three months after the date the sample was obtained.

R160 Subject to R168–R169 (relating to children and young people), a DNA profile stored on the offenders index of the proposed DNA databank should be removed and destroyed no later than three months after:

a. the conviction in respect of which the profile is stored on the offenders index is quashed; or

b. the expiry of seven years from the date of conviction if the offender was sentenced to a non-custodial sentence and has not been convicted of a subsequent qualifying offence during that time; or

c. the person's death is registered under the Births, Death, Marriages, and Relationships Registration Act 1995.

R161 A DNA sample required from an adult arrested or intended to be charged under R142 must only be sent to the forensic services provider for analysis once the person is charged with the offence in relation to which the sample was obtained. If that person is not charged within two months of the sample being obtained, the sample should be destroyed.

R162 DNA profiles generated from samples required under R142 must only be stored on the pre-conviction index of the proposed DNA databank and should be removed from that index and destroyed no later than three months after:

a. the charge is withdrawn; or

b. the person is acquitted of the offence; or

c. the person is convicted of an offence that does not meet the threshold for retention of that person's DNA profile on the offenders index of the proposed DNA databank.

R163 If a person whose DNA profile is stored on the pre-conviction index is subsequently convicted of the qualifying offence for which the DNA sample was obtained (or a related qualifying offence), their DNA profile should be removed from the pre-conviction index of the proposed DNA databank and destroyed no later than 12 months after the date of conviction if a databank transfer notice has not been issued under R146 within that time or earlier if a databank transfer notice is successfully challenged.

CHAPTER 21: CHILDREN AND YOUNG PEOPLE AND THE DATABANK

R164 The collection of a DNA sample from a child or young person (other than a suspect sample) and the loading of a child's or young person's DNA profile to the offenders index of the proposed DNA databank must only occur if a Judge makes an order under R165.

R165 If an order is made against a child or young person under section 283 of the Oranga Tamariki Act in relation to a qualifying offence (see R141) or if a child or young person is convicted of a qualifying offence, the presiding Judge may make an order (databank order):

a. requiring that child or young person to provide a sample for the purposes of storing their DNA profile on the offenders index of the proposed DNA databank; or

b. authorising the transfer of that child's or young person's DNA profile from the pre-conviction index to the offenders index (if a suspect sample was already obtained from that child or young person).

R166 A Judge may only make an order under R165 if they are satisfied that doing so is reasonable, having regard to:

a. the matters specified in R138; and

b. the considerations and principles that apply when exercising powers under Part 4 of the Oranga Tamariki Act.

R167 No child's or young person's DNA profile should be loaded to the offenders index of the proposed DNA databank in respect of a charge that is discharged under section 282 of the Oranga Tamariki Act, whether or not that charge was proved.

R168 If a databank order is made under R165 and no sentence of imprisonment was imposed in relation to the offending, that child's or young person's DNA profile should remain on the offenders index of the proposed DNA databank for a period of five years from the date the order is made.

R169 If a databank order is made under R165, the retention rules in relation to adult offenders should apply (see R160) if:

a. a sentence of imprisonment was imposed in relation to the offending; or

b. during the five-year period referred to in R168, the child or young person is subject to a further section 283 order or conviction in respect of a qualifying offence.

CHAPTER 22: INVESTIGATING MISSING AND UNIDENTIFIED PEOPLE

R170 New DNA legislation should prescribe a regime for the collection and use of DNA samples for identification purposes.

R171 A police officer should be able to:

a. request a DNA sample from any person who is a close family member of a missing person for the purpose of assisting in the identification of the missing person (family reference sample); and

b. collect, with consent, a DNA sample from the personal items believed to belong to or to have been used by the missing person (indirect missing person sample).

R172 The procedure for requesting and collecting family reference samples should be prescribed in legislation and should be based on the elimination sampling regime outlined in R53–R67, with the necessary modifications.

R173 If a person is unable to identify themselves (an unidentified person), a police officer may only obtain a DNA sample in relation to that person (either directly or indirectly) for the purpose of identifying that person if authorised by order of a District Court or High Court Judge.

R174 The Judge should only authorise the collection of a DNA sample under R173 if satisfied that:

a. the unidentified person is unable to identify themselves and that this inability is likely to endure for a prolonged period;

b. if appropriate, the unidentified person has been consulted regarding the collection of a sample and, if so, does not object to a sample being obtained; and

c. it is in the best interests of that person to be identified.

R175 If an order is made, a sample may be taken from the unidentified person provided they do not object or resist. In all other cases, an order should authorise the obtaining of an indirect sample from personal items believed to belong to or have been used by the unidentified person.

R176 A coroner to whom the death of an unidentified person is reported may authorise a DNA sample to be taken for identification purposes.

R177 A family reference sample should only be used to generate a DNA profile to be stored on the relatives index of the proposed DNA databank. The profile should only be compared against profiles on the missing and unidentified index or unidentified deceased index.

R178 An indirect missing person sample or a sample obtained in relation to an unidentified person should only be used to generate a DNA profile to be stored on the missing and unidentified index of the proposed DNA databank.

R179 A DNA sample obtained from an unidentified deceased person or human remains should only be used to generate a DNA profile to be stored on the unidentified deceased index.

R180 A profile on the missing and unidentified index or the unidentified deceased index should only be able to be compared against:

a. all other profiles on the missing and unidentified index and the unidentified deceased index;

b. profiles on the relatives index; and

c. profiles on the offenders index and pre-conviction index if comparison with profiles under R180.a or R180.b does not result in the identification of an unidentified person or unidentified deceased person.

R181 Profiles on the missing and unidentified index, unidentified deceased index and relatives index should be retained indefinitely, unless:

a. the missing person investigation is resolved, in which case, any related profiles should be removed from the proposed DNA databank and destroyed; or

b. the unidentified person, deceased person or human remains are identified, in which case, any related profiles should be removed from the proposed DNA databank and destroyed; or

c. a person who provided a family reference sample withdraws their consent to the retention of their profile on the relatives index, in which case, that profile should be removed from the proposed DNA databank and destroyed.

CHAPTER 23: OTHER USES OF THE PROPOSED DNA DATABANK

R182 New DNA legislation should prescribe a regime for conducting familial searches of the proposed DNA databank in criminal investigations.

R183 Any familial search of the proposed DNA databank for the purpose of identifying a potential suspect or suspects must be authorised by an order of a High Court or District Court Judge (a familial search order).

R184 A Judge may issue a familial search order in respect of a profile on the crime scene index if satisfied that:

a. a databank search of the proposed DNA databank has failed to identify a suspect; and

b. conducting a familial search is reasonable in all the circumstances, having regard to:

   i. the purpose of the new DNA legislation (see R3);

   ii. the nature and seriousness of the suspected offending;

   iii. the stage of the investigation and the availability of alternative investigative methods; and

   iv. any other matter the Judge considers relevant.

R185 The effect of a familial search order is to permit a familial search of the offenders index of the proposed DNA databank only.

R186 A familial search order may be subject to any conditions the Judge considers appropriate, including conditions that relate to the time within which the familial search must be conducted, whether it can be conducted more than once during that time and any restrictions on the circulation of the results of the familial search order and related information.

R187 Procedural and technical requirements relating to the conduct of familial searches pursuant to a familial search order and how the results of familial searches are investigated should be set out in practice guidelines developed by Police and the forensic services provider in consultation with the DNA Oversight Committee.

R188 New DNA legislation should provide that the result of a familial search order does not of itself constitute reasonable grounds to suspect a person of committing the offence under investigation.

R189 New DNA legislation should permit access to and disclosure of information on the proposed DNA databank for the purpose of:

a. assisting a foreign country to decide whether to make a request for assistance under the Mutual Assistance in Criminal Matters Act 1992 by reporting on a match/no-match basis; and

b. responding to a request under the Mutual Assistance in Criminal Matters Act 1992.

R190 In line with permitted matching rules for domestic law enforcement, access to and disclosure of information on the proposed DNA databank under R189 should be limited to information on the crime scene index and the offenders index and must satisfy the applicable requirements for domestic use.

R191 New DNA legislation should not permit familial searching on the proposed DNA databank on behalf of a foreign country.

R192 New DNA legislation should permit access to and disclosure of information on the proposed DNA databank to conduct research only if that research:

a. is conducted internally by Police or the forensic services provider on Police's behalf;

b. relates to the purpose of the new DNA legislation (see R3); and

c. is approved by the DNA Oversight Committee.

R193 The DNA Oversight Committee will determine the process by which it will consider research requests, and a description of that process, a summary of any research proposals considered by the DNA Oversight Committee and the outcome of its considerations should be published (including online).