Te Aka Matua o te Ture
Law Commission

November 2020
Wellington, New Zealand

The Use of DNA in Criminal Investigations

Te Whakamahi i te Ira Tangata i ngā Mātai Taihara

Q&A Summary

WHY DID THE LAW COMMISSION REVIEW THE LAW ABOUT DNA IN CRIMINAL INVESTIGATIONS?

The Criminal Investigations Bodily Samples Act 1995 (CIBS Act) regulates DNA collection from known individuals, either by consent or by compulsion, and establishes the national DNA databank to hold the resulting profiles, which is administered on behalf of Police by the Institute of Environmental Science and Research (ESR).

There were significant changes to the Act in 2009, including giving Police the power to take DNA samples without judicial pre-approval from any individual they arrest for or intend to charge with an imprisonable offence. At the time, the Government signalled that the effectiveness and efficiency of these amendments would be reviewed. In July 2016, the Minister of Justice referred the CIBS Act to Te Aka Matua o te Ture | Law Commission (the Commission) for a comprehensive review of its operation.

Our terms of reference ask us to determine whether the CIBS Act is keeping pace with developments in forensic science, international best practice and public attitudes, and whether it gives appropriate recognition to law enforcement values and human rights, including the right to privacy.

WHAT ISSUES DID THE LAW COMMISSION FIND WITH THE CURRENT LAW? WHY IS CHANGE NEEDED?

Our review has surveyed 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.

Our review found six fundamental problems with the current Act:

1. It lacks a clear, robust purpose to guide the collection and use of DNA in criminal investigations.
2. 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.
3. 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.
4. It is not comprehensive. The increasing use of DNA in criminal investigations in Aotearoa New Zealand and elsewhere and scientific advances in DNA analysis have highlighted significant gaps in its provisions.
5. It is confusing and complex. A steady history of amendments has made the legislation difficult to apply in practice.
6. There is no statutory provision for independent oversight. This is inconsistent with international best practice.

WHAT WAS THE OBJECTIVE OF THE REVIEW?

Our objective has been to ensure that the law governing the collection and use of DNA in criminal investigations has the following attributes:

1. It should be fit for purpose. To do this, legislation must:
    (a) have a clear purpose and provide certainty as to rights and obligations;
    (b) be sufficiently flexible to enable the law to last and comprehensively address likely scenarios; and
    (c) work effectively with interrelated law in the wider criminal justice system.
2. It should be constitutionally sound — that is, the law should reflect fundamental constitutional principles and values of Aotearoa New Zealand law. This requires:
    (a) consistency with the Treaty;
    (b) recognising and providing for tikanga Māori; and
    (c) consistency with human rights values, including privacy and bodily integrity.
3. It should be accessible for users. The law should be able to:
    (a) be easily found by individuals; and
    (b) be easy to navigate and understand.

These objectives are adopted from the *Legislation Guidelines* approved by Cabinet and are considered the "core objectives for high quality law".

HOW DID THE LAW COMMISSION CONDUCT ITS REVIEW?

Throughout the course of this review we have engaged with a wide range of stakeholders and experts both within Aotearoa New Zealand and overseas, including organisations, judges, lawyers, forensic scientists and academics.

We published an Issues Paper that set out the main issues and options for reform. Alongside this, we used online tools to engage and educate the public on the issues encountered in our review prior to launching an online consultation platform for members of the public to make a formal submission (anonymously if preferred). In total we received 88 submissions from organisations and individuals. All submissions will be released on our website with personal information redacted in accordance with the Privacy Act 1993.

We have held frequent meetings with Police and ESR, the two agencies that use the CIBS Act daily. Both organisations generated substantial data to assist in our review and fact-checked both the Issues Paper and this Report. We also received advice from two specially constituted advisory groups, one of experts and one of officials, with whom we met on several occasions. The Commission's Māori Liaison Committee convened a subcommittee for us to consult with on matters of particular concern to Māori, and we regularly presented on our progress to the Committee.

WHAT ARE THE MAIN AREAS OF REFORM?

DNA samples from adult suspects

Currently a police officer must first attempt to obtain a suspect's DNA sample by consent before they can apply for a court order to compel a sample. The Act includes detailed rules around the information the suspect must be given as part of the consent process.

We agree with the current emphasis on consent but remain concerned that suspects may not always be in a position to provide "free and informed consent" because of the inherent power imbalance between a suspect and the requesting officer, the complexity and volume of information that must be provided and the difficulty in obtaining appropriate legal advice.

We recommend that suspect samples should not be obtained by consent from adults lacking the ability to give informed consent and we also suggest improved safeguards generally. Those safeguards include allowing all adult suspects to choose a support person to assist them in their decision-making, providing and explaining information in a manner and language that is appropriate to the suspect's level of understanding and enabling easier access to legal advice for suspects.

DNA samples from children and young people

Our proposed changes will modernise the law to account for the age and maturity of those in the youth justice system.

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. We also recommend a separate regime for retaining the DNA profiles of youth offenders that is not automatic and that is consistent with the rehabilitative focus of the youth justice system and that can take advantage of the specialist skills of the Youth Court.

Regulating DNA Databanks

A key recommendation is a new comprehensive 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. The proposed DNA databank contains indices to enable comparisons between DNA profiles to be conducted according to matching rules we recommend.

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.

Analysis techniques and the Forensic Services Provider

The technology to analyse DNA has advanced greatly in the past 25 years and change is ongoing. Techniques that improve the sensitivity of DNA analysis or reveal information about a person beyond just their identity are already available. Currently DNA analysis techniques are unregulated by statute. We recommend that only those techniques that have been approved and set out in regulations may be used in the investigation and prosecution of offences.

The Act is also largely silent on the forensic services provider who has a central role in the DNA regime including analysing DNA samples, generating DNA profiles, maintaining the profile databanks and managing the retention and destruction of samples and profiles. We recommend that the role and obligations of the forensic services provider be set out in new DNA legislation.

Indirect Sampling: Police collecting DNA that has been "abandoned" or deposited for a lawful purpose

Indirect sampling occurs when Police collect a DNA sample relating to a suspect via a secondary source. We all leave our genetic material on objects or utensils, for example on cups, toothbrushes, or hairbrushes. It is an involuntary and inevitable part of living and moving through our environment. Individuals also voluntarily give samples of bodily tissue or fluid — usually in a health context. The current law in this area is either fragmented or unclear.

We consider that indirect sampling may sometimes be necessary to assist Police to investigate crime when other ways of obtaining a DNA sample are unavailable. We recommend in those circumstances that Police must seek a court order to conduct indirect collection or to analyse a DNA sample collected indirectly. A judge is best placed to weigh the need to progress criminal investigations against the impact of indirect sampling on privacy and the rights of individuals.

Familial searching

An ordinary databank search looks for an exact match with a crime scene profile. Familial searching looks for a *near match* that might indicate that a close genetic relative of someone on the databank was the source of the DNA found at the crime scene. Police might then use the near match to investigate those relatives to see whether any are potential suspects in the offending. The current legislation does not regulate familial searching.

Familial searching is a questionable intrusion on privacy because it is unclear that using offender DNA profiles to implicate family and whānau members is justified. The practice is also inconsistent with tikanga Māori because it involves the use of whakapapa information to identify potential suspects. Further, it has a disproportionate impact on Māori due to their over-representation on the current databanks. The current lack of oversight for the practice also fails our assessment of transparency and accountability.

We recommend that new DNA legislation require that any familial search must be authorised by an order from a High Court or District Court Judge.

Genetic Genealogy Searching

Genetic genealogy is the application of DNA analysis and traditional genealogy research to infer relationships between individuals. This investigative technique has been made possible by the growth of databases consumers use to find out ancestry information from their DNA, such as AncestryDNA, 23andMe and FamilyTreeDNA. Genetic genealogy searching in criminal investigations compares a DNA profile generated from a crime scene sample that is believed to be from the offender against DNA profiles on a genetic ancestry database. Genetic genealogy searching has not yet been used in Aotearoa New Zealand and Police advise that it is not something it is actively considering. The technique has been used overseas, most notably in the high-profile case of the "Golden State Killer" in the United States.

We recommend that new DNA legislation regulate the use of genetic genealogy searching in criminal investigations. Due to its success elsewhere, it is likely to become a technique of interest in the future. We recommend that genetic genealogy searching be available to Police subject to appropriate safeguards, including judicial authorisation to undertake the process.

Retention of DNA profiles

Most DNA profiles from adults are retained indefinitely upon conviction. Our principal concerns are that indefinite retention may not be proportionate and may be inconsistent with an emphasis on rehabilitation. We recommend that profiles from convicted offenders should be removed if a conviction has been quashed (as the current law provides), or after seven years from the date of conviction if the offender received a non-custodial sentence and has not been convicted of a subsequent offence, or upon the person's death.

If a child or young person receives a non-custodial sentence and a databank order is made in relation to their profile, we recommend a shorter retention period of five years (unless they reoffend within that time).

Oversight of the DNA databank

The absence of independent oversight of the DNA regime places Aotearoa New Zealand out of step with most comparable jurisdictions. This gap also results in a lack of Māori participation, which is 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. We recommend three key changes to repair the oversight gap:

1. Establishing a new DNA Oversight Committee.
2. Increasing the role of the judiciary.
3. Establishing an external auditing function under the Independent Police Conduct Authority (IPCA).

We recommend the DNA Oversight Committee has five to seven members, at least three of whom are Māori, with expertise in forensic science, ethics, criminal law and procedure, te ao Māori and tikanga Māori. The Committee will perform multiple functions including: evaluating proposals to make or amend regulations under new DNA legislation (including those related to new DNA analysis techniques); advising Police and the forensic services provider on the development of practice, policy and procedure, including to provide for tikanga Māori; monitoring the operation 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.

The judiciary will have an increased role 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, which was a feature of the original legislation.

IPCA will have responsibilities to audit the operation of the proposed DNA databank and will also have membership on the Oversight Committee.

WHAT HAPPENS NEXT?

Pursuant to the Law Commission Act 1985 the Commission has submitted the Report to the responsible Minister who must lay a copy before Parliament. The Government will consider our recommendations and decide whether to implement them.